



**Birech (Suing in Her Capacity as the Legal Representative of the Estate of Paul Kiptenai K. Birech) v Lukhubwa & another (Environment & Land Case 149 of 2012) [2025] KEELC 449 (KLR) (11 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 449 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 149 OF 2012  
JM ONYANGO, J  
FEBRUARY 11, 2025**

**BETWEEN**

**ANNA CHELAGAT BIRECH (SUING IN HER CAPACITY AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PAUL KIPTENAI K. BIRECH) ..... PLAINTIFF**

**AND**

**NANDIKO LUKHUBWA ..... 1<sup>ST</sup> DEFENDANT**

**EDWARD KIPCHIRCHIR (DEFENDING IN HIS CAPACITY AS THE LEGAL REPRESENTATIVE & ADMINISTRATOR OF THE ESTATE OF VICTORINE RUTTO, DECEASED) ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The present case was commenced by way Originating Summons dated 30<sup>th</sup> April 2004 and amended on 11<sup>th</sup> February 2022 in which the Plaintiff sought the following Orders:
  1. Paul Kiptenai Birech (deceased) be registered as the proprietor of land parcel Number Uasin Gishu/ Kimumu/2896 having acquired ownership and or title through adverse possession and the titles of the Defendants be declared as having been extinguished.
  2. That the summons herein be served upon Nandiko Lukhubwa And Edward Kipchirchir (for And On Behalf Of Victorine Ruto (deceased).
  3. Costs of this Originating summons be provided for
2. In essence, the Plaintiff seeks to invoke the doctrine of adverse possession, arguing that years of open, continuous, and exclusive occupation have eclipsed the rights of the registered owner.



3. The Originating Summons was premised on the grounds on the face it and the substituted supporting affidavit of one Anna Chelagat Birech sworn on 11<sup>th</sup> February 2022.
4. The 1<sup>st</sup> Defendant failed/ neglected to enter appearance or file a response to the Originating Summons. Edward Kipchirchir, the 2<sup>nd</sup> Defendant herein, filed a substituted replying affidavit sworn on 24<sup>th</sup> June 2020 in response the Originating Summons. The hearing of the suit commenced on 9<sup>th</sup> May 2022 and concluded on 24<sup>th</sup> October 2024.

### **Background**

5. The Plaintiff case is founded on the claim that her husband, Paul Kiptenai K. Birech (deceased) entered into an agreement on 1<sup>st</sup> August 1986 with Nandiko Lukhubwa (deceased) for the purchase of a parcel of land measuring 0.5 acres for the sum of Kenya Shillings 7,300/-. It is the Plaintiff's case that her late husband paid the entire purchase price for a portion to be excised from a parcel of land then known as Uasin Gishu/ Kimumu/142. The Plaintiff claims that Paul Kiptenai K. Birech (deceased) took possession of the land upon payment of the purchase price.
6. The Plaintiff further claims that on 11<sup>th</sup> February 2004 Paul Kiptenai K. Birech (deceased) carried out an official search of the property at the Eldoret Land Registry and discovered that the 1<sup>st</sup> Defendant had subdivided the parcel of land known as Uasin Gishu/kimumu/142 and one of the portions, particularly Uasin Gishu/ Kimumu/2896 (suit property) measuring 0.20 Ha (roughly 0.5 acres) is the portion that had been sold to the late Paul Kiptenai K. Birech. It is the Plaintiff's case that Paul Kiptenai K. Birech (deceased) discovered that the suit property had been subsequently transferred to one Victorine Ruto (deceased) on 11<sup>th</sup> June 2003. The Plaintiff avers that Paul Kiptenai K. Birech (deceased) had been in occupation of the suit property and occupied the suit property for more than 12 years and therefore acquired the same by way of adverse possession.
7. The 1<sup>st</sup> Defendant failed to enter appearance or participate in these proceedings. The 2<sup>nd</sup> Defendant denies the claims made by the Plaintiff and avers that Victorine Ruto (deceased) was the registered proprietor of the suit property and was in possession of the same since 2002. The 2<sup>nd</sup> Defendant argues that the Originating Summons is fatally defective and prayed for the same to be dismissed by this honourable court.
8. It should be noted that the judgment delivered on 5<sup>th</sup> March 2015 and the resulting decree issued on 31<sup>st</sup> March 2015 declaring Paul Kiptenai K. Birech (deceased) as the proprietor of Uasin Gishu/ kimumu/2896 was set aside on 27<sup>th</sup> July 2016.
9. By mutual consent of the parties, the Originating Summons was revived on 6<sup>th</sup> November 2018, restoring the matter to judicial scrutiny. With the dispute now squarely before this Court, the task at hand is to examine the competing narratives advanced by the Plaintiff and the Defendants, weighing each against the demands of the law and the evidence presented.

