



Mwatela & 2 others (Suing as Officials of the Isangaiwishi Development Community Land Management Committee) v Mghazo & 2 others (Environment & Land Case E004 of 2023) [2025] KEELC 3735 (KLR) (Environment and Land) (8 May 2025) (Judgment)

Neutral citation: [2025] KEELC 3735 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT & LAND CASE E004 OF 2023**

EK WABWOTO, J

MAY 8, 2025

BETWEEN

**HON. CALIST MWATELA 1ST PLAINTIFF
TOLE MWAKIDEDI 2ND PLAINTIFF
MARY WADERO 3RD PLAINTIFF
SUING AS OFFICIALS OF THE ISANGAIWISHI DEVELOPMENT
COMMUNITY LAND MANAGEMENT COMMITTEE**

AND

**NANCY MGHAZO 1ST DEFENDANT
ERNEST MWAKIRETI KISOCHI 2ND DEFENDANT
ELIJAH MWAZUGHA 3RD DEFENDANT**

JUDGMENT

1. Vide an Amended Complaint dated 8th July 2024, the Plaintiffs are seeking for the following reliefs:-
 - a. A declaration that Isangawishi Development Community is the bonafide and registered owner of all the property known as Bura/Isangawishi Scheme 19.
 - b. An order of eviction of the Defendants from the suit property.
 - c. An order directing the Taita Taveta County Police Commandant, the Officer Commanding Police Division Mwatate and the Officer Commanding Station Mwaktau Police Station to supervise, provide security and enforce the eviction order.



- d. Mesne profits.
 - e. Costs of the suit.
 - f. Interest on (e) and (f) above at court rate.
2. The suit was contested by the Defendants who filed an Amended Statement of Defence and Counterclaim dated 17th July 2024 seeking for the following reliefs:-
- a. That the case by the Plaintiffs against the Defendant be dismissed with costs.
 - b. That the Counter claim be allowed and decreed that:-
 - i. The Plaintiffs have acquired title to land by Limitation of Actions Act and by the doctrine of adverse possession and that therefore, the Defendants hold the said title in trust for the Plaintiffs.
 - ii. That the Defendants, its agents, servants and or any authorized independent contacts be restrained by permanent injunction from entering the suit property or demolishing the Plaintiffs houses and/or properties, structures thereon and/or evicting the Plaintiffs, their families and/or in any other manner whatsoever interfering with the Plaintiffs peaceful occupation of the suit land.
 - iii. Damages.
 - iv. Costs.

The Plaintiffs case

3. It was the Plaintiffs case that the Plaintiffs are the management committee of Isangaiwishi Development Community. The present case is brought before this honourable court as a way of realising the actual rights of Isangaiwishi Community.
4. Isangaiwishi Development Community began as Isangaiwishi Group Ranch. As per PW1 testimony, he stated that the area known as Bura/Isangaiwishi Scheme/18, which gave birth to Bura/Isangaiwishi Scheme/19 (suit property) and Bura/Isangaiwishi Scheme/20 (donated to Taita Taveta University) was community land used for herding. It was stated that when the adjudication process commenced there was an issue between the Mwanda Community and Bura Community. This led to the creation of two ranches Oza Group Ranch for the Mwanda people and Isangaiwishi for the Bura people. The community property was held sacred and the members never lived in the property.
5. It was also stated that the process of creating Isangaiwishi group ranch was a public process which was completed in 1998 when George Mwambingu was allowed to join the group ranch as the final member.
6. It was the Plaintiffs case that in the year 2000, Misc Civil Application No. 225 of 2000 was brought about seeking to challenge the process of conferring the title to Isangaiwishi Group Ranch. The court held ‘There is evidence that objections were raised, heard and determined before the title were issued’. The upshot of the case was that Isangaiwishi was properly constituted and the land adjudication process was properly followed.
7. It was further stated that since then there has been multiple issues between Isangaiwishi and various people who encroached on their land. The Defendant’s herein should be categorised as trespassers who want to force their way in the property.



