



**Mwarania v Mutai (Environmental and Land Originating Summons
E018 of 2024) [2025] KEELC 5533 (KLR) (14 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5533 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E018 OF 2024**

JO MBOYA, J

JULY 14, 2025

BETWEEN

JOSPHAT RIUNGU MWARANIA PLAINTIFF

AND

MUTUMA MUTAI DEFENDANT

JUDGMENT

1. Before me is the Originating Summons [OS] dated 7th November 2024 brought pursuant to [sic] Section 38 of the Civil Procedure Act Chapter 21, Laws of Kenya and Section 8 & 9 of the Law Reform Act Chapter 26, Laws of Kenya and wherein the Plaintiff seeks the following declaration;
 - i. Is the Defendant the registered proprietor of LR NO. Abothuguchi/ Makandune/620?
 - ii. Does the Plaintiff occupy the whole of LR NO. Abothuguchi/Makandune/620?
 - iii. Has the Plaintiff occupied the suit land for over 12 years and therefore obtained its possession by way of adverse possession?
 - iv. Who is to pay costs of this suit?
2. The instant originating summons [OS] is premised on the various grounds which have been enumerated in the body thereof. In addition, the summons is supported by the supporting affidavit sworn by Josphat Riungu Mwarania [deponent] and wherein the deponent has averred that same entered into a sale agreement with one Mutai Imanyara [now deceased]. Furthermore, the deponent has averred that upon entry into the sale agreement, the vendor [now deceased] allowed same to enter upon and take possession of the suit property. Moreover, the deponent has contended that same has remained in occupation and possession of the suit property for a duration in excess of twelve years.
3. Arising from the foregoing, the Plaintiff has therefore posited that the same has since accrued and or acquired adverse possessory rights to and in respect of the suit property. To this end, the Plaintiff has



- implored the court to find and hold that same is entitled to the suit property on the basis of adverse possession.
4. The Defendant duly entered an appearance and thereafter filed a Replying affidavit sworn on the 22nd April 2025 and a witness statement of even date. The Defendant has contended that the Plaintiff herein did not enter into and or execute any sale agreement with Mutai Imanyara [now deceased] either in the manner alleged or at all. Furthermore, it has been posited that the Plaintiff has failed to tender and or produce a copy of the sale agreement. Besides, the defendant has averred that the Plaintiff has never been in possession of the suit property to date.
 5. The subject matter came up for directions on 11th March 2025, whereupon the advocates for the parties covenanted to canvass the originating summons [OS] by way of viva voce evidence. To this end, the court proceeded to and issued directions in line with the provisions of Order 37 Rules 16;17; and 19 of the civil procedure rules 2010. Suffice it to posit that the court directed that the parties shall proceed to file and exchange their list of witnesses; witness statement, list and bundle of documents.
 6. The Plaintiff's case is premised on the evidence of three [3] witnesses namely; Josephat Riungu Mwarania, Peter Muchae and John Miriti. Same testified as PW1, PW2 and PW3 respectively.
 7. It was the testimony of Pw1[Josephat Riungu Mwarania] that same is the Plaintiff in respect of the instant matter. Furthermore, the witness averred that same is conversant with the Defendant herein. In any event, the witness added that same has raised a claim about ownership of Plot NO. Abothuguchi/Makandune/620.
 8. It was the further testimony of the witness that same purchased the suit property from the Defendant's father. Thereafter the witness averred that the defendant's father allowed him to enter upon and take possession of the suit property. To this end, the witness testified that same indeed entered upon and took possession of the suit property. Furthermore, the witness testified that same proceeded to and developed the suit property. Nevertheless, the witness averred that in September 2024 the Defendant herein informed same that the land in question does not belong to him [witness].
 9. Other than the foregoing, the witness averred that same has since recorded and filed a witness statement dated 18th March 2025 and which witness statement the witness sought to adopt and rely on as his evidence in chief.
 10. Suffice it to state that the witness statement dated 18th March 2025; was thereafter adopted and constituted as the evidence in chief of the witness. Besides, the witness averred that same has not filed any documents.
 11. On cross-examination by Learned counsel for the Defendant. the witness testified that the land in question belonged to Mutai Imanyara [deceased]. However, the witness averred that the land is currently registered in the name of the Defendant.
 12. It was the further testimony of the witness that same entered into a sale agreement with Mutai Imanyara [deceased]; however, the witness conceded that same has neither tendered nor produced the sale agreement before the court. While still under cross-examination, the witness testified that the defendant herein did not sell any land unto him.
 13. The Second witness who testified on behalf of the Plaintiff was Peter Muchae. Same testified as PW2.
 14. It was the testimony of the witness that same is familiar with the Plaintiff. Furthermore, the witness averred that same got to know of the matter herein when the Plaintiff reported the complaint touching



