



**Kalema v Memusi & another (Environmental and Land Originating Summons  
441 of 2017) [2025] KEELC 5311 (KLR) (14 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5311 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 441 OF 2017**

**MN KULLOW, J**

**JULY 14, 2025**

**BETWEEN**

**OLE SANTIYA KALEMA ..... PLAINTIFF**

**AND**

**NAIKOSWA OLE MEMUSI ..... 1<sup>ST</sup> DEFENDANT**

**SHANTILAL K SHAH & COMPANY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff herein, commenced this suit by way of Originating Summons dated 20<sup>th</sup> June 2014 invoking Section 38 of the *Limitation of Actions Act*, Cap 22, of the Laws of Kenya, seeking a declaration that he has acquired title to land parcel number Transmara/Moita/218, measuring approximately 16.51 hectares, by way of adverse possession.
2. The suit property was initially registered in the name of David Tumbesi Dikir on 10<sup>th</sup> December 1997 under first registration, and title deed issued on 17<sup>th</sup> December 1997. It was subsequently transferred to the 2<sup>nd</sup> Defendant, Shantilal K. Shah & Co. Ltd, on 20<sup>th</sup> November 2013.
3. The Plaintiff claims to have been in peaceful, open, uninterrupted, and exclusive possession of the suit land for a period exceeding 12 years and seeks to be registered as proprietor.

**The Plaintiff's Claim**

4. In his supporting affidavit sworn on 20<sup>th</sup> June 2014, the Plaintiff deponed that he entered and took possession of the suit land in 1966, built his homestead, and has since then cultivated and resided on the land with his family.



5. He contended that the land was part of his ancestral heritage and that during the adjudication process in the Moita Adjudication Section, strangers including one David Tumbesi Dikir were unlawfully registered as proprietors, despite never having occupied or developed the land.
6. He further deponed that upon the registration of Dikir in 1997, Dikir visited the land, found the Plaintiff in occupation, and left without taking possession.
7. The Plaintiff produced various exhibits, including photographs of his homestead and mature trees (Exhibit P2), a government survey report dated 2004 (Exhibit P4), and a caution he had registered on the land. He claimed the description of his interest as “licensee” in the caution was a mischaracterization by the Land Registrar.

### **The Defendants’ Case**

8. The 1<sup>st</sup> Defendant, Naikoswa Ole Memusi, swore a replying affidavit dated 8<sup>th</sup> August 2014 in his capacity as the administrator of the estate of the late David Tumbesi Dikir.
9. In that affidavit, the 1<sup>st</sup> Defendant’s representative deponed that the Plaintiff was never in occupation before the adjudication, and that the land was duly allocated and registered after public demarcation. It was further alleged that the Plaintiff unlawfully entered the land during inter-clan clashes in February 2010 and sought temporary stay from the registered owner.
10. The 2<sup>nd</sup> Defendant, through Dhirjal K. Shah, a director of Shantilal K. Shah & Co. Ltd, also filed a replying affidavit on 8<sup>th</sup> August 2014, where he deponed that they lawfully purchased the land from the estate of David Dikir and took all legal steps to verify the title.
11. The 2<sup>nd</sup> Defendant stated that during a site visit in 2014 (allegedly in the presence of the area chief), they found a newly constructed homestead and that the Plaintiff admitted to recent entry and promised to vacate.
12. Both Defendants deny the Plaintiff’s claim of adverse possession and assert that the Plaintiff is, at best, a licensee, evidenced by a caution registered by him describing his interest as such.
13. The matter proceeded to full hearing. The Plaintiff testified as PW1 on 5<sup>th</sup> April 2018, adopting his affidavit of 20<sup>th</sup> June 2014. He was cross-examined and maintained that he has lived on the land since 1966, had no knowledge of the adjudication until after registration, and never gave up possession.
14. The Plaintiff called three witnesses Namely: PW2 (Mzee Ole Koitiko), testified on 10<sup>th</sup> April 2018, confirming that he had known the Plaintiff since childhood and that the Plaintiff’s homestead had existed in the area long before land adjudication and PW3 (Ole Oleserian) and PW4 (Ole Meiteiya), both elderly neighbours, corroborated the Plaintiff’s occupation of the land prior to and after the adjudication process.
15. The Defendants closed their case on 30<sup>th</sup> May 2018, relying solely on their affidavits dated 8<sup>th</sup> August 2014. No independent witnesses, including the area chief allegedly present during the Plaintiff’s alleged admission, were called.
16. upon Conclusion of the hearing, the parties were granted timelines within which to file and exchange their respective written submissions. The record shows that the Plaintiff filed written submissions dated 26<sup>th</sup> January 2019, through O.M Otieno & Co. Advocates and the Defendants filed theirs in 23<sup>rd</sup> January 2019 Through M/s Oguttu, Ochwangi, Ochwal & Co. Advocates



