



**Kiso v Barkacha Kiboi Kiboi (Sued in the capacities as the Administrators of the Estate of Kiboi Mataya - Deceased) & 2 others (Environmental and Land Originating Summons E025 of 2024) [2025] KEELC 4252 (KLR) (27 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4252 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**  
**ENVIROMENTAL AND LAND ORIGINATING SUMMONS E025 OF 2024**  
**EC CHERONO, J**  
**MAY 27, 2025**  
**IN THE MATTER OF SECTION 38 OF THE LIMITATION**  
**OF ACTIONS ACT CAP 22 LAWS OF KENYA**  
**AND**  
**IN THE MATTER OF ACQUISITION OF TITLE BY ADVERSE POSSESSION**  
**AND**  
**IN THE MATTER OF LAND TITLE NO. ELGON/NAMORIO/201**

**BETWEEN**

**KATEMBU KENEDDY KISO ..... PLAINTIFF**

**AND**

**GEORGE KIPKYEKER BARKACHA, JULIUS ONIARA KIBOI & FERNANDES MATAYA KIBOI (SUED IN THE CAPACITIES AS THE ADMINISTRATORS OF THE ESTATE OF KIBOI MATAYA - DECEASED) ..... 1<sup>ST</sup> DEFENDANT**

**JULIUS ONIARA KIBOI ..... 2<sup>ND</sup> DEFENDANT**

**SINDILINAH CHEMATUI ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff commenced these proceeding vide an Originating Summons Amended on 27/11/2024 seeking the following orders;
  - a. That the Deceased's title to Land Title Number Elgon/Namorio/201 in relation to the 1.75 Acres occupied by the Plaintiff, be deemed to have been extinguished through the Plaintiff's



adverse possession thereof and the Plaintiff, Katembu Kennedy Kiso, be registered as the proprietor thereof.

- b. That the Land Registrar Bungoma be and is hereby ordered to register the Plaintiff, Katembu Kennedy Kiso, as an absolute proprietor of 1.75 Acres to be excised from all that piece of land known as Land Title Number Elgon/Namorio/201.
  - c. That the Land Registrar Bungoma be and is hereby ordered that while carrying out order No. 2 above, shall dispense with the production of such original documents or other documents as ordinarily required.
  - d. That an order be and is hereby issued that any order of inhibition, caution or restriction that may be subsisting in respect of Land Title Number Elgon/Namorio/201 is hereby discharged in order to facilitate the implementation of the final orders of this Honourable Court.
  - e. That an order be and is hereby issued that the consent of the land control board be dispensed with in the implementation of the final orders of this Honourable Court.
  - f. That costs of this suit be borne by the Defendants.
  - g. That the Honourable Court be pleased to issue any order as it may deem just and expedient to grant.
2. The suit is premised on the grounds apparent on the face of the Originating Summons and the Supporting Affidavit of the Applicant sworn on 27/11/2024.
  3. It is the Applicant's case that Land Title Number Elgon/Namorio/201(hereinafter referred to as "the suit land") is registered in the name of Kiboi Mataya-dcd and that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are beneficiaries of his estate. That on or about 15/01/2007, he purchased 1.0 acres from the 3<sup>rd</sup> defendants husband David Cherubet-dcd at a consideration of Kshs.150,000/=. That the said transaction was entered into by his uncle, one Dominic Kinyokie Ngeywo, on his behalf. That on 18/06/2007, he again bought 0.25 acres from the 3<sup>rd</sup> Defendant's husband at a consideration of Kshs, 37, 500/=. That on or about 21st January, 2007, he purchased 0.5 acres from the 2<sup>nd</sup> Defendant herein at a consideration of Kshs. 75, 000/=. That cumulatively, he purchased a total of 1.75 acres which portions were being sold within the Estate of Mataya Kiboi and/or within the larger Elgon/Namorio/201 wherein he was granted possession in the year 2007.
  4. He further deposed that after the purchase, he immediately started developments by building his matrimonial home, cowshed and farming. In addition, he has even buried his sister in the suit land with no objections. That his occupation of the suit land has been continuous, notorious, peaceful, open and uninterrupted for a period more than 17 years from the year 2007. He argued that the deceased's title to Land Title Number Elgon/Namorio/201 in relation to the 1.75 Acres he has been in possession and occupation has since become extinguished by operation of law.
  5. George Kipnyeker Barkacha, the 1<sup>st</sup> defendant herein filed a Replying affidavit sworn on 06/11/2024 in which he deposed that the agreements dated 15/01/2007, 21/01/2007 and 18/06/2007 referred to by the plaintiff do not have any evidentiary value since it does not relate to the estate of the deceased and in particular the suit land. That regarding the sale agreement dated 15/01/2007, the same is in respect of Land Title Number Elgon/Namorio/202 which does not belong to the estate of the deceased. That the agreement dated 18/06/2007 indicates that David Cherubet was selling his land and not part of the estate. Further, he stated that the agreement dated 15/01/2007 shows that David Cherubet was selling his land i.e. Land Title Number Elgon/Namorio/202. He argued that the plaintiff has not established the conditions for the grant of the orders sought.