### **Plaintiff's Case**

10. The Plaintiff places before this Court a claim rooted not in recent assertion, but in years of quiet, deliberate occupation. Through this Originating Summons, the Plaintiff contends that possession of the suit property has been continuous, exclusive, and adverse to the titleholder, and that by operation of law, title must now pass into her hands.
11. During the hearing, one Elizabeth Nyakundi, a Land Registrar stationed in Eldoret, testifying as PW1, produced the green-card to the suit property which was admitted into evidence as Plaintiff's exhibit



1. In cross examination, PW1 confirmed that the first registered owner of the suit property was the 1<sup>st</sup> Defendant herein on 16<sup>th</sup> December 2002. Thereafter, the parcel was transferred to Victorine Rutto (deceased) on 11<sup>th</sup> June 2003.
12. PW1 further confirmed that Paul Kiptenai K. Birech (deceased) placed a caution on the suit property on 20<sup>th</sup> January 2003 but stated that the parcel was never registered in the name of Paul Kiptenai K. Birech (deceased). She revealed that on 15<sup>th</sup> April 2015 the Land Registry at Eldoret was served with a decree from ELC Case No. 149 of 2012 to register Paul as the proprietor. She further stated that on 21<sup>st</sup> January 2016 the registry received a court Order stopping any further dealings with the property until the matter was comprehensively determined.
13. The Plaintiff testified as PW2 and asserted that her husband Paul Kiptenai K. Birech (deceased) purchased a portion of Uasin Gishu/kimumu/142 measuring 0.5 acres on 1<sup>st</sup> August 1986. PW2 stated that she together with her late husband took immediate possession of the parcel they purchased and began cultivating the suit property and have been peacefully utilizing the parcel since 1986. On cross examination, PW2 stated that she was not a witness to the agreement for the sale of land between the 1<sup>st</sup> Defendant and her late husband. PW2 further stated that her and Paul Kiptenai K. Birech (deceased) never lived on the suit property but in addition to cultivating the property, they assigned one John Thuo to take care of the property.
14. During cross examination, PW2 admitted to not knowing any of the neighbours to the suit property or the chief of Kimumu. She stated that Paul Kiptenai K. Birech (deceased) obtained a title to the parcel in 2005. On re-examination, PW2 asserted that she and Paul Kiptenai K. Birech (deceased) constructed a house on the suit property and they have been using the property peacefully without any interruption since taking possession in 1986.
15. Isaiah Bin Sang, an employee of Paul Kiptenai K. Birech (deceased) since 1980, testified as PW3 and asserted that he was aware that Paul Kiptenai K. Birech (deceased) bought the property and employed someone to live on and take care of the property since the purchase in 1986. He further testified that he has been to the suit land severally. During cross-examination, PW3 stated that Paul Kiptenai K. Birech (deceased) built a semi-permanent house on the suit property sometime in 1988. He also stated that he was not aware that upon subdivision, the parcel of land known as Uasin Gishu/kimumu/142 only gave rise to Parcel Numbers 722 and 723.
16. On re-examination, PW3 reaffirmed that the suit property measuring 0.5 acres belongs to Paul Kiptenai K. Birech (deceased) and the same has been used to grow subsistence crops.

