



REPUBLIC OF KENYA



**Musyoka v Masia & 6 others (Environment & Land Case 418 of 2017)  
[2025] KEELC 462 (KLR) (6 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 462 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 418 OF 2017  
CA OCHIENG, J  
FEBRUARY 6, 2025**

**BETWEEN**

**PETER NTHAMA MUSYOKA ..... PLAINTIFF**

**AND**

**SIMON MASIA ..... 1<sup>ST</sup> DEFENDANT**

**PAUL MUNYAO MASIA ..... 2<sup>ND</sup> DEFENDANT**

**MBATHA MASIA ..... 3<sup>RD</sup> DEFENDANT**

**MBITHI MUSYOKI ..... 4<sup>TH</sup> DEFENDANT**

**MUTINDA MUSYOKI ..... 5<sup>TH</sup> DEFENDANT**

**BERNARD MUTINDA ..... 6<sup>TH</sup> DEFENDANT**

**SERAH NYENZE ..... 7<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. Through a Plaint dated the 10<sup>th</sup> October, 2017, the Plaintiff prays for judgement against the Defendants jointly and severally for:
  - a. A permanent injunction restraining the Defendants either by themselves or their agents or employees from accessing, entering, cultivating, constructing any buildings or interfering in any manner whatsoever with the suit property known as Mbiuni/ Ulaani/146.
  - b. A Mandatory injunction against the Defendant jointly and severally directing the defendants to vacate from the suit property and the remove any illegal structures erected on suit property at their own costs.
  - c. Mesne Profits and general damages for trespass and unlawful use of the suit property.



- d. Costs.
2. In opposition to the suit, the Defendants filed a Defence including Counterclaim where they denied the averments in the Plaint except the descriptive and jurisdiction of the Court. They confirmed that the Plaintiff's grandmother passed away before they could finalize paying the balance of the purchase price. They insisted that they have been in occupation of LR No. Mbiuni/ Ulaani/146 hereinafter referred to as the 'suit land', for more than fifty (50) years whereby they have constructed permanent houses and cultivated it. They contend that the Plaintiff and his grandmother had never been in occupation of the suit land. In the Counterclaim, they seek the following Orders: A permanent injunction restraining the Plaintiff either by himself and/or his authorized agents, relatives and/or servants from interfering with the Defendant's quiet possession and enjoyment and use of their land Mbiuni/ Ulaani/146. The title of the plot No. Mbiuni/ Ulaani/146 in the names of the Plaintiff's grandmother to be cancelled and registered into the Defendants' names. Alternatively, an order that the Defendant has acquired prescriptive rights over the land Mbiuni/ Ulaani/146 by adverse possession. Cost of this suit. Any other and/or further relief that this Honourable Court may deem fit and just to grant in the circumstances.
  3. The Plaintiff filed a reply to Defence and Defence to Counterclaim dated the 6<sup>th</sup> December, 2017 where he denied the averments therein. He argued that the Defendants are not entitled to adverse possession as claimed but their only recourse is to seek the refund of Kshs. 64,500 from the deceased estate. He contends that the counterclaim does not disclose any cause of action. Further, that the Defendants are not entitled to the prayers as sought therein.
  4. The matter proceeded for hearing where the Plaintiff called two witnesses while the Defendants had five witnesses.

### **Evidence of the Plaintiff**

5. The Plaintiff claims his late grandmother Mukai Nthama was the registered proprietor of the suit land. He confirms that his late grandmother allowed the Defendants to use the suit land since she moved to Yatta. It was the testimony of the Plaintiff's witnesses that the Defendants attempted to purchase the suit land but failed to pay the balance of the purchase price amounting to Kshs. 84,000/. They contended that the Defendants had continued to reside on the suit land with some of them putting up structures thereon, despite failing to pay the full purchase price. The Plaintiff sought for the Defendants to be restrained from occupying the suit land and also to pay general damages and mesne profits for using it. The Plaintiff produced the following documents as exhibits: Death Certificate for the late Mukai Nthama; Grant of Letters of Administration Intestate; Sale Agreement dated 11<sup>th</sup> October, 2002; Title Deed for Mbiuni/ Ulaani/146; Demand Letters to the Defendants and Map for Ulaani Registration Section.

