



Njoka & 5 others v Mbarire (Environmental and Land Originating Summons E023 of 2021) [2025] KEELC 3857 (KLR) (8 May 2025) (Judgment)

Neutral citation: [2025] KEELC 3857 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E023 OF 2021**

AK BOR, J

MAY 8, 2025

BETWEEN

**GRACE WANJIRU NJOKA 1ST APPLICANT
ESTHER KANYUA NG'ANG'A 2ND APPLICANT
JACINTA MUTHOMI NJURURI 3RD APPLICANT
LUKA MICHAEL NJOKA 4TH APPLICANT
CHARITY NJOKI NJOKA 5TH APPLICANT
RUTH WANJUKI NJOKA 6TH APPLICANT**

AND

GRADWELL MURINGO MBARIRE RESPONDENT

JUDGMENT

1. The applicants filed the originating summons dated 15/6/2021 seeking a declaration that they had become entitled to all that parcel of land comprised in title Ngandori/Kirigi/2374 (the suit land) through adverse possession. They sought to be registered as proprietors of the suit land in place of the respondent. They also sought to have the respondent transfer the suit land to them at her own cost and in default, for the deputy registrar of this court to effect the transfer. Additionally, they sought to have the caution placed by the 3rd applicant against the suit land removed to enable the successful transfer of the property to them upon grant of the other prayers.
2. The Applicants averred that the respondent, Gradwell Muringo Mbarire was registered as the proprietor of the suit land. They claimed that they were born on the suit land over 50 years ago and that they had lived there since, and did not know the circumstances under which their parents acquired the land except that their mother told them that the land belonged to their father. They claimed that their mother died and was buried on the suit land while their father abandoned them years ago.



3. Efforts to locate the respondent to effect personal service were unsuccessful, and service was therefore effected through substituted means by advertisement in the Daily Nation. The respondent did not enter appearance or file a defence and the suit proceeded undefended.
4. The issue for determination is whether the applicants have become entitled to the whole of land parcel known as Ngandori/Kirigi/2374 through adverse possession and whether they should be registered as proprietors of the suit land in place of the respondent.
5. 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. While Section 13 of that Act provides that the right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run, referred to as adverse possession. It goes further to stipulate that where under sections 9, 10, 11 and 12 of the Act 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.
6. In *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] KECA 532 (KLR) the Court of Appeal defined adverse possession as 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 twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites were that possession of the adverse possessor was neither by force or stealth nor under the license of the owner. The possession must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”
7. The guiding principles for determining a claim for adverse possession were laid down in *Wambugu vs Njuguna* [1983] KLR 172, where the Court held as that the owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it. Further, that the proper way of assessing proof of adverse possession would be whether or not the title holder had been dispossessed or had discontinued his possession for the statutory period and not whether or not the claimant proved that he had been in possession of the requisite number of years.
8. Similarly, in *Samuel Kihamba v Mary Mbaisi* [2015] KECA 853 (KLR) the court stated that to succeed in a claim for adverse possession one must prove and demonstrate that he had occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner and with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are captured in the Latin as *nec vi, nec clam, nec precario*, with the additional requirement of *animus possidendi*, or intention to have the land.
9. An applicant must show actual, open, and uninterrupted occupation of the land for a continuous period of twelve years. Such occupation must be adverse to the interests of the registered proprietor, who must have taken no action to assert their rights over the land within that period.
10. The applicants claim to have been have been in uninterrupted, exclusive possession of the suit land parcel for over 50 years since birth. They claim that their late mother, who is buried on the land, never indicated it belonged to anyone else, nor left ownership documents. They averred that they have continued to occupy and benefit from the suit land without interference from anyone until recently, when unknown individuals started harassing them and issuing them with threats that they would evict



them from the suit land and that upon doing a search of the land, they discovered that it is registered in the name of the respondent a person they say, they have never met or heard of her.

11. The first element to be proven for a claim on adverse possession to succeed is that the claim is against the registered owner of the land. It is not in dispute that the respondent is the registered owner of the suit land as the applicants produced in evidence a copy of the green card for land parcel Ngandori/Kirigi/2374, which shows that Gradwell Muringo Mbarire was registered as the owner on 21/4/1975. The first element is satisfied.
12. The other element is whether the applicants have been in open, continuous and uninterrupted possession of the suit parcel of land for a period exceeding twelve years. To successfully claim land through adverse possession, the applicant must demonstrate that they have occupied the land exclusively, openly, and as of right, without interruption for a continuous period of 12 years either by dispossessing the rightful owner or by the owner voluntarily ceasing possession. The applicants in this case claimed that they have been on the suit land since they were born over 50 years ago. They also claimed that they have utilized the land during that period and that they have also buried their mother on that land. The only evidence they produced was a letter from the Chief confirming that they are the children of Judith Wanjovi (deceased), who the court presumes is their mother and who is said to have been the wife to Arnest Njoka Kiriro. The letter also confirms that the applicants are the children of the deceased and are residents of the sub location known as Mukangu sub location.
13. In this court's view, that letter falls short of proving actual possession of the suit land. It is not clear whether the suit land, Ngandori/Kirigi/2374 is located within the mentioned sub-location. The letter merely confirms family ties and place of residence of the applicants but does not speak to the applicant's occupation or use of the suit land. The letter cannot be relied upon as credible proof of possession as required under the doctrine of adverse possession.
14. Although the suit was not defended, it is not enough for the applicants to simply allege possession. Actual possession is a fundamental element in a claim for adverse possession, and the burden lies with the applicants to provide tangible and credible proof of such possession and or occupation on a balance of probabilities. Section 107 of the *Evidence Act* places the burden of proving any fact on the person who asserts it while Section 109 provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, especially where such facts are within that person's knowledge.
15. In *Thomas v Ngugi* [2024] KEELC 5857 (KLR) the court emphasized that both factual possession and the intention to dispossess the owner must be established. The court stated that for a claim of adverse possession to crystalize, dispossession of the owner of land must be apparent and that it must be without secrecy, without force and without permission.
16. One must also prove that he has used the suit land without force, without secrecy, and without persuasion for twelve years and demonstrate that the registered owner had knowledge (or the actual knowing) that the adverse possessor was in possession of the land. The possession must be continuous, not be broken or interrupted.
17. The applicants should have gone further than mere assertions of possession and produced evidence to show their use the suit land. The applicants are essentially inviting the court to accept their statements at face value, without any supporting evidence. While their written submissions provide more detail on the nature of their alleged possession, it is well established that submissions are not evidence, nor can they take the place of pleadings or evidence. It is also trite law that parties are bound by their pleadings, and it is on the strength of their evidence, not mere assertions that a court can base its decision.



18. In the absence of any evidence of actual possession and or occupation of the suit land, this court is not persuaded that the applicants have been in open and notorious occupation of the land adverse to that of the registered owner.
19. The court declines to grant the orders sought in the originating summons dated 15/6/2021. It is dismissed with no orders as to costs.

DELIVERED VIRTUALLY AT EMBU THIS 8TH DAY OF MAY 2025.

K. BOR

JUDGE

In the presence of: -

Ms.W. Chege holding brief for Mr. G. Mwanza for the Applicants

Court Assistant- Diana Kemboi

No appearance for the Respondent