### **Defendant's Case**

17. The 2<sup>nd</sup> Defendant did not come before this Court to surrender what he insists rightfully belongs to the Estate of Victorine Rutto (deceased). Against the Plaintiff's claim of adverse possession, the 2<sup>nd</sup> Defendant raises the shield of legal title, contending that the suit property was registered in the name of Victorine Rutto (deceased) and no amount of time, silence, or occupation has lawfully divested her of ownership.
18. William Sang, a retired chief of Chepkoilel location in Uasin Gishu County, took the witness stand as the 2<sup>nd</sup> Defendant's first Witness. Testifying as DW1, he stated that while he had never personally known Paul Kiptenai K. Birech (deceased) he had heard of him. However, he confirmed that he knew Victorine Rutto (deceased) and that he also knew Nandiko Lukhubwa (the first defendant herein) who had likewise passed away. He confirmed that John Thuo stayed on the suit land in a semi-permanent house.



19. During cross-examination, DW1 confirmed that the suit land is in Kimumu in Chepkoilel location. He further admitted that he had no documentation to ascertain his position as the chief of Chepkoilel Location between 1984 and 2021. DW1 asserted that he was unaware of any transactions in relation to the suit land and went on to state that the property belonged to Victorine Rutto (deceased). He stated that John Thuo was not put in occupation of the suit property by Paul Kiptenai K. Birech (deceased) and only started residing in the suit property after the 2007 post-election violence. DW1 also noted that the 1<sup>st</sup> Defendant stayed on the suit land before he later sold it to several people.
20. The 2<sup>nd</sup> Defendant then took the stand as DW2 to give his testimony. He asserted that he is the son of Victorine Rutto (deceased) and the administrator of her estate. On cross-examination, DW2 confirmed that he had not produced the Grant of Letters of Administration in respect to the Estate of Victorine Rutto (deceased). He confirmed that Victorine Rutto (deceased) passed away in 2019. DW2 stated that his mother bought the suit land from Nandiko Lukhubwa (deceased) in 2002 but noted that the agreement in relation to the purchase of the suit land got lost.
21. He noted that Victorine Rutto (deceased) never stayed on the suit land but assigned one Geoffrey Mutola to take care of the land. DW2 further stated that Geoffrey abandoned the suit land and he and his late mother only learned that Paul Kiptenai K. Birech (deceased) had registered a caution on the suit land in 2016. DW2 acknowledged that his late mother's Replying Affidavit asserted that John Thuo stayed on the suit property.
22. In re-examination, DW 2 stated that Victorine Rutto (deceased) had filed ELC Case Number 35 of 2016 to evict John Thuo from the suit property but the suit was ultimately stayed pending the determination of the instant suit. He also stated that he was issued with an Ad Litem grant dated 17<sup>th</sup> June 2020.
23. The 2<sup>nd</sup> Defendant then called Christopher Kiprotich Arusei, who took the stand as DW3. In cross-examination, DW3 asserted that he was present when the late Nandiko sold the suit land to Victorine Rutto (deceased). However, he confirmed that despite being a witness to the transaction, he did not sign the same agreement as a witness. Additionally, he confirmed that he is aware that Victorine never stayed on the suit land and that the person who stayed on the land was one John Thuo who was put in possession of the land by Paul Kiptenai K. Birech (deceased). He also stated that he is aware of Geoffrey Mutola stays on his own parcel of land which borders Victorine Rutto's (deceased) land. In re-examination, DW3 clarified that although he is aware that John Thuo stayed on the suit land, he does not know when he moved into the land.
24. The 2<sup>nd</sup> Defendant opted not to call the Chairman of the Land Control Board as their final witness since the title is not contested and the Defendant's case was marked as closed concluding the hearing on 24<sup>th</sup> October 2024.