6. At the hearing of the case, the plaintiff called two witness. PW1 Kennedy Katembu Kiso adopted his supporting and supplementary affidavit sworn on 14/08/2024 and 27/11/2024 respectively as his evidence-in-chief. He produced into evidence documents contained in his list of documents dated 14/08/2024 as P-Exhibit 1-5. He also produced into evidence 4 items contained in his further list of documents dated 27/11/2024 as P-Exhibit 6-9. In cross-examination, he testified that the suit land belongs to the estate of one Mataya Kiboi. He stated that according to the said sale agreements, the plaintiff purchased land parcel Number Elgon/Namorio/202. It was his evidence that a survey of the land was done and beacons placed. He further stated that his family has been on the suit land since the year 2007 but he joined them in the year 2022 after he was acquitted of criminal charges that had been preferred against him. In re-examination, he stated that after executing the sale agreements, he was shown the parcels and immediately took possession and occupation of the same.
7. PW2 Dominic Kinyokie Ngeywo adopted his witness statement dated 14/08/2024 as his evidence-in-chief. He stated that in the year 2007, the plaintiff asked for his help to look for a piece of land for sell. He was later approached by one Daniel Jerubet, the son of Mataya Kiboi. That in the same year, the plaintiff took occupation of the said land where he has been to date. In cross-examination, he stated that the land he purchased on behalf of the plaintiff was title no. Elgon/Namorio/202. He testified that the land was not occupied by SLDF as alleged.
8. DW1 George Kipnyeker Barkacha adopted his witness statement dated 06/11/2024 and a Replying affidavit sworn on even date as his evidence-in-chief. He produced into evidence two documents being a grant of letters of administration for succession cause No.19 of 2018 and a copy of search of Land Parcel no. Elgon/Namorio/201. In cross examination, he testified that he is not aware that part of his grandfather's land was sold by his uncles, David Jerubet and Justus Kiboi. That the dispute was first reported to the Assistant County Commissioner who caused for a survey to be done and for the people occupying the land to be included in the succession. That a protest was later filed in the succession cause to remove strangers from the estate.
9. After the close of their respective cases, the parties agreed to file and exchange written submissions. The plaintiff through the Firm of M/S Echom Asiro & Co. Advocates filed their submissions dated 03/03/2025 while the defendant through the Firm of M/S Kraido & Co. Advocates filed their submissions dated 25/02/2025.

### **Analysis and determination.**

10. I have considered the pleadings, the evidence adduced by the parties and their witnesses, rival submissions, authorities cited and the relevant provisions of law and find that the one and singular issue for determination in this suit is whether the plaintiff has satisfied the criteria for acquisition of title under the doctrine of adverse possession.
11. The plaintiff contends that he is entitled to a 1.75-acre portion of land forming part of Land Parcel No. Elgon/Namorio/201. He claims to have initially taken possession of the land as a purchaser, having entered into several agreements in 2007. That the land was originally owned by the late Mataya Kiboi and is currently under the administration of the defendants. The plaintiff further stated that he has been in continuous occupation of the said portion of land since 2007. However, the defendants disputed his claim, arguing that his evidence does not clearly identify the specific portion of land allegedly purchased. They contend that the only agreement which specifies a land reference number pertains to Land Title No. Elgon/Mamorio/202, a distinct and separate parcel from the one claimed by the plaintiff.



12. Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action to remove the intruder from his land in assertion of his title for a certain period, in Kenya, the prescribed period is twelve (12) years. The process ideally springs into action by default or inaction by the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied under Section 7 of the [Limitation of Actions Act](#), which states as follows: -

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

13. The [Limitation of Actions Act](#) makes further provision for adverse possession at Section 13 as follows:

“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and afresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3), the land in reversion is taken to be adverse possession of the land.”