### **Evidence of the Defendants**

6. The Defendants confirmed that they are in possession of the suit land. They explained that they had entered into a Sale Agreement with Mukai Nthama to purchase the suit land but she died before receiving the full purchase price. They insisted that they have been in occupation of the suit land for more than fifty (50) years whereby they had constructed permanent structures thereon and cultivated it. They insisted that they were entitled to the suit land through adverse possession. The Defendants produced the following documents as exhibits: Sale Agreements in Kikamba and English Translation; Photographs and Letter dated 30<sup>th</sup> November, 2016.



## Submissions

### Plaintiff's Submissions

7. The Plaintiff in his submissions highlighted the proceedings herein, relied on the evidence tendered and contended that he was entitled to the orders as sought in the Plaintiff. He submitted that the Defendants were trespassers on the suit land since they had failed to pay the full purchase price, prior to Mukai Nthama's demise. He sought to be awarded Kshs. 1 million as general damages for trespass. He submitted that the Defendants were not entitled to their claim of adverse possession over the suit land. To buttress his averments, he relied on various decisions which included: *Giella vs Cassman Brown* (1973) EA 358; *Mrao Ltd v First American Bank Limited* (2003) eKLR; *John Chuma Ngamia v Attorney General & Another* (2019) eKLR; *Nakuru Industries Ltd v S. S Mehta & Sons* (2016) eKLR; *Bandari Investments & Co. Ltd v Martin Chiponda & 139 Others* (2022) eKLR; *Joseph Kaloki t/a Royal Family Assembly v Nancy Otieno Ouma* (2020) eKLR; *Wambugu v Njuguna* (1983) KLR 172 and *Wanja v Sakwa* (1984) KLR 254.

### Defendants' Submissions

8. The Defendants in their submissions analysed the evidence as presented and insisted that they had acquired the suit land through adverse possession since the year 2002 when they entered into a Sale Agreement with its owner. They further submitted that the Plaintiff is not entitled to the orders of permanent injunction as sought since they have been on the suit land since 1973. To support their arguments, they relied on the following decisions: *Kenya Power & Lighting Co. Ltd v Sheriff Molana Habib* (2018) eKLR; *Nguruman Ltd. Vs. Jan Bonde Nielsen* (2014) eKLR; *Cheromei v Muigai* (Environment & Land Case E005 of 2023) (2024) KEELC 5604; *Sisto Wambugu v Kimani Njuguna* (1983) KLR 173 and *Peter Mwangi Mbutia & Another v Samow Edin Osman* (2014) eKLR.

### Analysis and Determination

9. Upon consideration of the pleadings, testimonies of the witnesses, exhibits and rivalling submissions, the following are the issues for determination: Whether the Defendants have trespassed on the suit land. Whether the Defendants are entitled to the suit land through adverse possession. Whether the Plaintiff is entitled to the orders as sought in the Plaintiff. Whether the Defendants are entitled to the orders as sought in the Counterclaim.

As to whether the Defendants have trespassed on the suit land and if they are entitled to it, through adverse possession.

10. The Plaintiff claims the Defendants have trespassed on the suit land as they failed to pay the full purchase price for the said land. In the Plaintiff, the Plaintiff sought for orders of a permanent injunction restraining the Defendants from the suit land, general damages including mesne profits and costs. The Defendants on the other hand contend that the Plaintiff's suit should be dismissed and they be deemed to have acquired the suit land through adverse possession.
11. PW1 Peter Nthama Musyoka in his testimony stated that his late grandmother Mukai Nthama who owned the suit land died on 20<sup>th</sup> June, 2006. He confirmed that the late grandmother had allowed the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 7<sup>th</sup> Defendants to occupy the suit land in 1973 as she moved to Yatta. He admitted that on 11<sup>th</sup> October, 2002, the 1<sup>st</sup> Defendant together with his grandmother entered into a Sale Agreement for purchase of the suit land, at a consideration of Kshs. 147, 000. He further admitted that the Defendants only paid Kshs. 64,500 leaving a balance of Kshs. 83,000/= . He sought for the Defendants to vacate the suit land and pay mesne profits for using it. He disputed that the 1<sup>st</sup> Defendant had constructed