17. I have reviewed the pleadings herein, the respective exhibits and parties' rival submissions in totality and it is my considered opinion that the following issues arise for determination: -
- a. Whether the Plaintiff has established a valid and legally sustainable claim for adverse possession over land parcel LR No. Transmara/Moita/218.
  - b. Whether the Plaintiff's occupation of the suit land was permissive, by license, or under the consent of the registered proprietors.
  - c. Whether the transfer of the suit property to the 2<sup>nd</sup> Defendant on 20<sup>th</sup> November 2013 interrupted or extinguished any accrued rights of the Plaintiff under adverse possession.
  - d. Whether the Plaintiff is entitled to the reliefs sought, including registration as owner and injunctive orders,
  - e. Who should bear the costs of the suit.
18. Sections 7,13, 17 and 38 (1) and (2) of the *Limitation of Actions Act* and Section 28 (h) of the *Land Registration Act* provides the statutory framework for the doctrine of adverse possession.
19. Makhandia, JA in *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR in describing the doctrine of adverse possession held as follows: -
- “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 against such person in assertion of his title for a certain period, in Kenya, it is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence 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 in Section 7 of the *Limitation of Actions Act*.....”
20. Similarly, in *Chevron (K) Limited v Harrison Charo Wa Shutu* [2016] eKLR it was held, inter alia, that:
- “...the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it. See *Littledale v Liverpool College* [1900]1 Ch.19, 21.”
21. The Plaintiff testified that he entered the suit property in 1966, decades before the land was adjudicated. He constructed a homestead, cultivated crops, grazed livestock, and settled with his family on the land. His testimony was corroborated by several witnesses (PW2–PW4) and supported by photographic evidence (PEX2) and a joint inspection report by the Land Registrar, Surveyor, and Adjudication Officer (PEX4), which confirmed the Plaintiff's physical presence and occupation as of 2004.
22. The property was subsequently registered in the name of David Tumbesi Dikir on 10<sup>th</sup> December 1997, and a title deed was issued on 17<sup>th</sup> December 1997. It is from this point that time for adverse possession began to run, since the Plaintiff's occupation at that point became adverse to the interests of the registered proprietor.



23. The Plaintiff filed this suit in June 2014, more than 16 years after registration. There is no evidence that Dikir, or any person claiming under him, ever took possession or sought to assert ownership of the land during that period.
24. The Court in *Cheromei v Muigai* (Environment & Land Case E005 of 2023) [2024] KEELC 5604 (KLR) explained:
- “...Furthermore, one of the requirements of adverse possession is open possession, without secrecy and the acquisition of rights in such a clandestine manner would in essence defeat the very important ingredients of openness of possession....”
25. There is no suggestion that the Plaintiff’s use was clandestine, violent, or permissive. To the contrary, his possession was open, peaceful, and notorious, and it remained uninterrupted throughout the statutory period.
26. The Defendants contested this claim, arguing that the Plaintiff only entered the land around 2010 during ethnic clashes and that he did so with their permission. These assertions were supported by affidavits from Naikoswa Ole Memusi and Dhirjal K. Shah. However, the alleged source of the Plaintiff’s permission namely the area chief was not called to testify. This omission attracts a negative inference under Section 119 of the *Evidence Act*, suggesting the testimony would have undermined their case.
27. The Defendants further relied on a caution lodged by the Plaintiff identifying his interest as that of a “licensee.” The Plaintiff explained, and the Court accepts, that this designation was applied unilaterally by the Land Registrar without his input or knowledge of the legal implications. There is no documentary or oral evidence of a license, tenancy, or other agreement authorizing the Plaintiff’s occupation.
28. In *Gabriel Mbui vs Mukindia Maranya* (1993) eKLR, where Justice Kuloba had this to say:
- “(3) .... It has been held many times that acts done under licence or permitted by, or with love of, the owner do not amount to adverse possession and do not give the licensee or permitted entrant any title under the limitation statute. If one is in possession as a result of permission given to him by the owner, or if he is in possession of the land as a licensee from the owner, he is not in adverse possession....”
29. In the present case, the Defendants failed to demonstrate that the Plaintiff’s possession was ever founded on permission. Accordingly, the Court finds that the Plaintiff’s occupation from 1997 was without permission and against the rights of the registered owner, which supports his claim for adverse possession.
30. The Court also considers whether the transfer of the suit land in 2013 affected the Plaintiff’s claim. On 20<sup>th</sup> November 2013, title was transferred from the estate of David Tumbesi Dikir to the 2<sup>nd</sup> Defendant, Shantilal K. Shah & Co. Ltd, as evidenced by P-EX5. However, by that date, the Plaintiff had been in continuous and adverse possession for more than 15 years.