8. It was the Plaintiffs case that in 2020, in a bid to secure its property the Isangaiwishi Development Committee put up notices to evict the trespassers from the property. Despite the courts holding that Isangaiwishi is the owner of the property the Defendants continued trespassing into the property despite the notices issued.
9. According to the Plaintiffs, the trespassers have become bold to an extent where they want to chase the owner from actualising any developments on the property and that is why the land management committee comes before came to this court to seek justice on behalf of its members.
10. During trial, two witnesses testified on behalf of the Plaintiffs. Calist Mwatela as PW1 and Tole Mwakidedi as PW2.
11. PW1 adopted and relied on his statement dated 8th April 2024. It was his testimony that the Land Adjudication began in 1972 and was completed in 1994. The Registrar closed on 22nd March 1998. He also stated that in the year 2000 there was an attempt to challenge the adjudicator but the case was dismissed.
12. He further stated that the Defendants belong to another community. He also produced and relied on the Plaintiffs bundle of documents dated 14th September 2023, 8th April 2024, 8th July 2024 and 9th September 2024.
13. When cross-examined by the Defendants Counsel, he stated that the title was issued in 1994. He was not present during the adjudication process. He was not aware of the Senate Committee report on the land. There have been subdivisions on the land. The Plaintiff's officials were involved in the process. The Defendants are squatting on the land illegally. The Plaintiffs have been trying to regain possession for the last 10 years. They have also complained to the police but no action has been taken to date against the 1,000 to 2,000 people who are squatting on the land. He also stated that they have sued the 3 Defendants who are representatives of the rest. He also stated that the Defendants have never applied to join their group. He further stated that he was aware of the public utilities on the land. There are 4 primary schools and several churches on the said land.
14. He also stated that during the adjudication the community set aside 17 plots for public utilities. He also stated that the Defendants were given notices to vacate the land but they did not comply.
15. When re-examined he clarified how the Isangaiwishi Community came to get the land.
16. Tole Mwakidedi testified as PW2. He adopted and relied on his witness statement dated 14th September 2023. He stated that he became a member in 1995 though he was eligible since birth.
17. On cross-examination, he stated that he was aware of the Senate visit and was also aware of the report that it prepared after the visit to the land. He however stated that he was not aware of the County Assembly visit. He further stated that he was the Secretary of Isangaiwishi Community.
18. On further cross examination, he could not confirm the number of persons on the land though he reiterated that the Defendants are squatters on the land.
19. He further stated that the police delayed in taking action, they had not produced the minutes of the last meeting in court. He became Secretary in 2021.
20. He conceded that the Defendants are in occupation of the land. They have been residing on the land. The 3 Defendants have developments on the land.



The Defendants case

21. The Defendants filed an Amended Statement of Defence and Counter claim dated 17th July 2024.
22. It was the Defendants case that they have been in the property for over 100 years and they can therefore not be encroachers. They have known the land as their only home.
23. They also averred that they have continuously and without any interruption lived in the suit property and their occupation has been exclusive, open, continuous and uninterrupted hence the acquisition of proprietary rights through adverse possession.
24. They also pleaded that they are aware that the suit property is registered to Isangaiwishi Development Community.
25. During trial, James Mwafunja Mwanika testified on their behalf and as the sole Defendants' witness. He adopted and relied on his witness stated dated 17th July 2024 and the Defendant's bundle dated 15th February 2024 and a further bundle of documents dated 1st July 2024.
26. On cross-examination, he stated that he was born in Mwakitau. He stated that there was an eviction notice which was issued to them sometimes in the year 2000 but they were not evicted. He also stated that the case that was filed in respect to their eviction was alter withdrawn. He also stated that the Defendants are the ones staying on the land and that is why they have filed a Counter claim.
27. He also stated that the Plaintiffs have never been on the said land.