- a house on the suit land but admitted that he only cultivates it. He further admitted that the other Defendants had constructed other structures on the suit land, which he wanted removed.
12. During cross examination PW1 admitted that the Defendants entered the suit land in 1980 when he was in primary school before his grandmother passed away and she left them thereon. Further, that he was always present together with his mother when his grandmother was selling the suit land to the 1st Defendant. He further confirmed that his grandmother never resided on the suit land.
  13. PW2 Joseph Muthama Mutiso in his testimony claimed the 1st Defendant had never been in occupation or possession of the suit land but resided on Plot No. 142/Mbiuni/Ulaani, which belonged to his father. He confirmed that in 1968 the Plaintiff's grandmother relocated to Ikataani in Yatta. Further, that in 1973 during demarcation, they decided as a family that since Plot No. 146 was vacant, they pushed Mukai Nthama to a parcel of land at the edge. He testified that the Defendants were not allocated the Plaintiff's grandmother's land. He however admitted that todate the Defendants reside in parcel No. 142 but some have moved to the suit land.
  14. During cross examination PW2 admitted that he was not a witness to the Sale Agreement. He confirmed that Mukai gave the Defendants permission to cultivate the suit land. Further, that the 1st Defendant is in occupation of Plot No. 142, which borders the suit land.
  15. DW1 Paul Munyao Masia testified that they all reside together as defendants on the suit land. It was his testimony that he purchased the suit land on behalf of the Defendants Mbithi Musyoki, Mutinda Musyoki and Bernard Mutinda who resided thereon before the death of Mukai Nthama. Further, that three people being his late brother Mbatha Masia, his wife Rebecca Mueke Mbatha and David Kimeu Mbatha were buried on the suit land. During cross examination, he explained that during demarcation they were residing on Mbiuni/Ulaani/142 but Mukai Nthama had migrated to Yatta. Further, that they bought the suit land from Mukai Nthama, but he is the one who commenced the process of purchase of the said land, hence mentioned in the Sale Agreement. He explained that they were supposed to pay the balance of Kshs. 83,000 by April, 2005 but were yet to do so. He was emphatic that they took the balance to the Plaintiff and his mother in 2015 but they declined to receive it. He admitted that he never built on Plot No. 146 but cultivates it.
  16. DW2 Simon Masia confirmed that all the Defendants reside on the suit land and cultivate it. Further, that they bought the said land from Mukai. In cross examination, he testified that demarcation was done in 1973, while Mukai had gone to Yatta in 1968. He admitted that the 1<sup>st</sup> Defendant is his step brother and had built on Plot No. 142. He was emphatic that his father told him to build on Plot No. 146 and did not know if the said land belonged to Mukai but learnt in 2000, that it indeed belonged to her. Further, that he personally contributed Kshs. 10,000/= towards the purchase price but they had not finalized full payment of the same. He confirmed that he was only claiming two acres of land from the suit land where he cultivates. It was his testimony that the 1<sup>st</sup> Defendant cultivates a portion of the suit land, but no one from Mukai Nthama's house utilizes it.
  17. DW3 Willy Sini Manthi in cross examination confirmed that the suit land was part of a bigger parcel of land owned by Kyeengui before demarcation. It was his testimony that other wives of Nthama were using a portion of Mukai's land. He knew Mukai sold land to the 1<sup>st</sup> Defendant as he witnessed the purchase price being paid, three times but stated that there is a balance of Kshs. 83,000/= which was yet to be settled.
  18. DW4 Japheth Wambua Kyengo in cross examination claimed that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants had built on the suit land. Further, that there are several houses on the suit land. He did



not know if Mukai allowed them to use the said land but confirmed that no member of Mukai's family was on the land.

19. DW5 Serah Nduku Nyenze confirmed during cross examination that they purchased Mukai Nthama's land, and had been paying the purchase price and taking money to Mukai Nthama when she was with Wayua. She explained that they used to take money to Wayua and her son Peter Nthama (Plaintiff) but when they took money to Peter Nthama and Wayua after Mukai's death, they refused to receive it. She was emphatic that the seven of them, contributed towards payment of the purchase price. Further, that they settled on Mukai's land because she was like their mother. She testified that they did not go to the Land Control Board despite purchasing the suit land from Mukai. It was her further testimony that she cultivates the suit land but had not constructed thereon. She however confirmed that Simon Masia, Mbatha Masia, Mbithi Musyoki, Mutinda Musyoki and Bernard Mutinda have all constructed on the suit land.
20. From my analysis of the evidence above, it emerges that it is the deceased who allowed the Defendants to occupy the suit land and never evicted them, during her lifetime, despite the fact that the full purchase price had not been paid. It also emerged that some members of the Defendants' families were buried on the suit land during the lifetime of Mukai. The Plaintiff claims that the Defendants are trespassers and should be permanently restrained therefrom. On the issue of trespass, I will refer to the definition of the same as contained in Clerk & Lindsell on Torts, 18th Edition, page 923, paragraph, 18-01 where it states thus:

‘ as any intrusion by a person on the land in the possession of another without any justifiable cause’.