31. In the case of Paul Kamande Gicheha Vs Jacob Kinyua Kiragu [2018] eKLR the Court held that;
- “It is trite that the mere change of ownership of land which is occupied by another person under adverse possession does not stop time from running or interrupt such person’s adverse possession
32. In the instant suit, the 2<sup>nd</sup> Defendant took no steps to assert its ownership or evict the Plaintiff. No demand notice, court proceedings, or physical re-entry was made. The Plaintiff remained in possession, just as he had been prior to the transfer. The Court, therefore, finds that the 2013 transfer did not extinguish or interrupt the Plaintiff’s matured claim.
33. The Court is satisfied that the Plaintiff meets the cumulative legal threshold for adverse possession. In the case of Mombasa Teachers Cooperative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others [2018] eKLR, where the court held that:
18. Likewise, it is settled that a person seeking to acquire title to land by 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 12 years as espoused in the Latin maxim, nec vi nec clam nec precario.
34. The photographs on record, showing homes, cultivated land, livestock, and fencing (PEX4(a)–(d)), are clear indicators of possession inconsistent with the rights of the registered owner. These developments were carried out over time and reflect the Plaintiff’s intention to possess the land to the exclusion of all others. The subject parcel LR No. Transmara/Moita/218, measuring 16.51 hectares is clearly identified in the pleadings, the title documents, and survey records. There is no ambiguity as to its identity or boundaries. The Court is therefore satisfied that the Plaintiff has met all the legal and factual requirements for acquisition of the land by adverse possession.
35. Finally, on the matter of costs, Section 27 of the [Civil Procedure Act](#) provides that costs follow the event unless there is good reason to order otherwise. No such reason has been demonstrated in this case. The Plaintiff, having succeeded in establishing his claim, is entitled to the costs of the suit.
36. For the above reasons, the Court enters judgment for the Plaintiff as prayed in the originating summons dated 20<sup>th</sup> June 2014 in the following terms:
- a. A declaration is hereby issued that the Plaintiff, Ole Santiya Kalema, has been in open, continuous, and exclusive possession and occupation of all that parcel of land known as LR No. Transmara/Moita/218, measuring 16.51 hectares, for a period exceeding twelve (12) years.
- b. It is hereby declared that the title held by the Defendants over the suit land has been extinguished by operation of law under the doctrine of adverse possession.
- c. A further declaration is made that the 2<sup>nd</sup> Defendant holds the suit property in trust for the Plaintiff, and that the Plaintiff is entitled to be registered as proprietor thereof.
- d. The Land Registrar, Narok County, is directed to register the Plaintiff as the absolute proprietor of LR No. Transmara/Moita/218 in place of the 2<sup>nd</sup> Defendant.
- e. The 2<sup>nd</sup> Defendant is ordered to execute all necessary instruments of transfer within sixty (60) days of this judgment, failing which the Deputy Registrar of this Court shall execute the same on their behalf.



- f. A permanent injunction is issued restraining the Defendants, their agents, servants, or assigns from entering, interfering with, or dealing with the suit land in any manner.
- g. The Defendants shall bear the costs of this suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON 14<sup>TH</sup> DAY OF JULY, 2025.**

**MOHAMMED N. KULLOW**

**JUDGE**

Ruling delivered in the presence of: -

..... for the Plaintiff

..... for the Defendants

Philomena W. Court Assistant