The Plaintiffs submissions

28. The Plaintiffs filed written submissions dated 8th April 2025. Counsel submitted on the following issues:-
 - i. Who is the rightful owner of the property known as Bura/Isangaiwishi Scheme/19?
 - ii. Do the trespassers satisfy the legal requirements to sustain a claim for adverse possession?
 - iii. Does the Plaintiff meet the legal threshold to justify the eviction of the alleged trespassers?
 - iv. Who is to bear the costs of the application.
29. Citing Section 26 of the [Land Registration Act](#), 2012 and the case of Margaret Njeri Wachira =Versus= Eliud Waweru Njenga (2018) KE ELC 2703 (KLR), it was argued that a title document is prime face evidence of ownership to land the same can only be challenged on the grounds of fraud, misrepresentation or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
30. It was also submitted that since no challenge has been made on the title issued to Isangaiwishi this court should hold that the property belongs to Isangaiwishi and it should be allowed to enjoy such rights. No evidence has been brought to challenge the procedure through which Isangaiwishi came to own the property. Thus there is no evidence that has been tendered that disputes the ownership of the property to Isangaiwishi.
31. It was also submitted that the Defendants are trespassers on the land and hence cannot claim adverse possession over the same.
32. On whether the Plaintiffs met the legal threshold to justify the eviction of the alleged trespassers, it was submitted that the first ingredient to prove a claim of eviction is that the Plaintiffs ought to be the



owner of the land. The Plaintiffs have produced a titled which gives them authority as the owners of the land. The Defendants have failed to establish their claim to the land and keep shuttling between ancestral land and adverse possession. As a result of no challenge to title under Section 26 of the LRA, the land belongs to the Plaintiffs.

33. It was further submitted that the second ingredient is whether an act of trespass has been committed. In this case the Defendants have confirmed being in the land and this Court should grant the orders of eviction that had been sought. The court was urged to grant the reliefs sought in the plaint.

The Defendants submissions

34. The Defendants filed written submissions dated 8th July 2025. It was submitted that the documentary evidence presented in this matter is compelling and irrefutable. Among the documents are photographs of schools that were established in 1957 and 1976, both of which are located on the suit property. In addition, the property is home to dispensaries, places of worship such as the Mwakitau Catholic Church, which has served the community since 1950. Furthermore, the annexed photographs depict graveyards where generations of the community have laid their loved ones to rest. This substantial body of evidence further solidifies the Defendants claim of long-standing, undisturbed occupation of the suit property.
35. It was further submitted that the suit property is currently registered in the name of Isangaiwishi Development Company as Plot No. Bura/Isangaiwishi Scheme/19 and that the Plaintiffs had produced in evidence certificate of title dated 17th June 2021. It was also submitted that the Defendants were not disputing the ownership and registration of this property in the names of the Plaintiffs.
36. It was contended that the Plaintiffs witnesses had testified that the Defendants had illegally encroached into the suit property and as such their entry was without consent and or permission of the Plaintiffs. The cases of Mtana Lewa =Versus= Kahindi Ngala Mwangandi (2015) eKLR, Ruth Wangari Kanyagia =Versus= Joseph Muthoni Kinyanjui 92017) eKLR and Wilson Kazungu Katana & 101 Others =Versus= Salim Abdalla Bakshwein & another (2015) eKLR were cited in support of the Defendants Counter claim.
37. The court was urged to dismiss the Plaintiff's suit and enter judgment in favour of the Defendants as prayed in the Counter claim.

Analysis and Determination

38. Having considered the pleadings filed, oral and documentary testimony tendered together with the written submissions filed, the salient issues for determination are as follows:-
- i. Whether the Plaintiffs suit has been proved to the required standard.
 - ii. Whether the Defendants Counter claim is merited.
 - iii. What are the appropriate reliefs to grant herein.
39. The court shall now consider all the said issues sequentially.
40. It is not in dispute that the suit parcel known as Bura/Isangaiwishi Scheme/19 is registered in the name of Isangaiwishi Development Community Land. From the evidence that was tendered it was also not in dispute that the Plaintiffs have made previous attempts to evict the Defendants who are currently residing on the land. The Plaintiffs have now come to court vide this suit seeking several reliefs including an eviction order for the Defendants.