21. Section 3 of the *Trespass Act* provides that,

“(1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.

(2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.”

22. In the case of *Municipal Council of Eldoret v Titus Gatitu Njau* [2020] eKLR, the Court of Appeal favourably cited the case of *M'Mukanya v M'Mbijiwe* (1984) KLR 761, wherein the ingredients of the tort of trespass were described as follows:

“trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership (See *Thomson v Ward*, (1953) 2QB 153.”

23. From the evidence before this court, I find that since the Defendants were on the suit land with the deceased Mukai's 'consent who even sought to sell the same to them, and they paid part of the purchase price, they cannot be deemed to have trespassed thereon. I opine that the burden of proof was upon the Plaintiff to prove intrusion by the Defendants, without justification, which he failed to do.



24. As to whether the Defendants have acquired the suit land through adverse possession. Adverse possession is governed by the provisions of section 38 (1) and (2) of the Limitation of the Actions Act which stipulates thus:

‘ Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.’

25. The Court of Appeal in *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR provided tenets on adverse possession and stated thus:

“ Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or in action of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor 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.

26. Further, in the case of *Samuel Miki Waweru vs. Jane Njeru Richu, Civil Appeal No. 122 of 2001*, it was held that:

‘it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in *Jandu v Kirpal* [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted.’

27. Professor Tom Ojienda’s *Principles of Conveyancing Hand Book, Law Africa Vol II* at page 97 clarifies the position on adverse possession by stating thus:

“ Where the claimant is in possession of the land with leave and licence of the true owner in pursuance of a valid agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse.”

28. From the foregoing, it is clear the Defendants had direct authorization from Mukai Nthama to enter the suit land. Further, the deceased Mukai never sought to evict them, despite their failure to pay the full purchase price. Since they entered the suit land through permission of its owner, I opine that they were licensees on the said land. However, from 2002 when Mukai Nthama opted to sell the suit land to them, and they executed a Sale Agreement to that effect on 11<sup>th</sup> October, 2002, the license was determined and time begun to run in respect to adverse possession. For the Defendants to be entitled to the suit land through adverse possession, they should demonstrate that they had been openly on the land for at least twelve (12) years with the knowledge of the owner and without interruption.

29. Based on the evidence that I have analyzed above, it is my considered view that since the year 2002 when the Defendants license to stay on suit land had been extinguished, I find that they had been on the suit land for more than twelve (12) years and this was within the knowledge of Mukai and



her beneficiaries. Further, their actions of having constructed on the suit land and cultivating it, are acts inconsistent with the late Mukai's including Plaintiff's enjoyment of the said suit land, for the purpose which they intended to use it for. I opine that the Defendants' possession of the suit land was continuous, uninterrupted and unbroken for the statutory period from 2002 to date.

30. In the circumstances while associating myself with the judicial authorities cited above, I find that the Defendants have proved their claim and are entitled to the suit land through adverse possession.
31. I hence find that the Plaintiff has not proved his case on a balance of probability and is not entitled to the orders as sought in the Plaint. I however find that the Defendants have proved their case on a balance of probability and are entitled to the orders as sought in the Counterclaim.
32. On the issue of costs, since the Plaintiff and Defendants are related, I will direct that each party does bear their own costs.
33. In the foregoing, I will enter judgement in favour of the Defendants as per the Counterclaim in the following terms: The Plaintiff's suit be and is hereby dismissed. An order be and is hereby issued that the Defendants have acquired prescriptive rights over the land Mbiuni/ Ulaani/146 through adverse possession. An order do issue that title to Mbiuni/ Ulaani/146 in the names of the Plaintiff's grandmother to be cancelled and registered into the Defendants' names. Each party do bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**CHRISTINE OCHIENG**

**JUDGE**