### **Issues for determination**

25. With the parties having laid out their respective positions, the task before this Court is to isolate the key legal and factual issues that require determination. It is upon these issues that the fate of the Plaintiff's claim and the 2<sup>nd</sup> Defendant's defence must rest. Having considered the parties pleadings, evidence and submissions before me, the following issues emerge for determination:
  - i. Whether the Plaintiff is entitled to parcel Number Uasin Gishu/ Kimumu/2896 by way of adverse possession
  - ii. Who shall bear the costs of the suit?



## Analysis and Determination

26. The courtroom is no place for assumptions or sentimental claims; it is a forum where rights are weighed on the scales of law and justice. The Plaintiff has invoked the doctrine of adverse possession; the 2<sup>nd</sup> Defendant has resisted it.

I am now tasked with the duty of measuring the Plaintiff's claim against the standards of adverse possession and to determine whether the facts, as presented, meet the stern demands of the law.

27. The Plaintiff argues that Paul Kiptenai K. Birech (deceased) entered into an agreement with Nandiko Lukhubwa (deceased) to purchase a parcel of land measuring 0.5 acres to be excised from Uasin Gishu/kimumu/142 in 1986.

28. The Plaintiff further claims that her late husband paid the entire purchase price of Ksh. 7,300/- in cash and they immediately took possession of the property. It is the Plaintiff's assertion that they have been in continuous occupation and possession of the suit land for a period of 38 years. The Plaintiff claims that the 1<sup>st</sup> Defendant later subdivided the parcel of land known as Uasin Gishu/kimumu/142 and was subsequently registered as the first owner of the parcel of land known as Uasin Gishu/kimumu/2896 (the suit property) in 2002.

29. Ownership once vested cannot easily be undone. Adverse possession is not a loophole; it is a rule of law, forged by statute and refined by precedent. Before turning to the facts, it is essential to first consider the statutory framework within which this doctrine operates.

30. Section 7 of the *Limitation of Actions Act* provides that:

“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.”

31. Section 13 of the *Limitation of Actions Act* further provides that:

“(1) (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 a fresh 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.”

32. Sections 37 and 38 of the *Limitation of Actions Act* make it clear that where land is registered under one of the applicable registration statutes, title is not extinguished outright. Instead, it is held in trust



for the person in adverse possession, who must obtain and register a Court order vesting the land in him before the law will recognize his ownership.

33. Statute lays the foundation, but it is through judicial interpretation that the true contours of adverse possession emerge. In *Gabriel Mbui v Mukindia Maranya* [1993] eKLR the Court adopted the definition of adverse possession in the following terms:

“...it is possible to define “adverse possession” more fully, as the nonpermissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owners enjoyment of the land for the purposes for which the owner intended to use it.”

34. Kuloba J’s definition distills the essence of adverse possession with precision. In my view, at its core, adverse possession is not a matter of mere presence but of possession that is deliberate, exclusive, and hostile to the rights of the true owner. It demands an unambiguous assertion of dominion; possession that is neither covert nor permissive, but one that stands in open defiance of the owner’s title. Without this essential conflict between the possessor and the rightful owner, there can be no adverse possession, for the law does not reward mere occupation but the usurpation of ownership itself.

35. Learned Counsel for the Plaintiff has urged the Court to consider the principles of adverse possession as outlined by the Court of Appeal in *Mtana Lewa v Kahindi Ngala Mwahindi* [2015] eKLR where the court state:

“In terms of Sections 7, 9,13,17,37 and 38 of the title of a registered owner of land will be extinguished and vested in a third party who proves that he has been in possession of the land continuously and uninterrupted for a period of 12 years; that such possession has been open and notorious to the knowledge of the owner; that the possession has been without the permission of the owner; and that the third party has asserted a hostile title and dispossessed the true owner.”