14. Sections 37 and 38 of the [Limitation of Actions Act](#) stipulate that if the land is registered under one of the registration Acts, then the title is not extinguished, but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in his name.

15. It is trite that a claim for adverse possession is attached to land and not title and it matters not that ownership has changed since the plaintiff allegedly occupied the land. This was the holding in *Maweu VS Liu Ranching & Farming Cooperative Society* [1985] eKLR as quoted in Civil Appeal No 164 of 2011 *Gachuma Gacheru VS Maina Kabuchwa* [2016] eKLR where the Court stated as follows;

“Adverse possession is a fact to be observed upon the land. It is not to be seen in a title”

The burden of leading the Court to ascertain this lies with the plaintiff as stated by Justice Kuloba J, (as he then was,) in *Nairobi Civ No. 283 of 1990 Gabriel Mbui v Mukindia Maranya* [1993] eKLR, where the Court held:

“The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve



or more years. In addition there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown”

16. Further, in the case *Mbira v. Gachuhi* (2002) 1 EALR 137: the court stated as follows:

“... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption...”
17. Therefore, to determine whether the plaintiff’s rights accrued, the Court will seek to answer the following
  - a. How did the Applicant take possession of the suit property?
  - b. When did she take possession and occupation of the suit property?
  - c. What was the nature of her possession and occupation?
  - d. How long has the Applicant been in possession?
18. The most recent certificate of search dated 03/07/2023 indicates that the registered owners of Land Title No. Elgon/ Namorio/201 are indicated as Bramwel Barasa Kiboi, Patrick Barakacha Kiboi, Sindilinah Chemutui, Fernandez Mataya Kiboi and 3 Others which registration was by way of transmission through a confirmed grant. This court has been told that the said grant was revoked by the succession Court after a beneficiary protested against the confirmed grant as a result of which the grant was revoked. It is evident however that the defendants herein remain as the administrators of the said estate pending the confirmation of the grant.
19. The plaintiffs claim is that he entered into three separate sale agreements (P-Exhibit 2, 3 & 4 ) for his claimed portions allegedly with individuals who were sons of Mataya Kiboi who was the registered owner. DW1 in his evidence testified that the alleged sellers were his uncles who are now deceased. The plaintiff claims that upon purchase, he was put in possession of the land and has been in occupation since then to date. That position has been contested by the defendants who contend that the plaintiff purchased unknown or separate Parcels of land and not the suit Land Parcel No. Elgon/ Namorio/201.
20. I have looked at the three sale agreements produced by the plaintiff as P-Exhibits 2, 3 and 4. Though the defendants are contesting the parcel of land allegedly bought by the plaintiff, the letter from Sub-County Surveyor, Mt. Elgon/Cheptais dated 09/02/2022 produced by the plaintiff as P-Exhibit 9 identifies a portion occupied by the plaintiff measuring approximately 0.6 Ha as part of land parcel NO. Mt. Elgon/Namorio/201. It follows therefore that the plaintiff is actually occupying land parcel NO. Mt. Elgon/Namorio/201 registered in the name of Kiboi Mataya(deceased). No evidence was adduced to challenge the contents of this letter, and this court therefore has no reason to doubt its authenticity or the validity of its contents regarding the plaintiff’s occupation.
21. It is not in contention that plaintiff’s mode of entry into the suit property was by way of a sale agreement which means it was a permissive and/or consensual one. It is trite that for a claim of adverse possession to succeed, the claimant must demonstrate that the entry was non-permissive and non-consensual and without license. (See *Mombasa Teachers Co-operative Savings & Credit Society*



Limited v Robert Muhambi Katana & 15 others [2018]) eKLR, where the Court enumerated the elements required to prove adverse possession as follows:

“Likewise, it is settled that a person seeking to acquire title to land by way of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12years as espoused in the Latin maxim, nec vi nec clam nec precario.”

22. From the evidence on record, the plaintiff acquired part of the suit property through sale agreements. At the time of the alleged sale in 2007, the suit property was registered in the name of Kiboi Mataya who by then was deceased. There is no evidence that Julius Oniara Kiboi and David Cherubet who purportedly sold the disputed land had obtained grant of letters of administration authorizing them to alienate the same. In my view, the purported transactions amounted to intermeddling with the free property of a deceased person. Section 45(1) of the Succession Act provides as follows;

“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with any free property of a deceased person.