41. The Defendants herein in contesting the reliefs sought by the Defendant filed a Statement of Defence and Counter Claim upon which they pleaded adverse possession and over the said land.
42. In the instant case, it emerged during trial that the Defendants have been residing in the suit property for over 12 years even before the land was registered in the name of Isangaiwishi Development Community on 17th June 2021. DW1 who testified on behalf of the Defendants confirmed that he was in the land even earlier before the registration of Isangaiwishi Development Community.
43. The law on adverse possession is provided for under the *Limitation of Actions Act*. Section 7 of the Act, provides 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.”

Further provisions are made under Section 13 which provides;

- “(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 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.”

And Section 17 of the Act which states;

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”

44. Finally, Section 38(1) and (2) states as follows:

- “(1) 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.
- (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”



45. The net effect of the foregoing provisions of the law is to extinguish the title of the proprietor of land in favour of a party who has been in possession thereof for a minimum period of 12 years. Discussing the concept of adverse possession, the Court of Appeal in *Mtana Lewa vs Kahindi Ngala Mwangandi* (Supra) stated thus:

“Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12 years.”

46. In discussing the essential elements in a claim for adverse possession, the Court of Appeal in the case of *Richard Wefwafwa Songoi vs Ben Munyifwa Songoi* [2020] eKLR stated thus;

“A person who claims adverse possession must inter alia show:

- (a) on what date he came into possession;
- (b) what was the nature of his possession;
- (c) whether the fact of his possession was known to the other party;
- (d) for how long his possession has continued; and
- (e) that the possession was open and undisturbed for the requisite 12 years.”

47. Earlier on, the Court in *Gabriel Mbui vs Mukindia Maranya* [1993]eKLR gave a thorough and exhaustive explanation of these elements thus;

- i. The intruder must make physical entry and be in actual possession for the statutory period. Time does not begin to run unless there is some person in adverse possession of the land and time does not begin to run merely because the land is vacant, adverse possession rests de facto use and occupation by an entrant. There must be actual possession which requires some with sufficient degree of physical occupation for 12 years.
- ii. The entry and occupation must be with, or maintained under, some claim or color of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else. In other words the intruder must have some apparent title, the appearance of title but not the reality of it. He must have with him his own apparent right which affords him some semblance of title under which he claims to found his occupation of the land independently of anyone else’s power.
- iii. The occupation of the land by the intruder must be without permission from the true owner of the land. Permissive occupation or where possession was consensual or contractual cannot be called adverse. Any kind of permissive use, as a tenant, licence, contract purchaser in possession, or easement holder is rightful and not hostile. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive and with an evinced unmistakable animus possidendi that is to say, occupation with the clear intention of excluding the owner as well as other people. Exclusive possession means that the exercise of dominion over the land must not be shared with the owner....”



- v. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner, unless the acts be done are inconsistent with the owner's enjoyment of the soil for the purpose which he intended to use it. He must show that his possession was of such a nature and involved the exercise of rights so irreconcilable with those claimable by the owner of the land, and gave rise to a cause of action or right to sue for possession throughout the 12 years. Where the true owner of land intends to use it in the future for a particular purpose, but has no immediate use for it so leave is unoccupied does not lose his title to it simply because someone enters on it and uses it for some purpose not even if this purpose continues year after year for 12 years or more (see Leigh V Jack 1879 5 Ex D 264) The reason being by using land knowing it does not belong to him, he assumes the owner permits it and by not turning him off the owner impliedly gives him permission. Where the true owner can make no immediate use of the land, as the years go by it cannot be said he would lose his rights as an owner merely by reason of acts of trespass. Time therefore does not run against a true owner whose purposes are not prejudiced by the intruder's acts.
- vi. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice by the owner and the community of the exercise of dominion over the land. The owner has an opportunity to notice the intruder if reasonable inspection is conducted. There must be a denial of the owner's right by an open assertion of a hostile title by the person setting up adverse possession and there must be notice of the denial to the owner, either given directly or inferred from notorious acts and circumstances. So notorious must be the overt acts of ouster that there must be nothing that would lead the owner to suppose that his rights remain intact.
- vii. The possession must be continuous, uninterrupted, unbroken for the necessary statutory period. The possession by the adverse possessor must continue without significant interruption for a solid block of time at least so long as the period of limitation being at the moment 12 years before filing of the suit. The test is whether the adverse possessor used the land as a true owner would. There are a number of ways in which adverse possession which has begun to grow may be interrupted. Possession may be interrupted:-
 - a) By the physical entry upon the land by any person claiming the land in opposition to the person in actual possession with the intention of causing interruption.
 - b) By the institution of legal proceedings by the rightful owner to assert his right to the land; or
 - c) By any acknowledgement made by the person in possession, to any person claiming to be the rightful proprietor, that such claim is admitted or otherwise recognized.
- viii. The rightful owner against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, during the statutory period. If at any time in the course of the running of the time he had no right to claim possession, or he was under a