36. Essentially, the Plaintiff must therefore demonstrate that his occupation was not one of mere presence, but of dominion exercised openly, notoriously, and without the registered owner’s consent.

37. The Plaintiff argues that the time for adverse possession started running in 1986 after the purchase price for the 0.5 parcel of land was paid in full by Paul Kiptenai K. Birech (deceased). When you scrutinize the agreement for sale dated 1<sup>st</sup> August 1986, there is an acknowledgement of receipt of the full purchase price of Ksh. 7,300 paid by Paul Kiptenai K. Birech (deceased).

38. In order to establish when time started running for the claim of adverse possession, counsel for the Plaintiff relied on the Court of Appeal decision in *Public Trustee v Wanduru Ndegwa* [1984] eKLR where the Court essentially noted that the time for adverse possession begins running once full payment of the purchase price has been made.

39. The 2<sup>nd</sup> Defendant argues that the suit property was not in existence until 2002 when the 1<sup>st</sup> Defendant was registered as the owner before subsequently transferring the parcel to Victorine Rutto (deceased).

40. A scrutiny of the evidence produced during the hearing reveals that the parcel of land measuring 2.0 Ha known as Uasin Gishu/kimumu/142 was registered in the name of the 1<sup>st</sup> Defendant on 18<sup>th</sup> November 1988. The property was originally registered to the Settlement Fund Trustee on 12<sup>th</sup> May 1986. The



agreement between Paul Kiptenai K. Birech (deceased) and the 1<sup>st</sup> Defendant is dated 1<sup>st</sup> August 1986. In essence, the 1<sup>st</sup> Defendant had no legal right to sell the 0.5 acres parcel to Paul Kiptenai K. Birech (deceased) until the same was transferred to his name in 1988.

41. PW2 and PW3 testified that Paul Kiptenai K. Birech (deceased) built a semi-permanent house on the parcel of land which is the subject of this suit. The green cards submitted as evidence in this case tell two tales; both of which involve the 1<sup>st</sup> Defendant.
42. Firstly, Uasin Gishu/ Kimumu/142 measuring 2.0 Ha which was registered in the name of the 1<sup>st</sup> Defendant (1988) was subdivided in 1993 and gave rise to two parcels, namely 722 and 723. Secondly, on 16<sup>th</sup> December 2002 a parcel of land measuring 0.20 Ha known as Uasin Gishu/kimumu/2896 (suit land) was registered in the name of Paul Kiptenai K. Birech (deceased) who later transferred it to Victorine Rutto (deceased) on 11<sup>th</sup> June 2003.
43. It is important to examine the green card to trace the root of the title. The green card is not a mere piece of paper; it is the very heartbeat of land ownership. In a claim of adverse possession, where time is the claimant's strongest ally, the green card serves as the immutable ledger against which that time is measured. It reveals the true history of ownership, the moment a title was born, and whether possession was indeed adverse to the rights of the registered proprietor.
44. The conundrum that emerges after a careful examination of the green-cards produced as evidence in this matter is that Uasin Gishu/kimumu/2896 emerged from the subdivision of Uasin Gishu/kimumu/1392 and not Uasin Gishu/kimumu/142 as alleged by the Plaintiff.
45. The 2<sup>nd</sup> Defendant's primary argument is that Victorine Rutto (deceased) is the registered proprietor of the suit land and the Plaintiff's claim for adverse possession is essentially premature.
46. To buttress their argument, learned counsel for the 2<sup>nd</sup> Respondent urged the court to be guided by the decision in John Francis Muyodi v Peter Lunani Ongoma & 2 others [2016] eKLR where the court of Appeal opined thus:

“Having found as we have that Land Parcel 1482 did not exist prior to 1972, could the deceased have acquired the subject parcel by adverse possession? From the record, the deceased died in 1980. Therefore the period from 1972 to 1980 was only 8 years. As such, this period did not meet the statutory threshold of 12 years, as a result of which a claim for adverse possession could not arise.”