2(a) Any person who contravenes the provisions of this section shall-

a. Be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both fine and imprisonment.

b. ....”

Section 82 of the same Act also stipulates that no immovable property of a deceased person shall be sold before confirmation of grant. From my analysis, the plaintiff in this case cannot succeed in a claim for adverse possession on two grounds. First, his entry into the suit land was not hostile but was permissive/consensual through a sale agreement. Secondly, there was a ‘prohibition’ over the suit property from any dealings under Section 82 of the Law of Succession Act being a free property of a deceased person. Section 45 read with Section 82 of the Law of Succession Act makes it a criminal offence for any person intermeddling or disposing of such property contrary to the law. In view of the foregoing, I find that the plaintiff’s claim for adverse possession fails the litmus test as his entry, occupation and possession of the suit property was permissive and/or consensual.

23. In the case of Zacharia Wambugu Gathimu & Another v John Ndungu Main (2013) KLLR, the Court held as follows;

“...from the said agreements, the vendor of land parcel No. Nyandarua/Ndaragwa Block4/ Miricho No.1007, the subject suit herein was shown as one John Kagai Nderi. From the discourse above and having found that the proprietor of the suit land was the deceased Rudia Waruguru, it therefore goes without saying that the said John Kagai Nderu, who was neither the registered owner nor a beneficiary to the estate of the deceased, had no interest on the land to pass...”

Again in the case of the matter of the Estate of M’Ajogi alias M’Ikiugu Ajogi (deceased) on sale of estate property before confirmation of grant, the court observed that a Sale of estate property before confirmation is prohibited under Section 82 (b) (ii) of the Law of Succession Act. Again, under section 55 of the Law of Succession Act, the law has placed restriction on distribution of any capital assets of the estate before confirmation of grant. It follows therefore that no person shall have power or legal



authority to sell immovable property of a deceased person before confirmation of grant. As such, any purported sale of immovable property of the estate of a deceased person before confirmation of grant shall be null and void for all purposes and intents. Lord Denning M.R in the case of *Macfoy v United Africa Co. Ltd* (1961) 3 ALL ER 1169 at page 1172 held;

“If an act is void, then it is in law a nullity. It is not only bad, incurably bad, void without more ado, though it is sometimes convenient to have the court declare there is no need for an order of the court to set aside. It is automatically null and bad. You cannot put something on nothing and expect it to stay there. It will it to be so. And every proceeding which I founded on it is also bad and incurably collapse.

Based on the foregoing provisions of the law and case law, I find that any acquisition of land in violation of the *law of Succession Act* is unlawful and a finding to that effect by a court of competent jurisdiction brings such acquisition within the drawback provisions of Article 40(6) of *the Constitution* which provides that the rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

The upshot of my finding is that the sale agreements entered between the plaintiff and David Cherubet as well as Julius Oniara Kiboi were null and void and could not confer the plaintiff any right capable of protection by this court as no grant had been issued nor confirmed before alienation. The plaintiff’s purported acquisition is in violation of the *Law of Succession Act* as well as Article 40(6) of *the Constitution*. The doctrine of adverse possession cannot aid or sanitize the plaintiff’s illegality in the acquisition of the suit property. He should have done due diligence before purporting to buy the suit property which the law prohibited from any dealings. It is my view that an offence might have been committed under Sections 45, 55 and 82 (b) (ii) of the *law of Succession Act* and do hereby order the directorate of Criminal investigation, Bungoma County to conduct investigations and prosecute persons found culpable.

24. To this end, I find and holds that the plaintiff has not proved his claim on a balance of probabilities for the grant of orders of adverse possession.
25. Costs ordinarily follow the events, and the successful party is always awarded costs. The Respondents herein are the successful parties and this Court has no reason to deny them costs.
26. The upshot of my finding is that the plaintiff’s Originating Summons Amended on 27<sup>th</sup> day of November 2024 is devoid of merit and the same is hereby dismissed with costs to the Defendants.
27. Orders accordingly.

**DATED, SIGNED and DELIVERD at BUNGOMA this 27<sup>th</sup> day of May, 2025.**

.....

**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of;

1. M/S Echom for the plaintiff/Applicant.
2. Mr. Kraido for the Defendants/Respondents.
3. Bett C/A.