disability or legal impediment, time does not run against him during that spell. The true owner must have the right to immediate possession during the 12 years and if he has no right to immediate possession it is practically immaterial to him who is in possession. Having no right himself to possession, he cannot eject the person in possession.

- ix. The rightful owner must know that he is ousted, he must be aware that he has been disposed or he must have parted and intended to part with possession. Just as the adverse possessor cannot succeed if he did not know he was in actual possession of another's land, the owner who had not intended to part with possession or is unconsciously dispossessed cannot be said to have been evicted or have quit the land."

48. In a claim for adverse possession, the burden of proof is upon the person setting up and seeking to prove title by adverse possession. The required element of proof is the usual standard of proof in civil cases, namely, on a balance of probability. This was enunciated by the Court in the case of Gabriel Mbui (Supra) which stated as follows:

"The plea of adverse possession is always based on facts and they must be asserted, pleaded and proved. The person claiming adverse possession must show on what date he took occupation of the premises, the nature of his possession, whether his possession is known to the true owner, how long the possession when on, whether his possession was open and undisturbed. Unless these questions are asserted and proved a plea of adverse possession must fail."

49. Having found that the Defendants have been on the suit property over a period 12 years. This means that as at the time the Plaintiffs filed the present suit, their title had already been extinguished.
50. As expressed by the Court of Appeal in *Wines & Spirits Kenya Limited & another vs George Mwachiru Mwango* [2018] eKLR;

"...It therefore follows that the onus is on the person or persons claiming adverse possession to prove that they have used this land which they claim as of right. This is the Latin maxim of *nec vi, nec clam, nec precario* (which means that the occupation of the land must have no force, no secrecy, no evasion). Accordingly, the respondent herein was beholden to not only show his uninterrupted possession, but also that the 1st appellant had knowledge (or the means of knowing) actual or constructive of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration."

51. The analysis of the evidence tendered herein also confirms that the entry of the Defendants to the said land was without the consent of the Plaintiffs who are its current registered owners and also the Defendants acknowledged and confirmed the registration of the Plaintiffs as owners of the land and as such it is the finding of this court that the Defendants have been able to prove their proprietary interest to the land by way of adverse possession.

Conclusion

52. Having considered the totality and weight of the evidence tendered herein, it is the finding of this court that the Plaintiffs suit has not been proved to the required standard, the orders sought by the



Plaintiffs cannot be granted since the Defendants have proved their Counter claim and deserving the reliefs sought having demonstrated their proprietary interest to the land by way of adverse possession.

Final Orders

53. In the end the Plaintiffs suit and the Defendants Counter claim are hereby determined as follows:-
- i. The Plaintiff's suit is hereby dismissed.
 - ii. A declaration is hereby issued that the Defendants have acquired title to the land known as Bura/Isangaiwishi Scheme/19 by way of adverse possession.
 - iii. A permanent injunction is hereby granted restraining the Plaintiffs from evicting, demolishing and interfering in any way with the Defendants peaceful occupation of the suit land.
 - iv. Each party to bear own costs of the suit and the Counter claim.

DATED, SIGNED AND DELIVERED IN OPEN COURT/VIRTUALLY AT VOI THIS 8TH DAY OF MAY 2025.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Nzuli for Plaintiffs

Mr. Iddi holding brief for Mr. Mukanzi for Defendants

Court Assistants: Mary Ngoira and Norah Chao.