47. My understanding of this excerpt is that adverse possession cannot take root in uncertainty; the land in question must exist in a form that can be possessed. Time does not run against a title that is yet to be born. Until the suit land was properly delineated, there was no identifiable parcel to be adversely occupied, and without that foundation, no legal claim could begin to accrue.
48. Learned Counsel for the Plaintiff argues that change of ownership from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant should not have any impact on the Plaintiff's claim for adverse possession. This argument is predicated on the assertion that the suit land can be accurately traced to Uasin Gishu/ Kimumu/142. Learned counsel for the Plaintiff urges this court to be guided by the Court of Appeal decision in Maweu v Liu Ranching & Farming Cooperative Society [1985] eKLR:

“Adverse possession is a fact to be observed upon the land. It is not to be seen in a title... Any man who buys land without knowing who is in possession of it risks his title, just as he does, if he fails to inspect his land for twelve years after he had acquired it. If such title



can be lost at all, its absolute and indefeasible nature obviously refers to other matters than adverse possession.”

49. In essence, adverse possession is not a right etched in the records of a registry; it is a reality written upon the land itself. It is not discovered in a title deed but in the unbroken dominion of one who treats the land as his own, while the true owner stands by in silence. The burden is on the Plaintiff to establish on a balance of probability that the possession of the suit land was nec vi, nec clam, nec precario, that is, peaceful, open and continuous.
50. However, as I have previously noted, for adverse possession to take effect, the land must be a tangible reality, not a mere abstraction. That is precisely why Rule 7(2) in Order 37 of the Civil Procedure Rules mandates that an applicant in an adverse possession claim must annex an extract of the title in question. There should be a distinct parcel against which possession could be measured, and without that essential anchor, no claim could lawfully accrue.
51. In this case, the evidence provided by the Plaintiff does not corroborate her claim that Uasin Gishu/kimumu/2896 emerged from a subdivision of Uasin Gishu/kimumu/142. There exists, for all intents and purposes, no legal thread stitching these two titles together.
52. The Plaintiff ought to have traced the root of Uasin Gishu/ Kimumu/2896 and ascertained the parcel that emerged from the subdivision of Uasin Gishu/kimumu/142 which is the basis upon which her claim lies.
53. I am inclined to concur with the 2<sup>nd</sup> Defendant’s argument, to the extent that, in so far as Uasin Gishu/kimumu/2896 is concerned that statutory time limit of 12 years has not accrued.
54. The suit land was registered in the name of the 1<sup>st</sup> Defendant on 16<sup>th</sup> December 2002, transferred to Victorine Rutto on 11<sup>th</sup> June 2003 and Paul Kiptenai K. Birech (deceased) filed the initial suit on 30<sup>th</sup> April 2004.
55. In a claim for adverse possession, the plaintiffs bear the burden of demonstrating uninterrupted possession for at least twelve years; possession that is open, notorious, and unmistakable to the true owner. They must further establish that their occupation was not by permission but under a hostile claim, one that defies the owner’s title and asserts dominion as their own.
56. In the instant case however, upon careful examination, the Plaintiff’s claim dissolves under the weight of its own deficiencies. The evidence fails to establish the requisite elements, and where the law demands certainty, mere occupation is not enough.
57. The upshot of the foregoing is that the Plaintiff’s claim for adverse possession must fail. The Originating summons dated 30<sup>th</sup> April 2004 and amended on 11<sup>th</sup> February 2022 is hereby dismissed with costs to the 2<sup>nd</sup> Defendants.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 11<sup>TH</sup> DAY OF FEBRUARY 2025**

**J. M. ONYANGO**

**JUDGE**

In the virtual presence of:

Miss Sielei for the Plaintiff

Mr Nabasenge for the 2<sup>nd</sup> Defendant



Court Assistant: Hinga