- on the suit land to him. Furthermore, the witness testified that same thereafter directed the Plaintiff to report the dispute to the Chief.
15. It was the further testimony of the witness that same has since recorded and filed a witness statement dated 18th March 2025 pertaining to the subject matter. To this end, the witness sought to adopt and rely on the content[s] of the witness statement as his evidence in chief. Instructively, the witness statement dated 18th March 2025 was thereafter adopted and constituted as the evidence in chief of the witness.
 16. On cross-examination by Learned counsel for the defendant, the witness averred that same had recorded a witness statement. Nevertheless, the witness testified that same did not witness the purchase of the land by the Plaintiff.
 17. The third [3rd] witness who testified on behalf of the Plaintiff was John Miriti. The witness testified as PW3.
 18. The witness averred that same is familiar with the Plaintiff herein. However, the witness testified that same did not know the Defendant. Furthermore, the witness averred that same has since recorded a witness statement dated 18th March 2025; and which witness statement same sought to adopt and rely on as his evidence in chief. Suffice it to state that the witness statement under reference was duly adopted and constituted as the evidence in chief of the witness.
 19. On cross-examination by learned counsel for the Defendant, the witness averred that same does not know whether the Plaintiff's father bought the land or otherwise. Furthermore, the witness testified that same only saw the Plaintiff's father using the land.
 20. While still under cross-examination, the witness testified that there is no house or structure on the land. Moreover, the witness added that the structure was burnt down.
 21. With the foregoing testimony, the Plaintiff's case was closed.
 22. The Defendant's case is premised on the evidence of one witness, namely; Ronald Mutuma Mutai. Same testified as DW1.
 23. It was the testimony of the witness [DW1] that same is the defendant in respect of the instant matter. To this end, the witness averred that same is therefore conversant with and knowledgeable of the facts of the case.
 24. The witness further testified that the land in question belongs to his father. Moreover, the witness averred that his father is now deceased.
 25. Additionally, the witness testified that same has since recorded and filed a witness statement. To this end, the witness referenced the witness statement dated 22nd April 2025; and which witness statement the witness sought to adopt and rely on as his evidence in chief. Instructively, the witness statement was adopted and constituted as the evidence in chief of the witness.
 26. On cross-examination by Learned counsel for the Plaintiff, the witness averred that same is familiar with the Plaintiff. Furthermore, the witness testified that same got to know the Plaintiff when he [witness] was summoned by the area chief. Moreover, the witness testified that same was summoned by the chief as concerns the issues pertaining to the suit property.
 27. While still under cross-examination, the witness testified that it is him [witness] who has been using the land. Moreover, the witness averred that the land in question is still registered in the name of Stephen Mutai Imanyara [deceased].



28. With the foregoing testimony, the defendant's case was closed.
29. Upon the close of the hearing, the advocates for the parties sought time to file and exchange written submissions. To this end, the court proceeded to circumscribe the timelines for filing and exchange for written submissions.
30. The Plaintiff filed written submissions dated 20th June 2025; and wherein same has canvassed two [2] salient issues, namely; the Plaintiff has been in occupation and possession of the suit property for more than 12 years; and the Plaintiff's occupation has been adverse to the rights of the Defendant herein.
31. Flowing from the foregoing, learned counsel for the Plaintiff has implored the court to find and hold that the Plaintiff has established and proved his case on a balance of probability. To this end, the court has been invited to find and hold that the Plaintiff is entitled to the suit property on account of adverse possession.
32. Learned counsel for the Defendant has filed written submissions dated 25th June 2025; and wherein same has highlighted two [2] salient issues, namely; that the Plaintiff herein has neither proved nor established occupation of the suit property or at all; the defendant has been improperly impleaded and or sued.
33. In particular, learned counsel for the Defendant has submitted that even though the Plaintiff has contended that same bought the suit property from Mutai Imanyara [now deceased], the Plaintiff has neither tendered nor produced the sale agreement [if any]. Furthermore, learned counsel for the Defendant has also submitted that the Plaintiff has also not produced any evidence to show that same has ever been in occupation of the suit property.
34. Flowing from the foregoing, learned counsel or the Defendant has submitted that the Plaintiff has failed to lay before the court any plausible evidence to establish possession, occupation, or use of the suit property. To this end, the court has been invited to find and hold that the Plaintiff has failed to discharge the burden of proof as pertain[s] to the Claim of Adverse possession.
35. Regarding the second issue, learned counsel or the Defendant has submitted that the purported sale agreement was allegedly entered into with Mutai Imanyara [now deceased]. To the extent that the sale agreement was entered into with the deceased, it has been contended that any suit can only be mounted against the estate of the deceased or the legal representative thereof.
36. Additionally, learned counsel for the Defendant has also contended that insofar as the suit property is still registered in the name of the deceased, no suit can be maintained against the Defendant without a grant of letters of administration.
37. Premised on the foregoing, learned counsel for the Defendant has implored the court to find and hold that the suit before hand is devoid of merit[s] and thus same ought to be dismissed with costs.
38. Having reviewed the pleadings filed by the parties; having taking into account the evidence tendered [oral and documentary], and having considered the written submissions filed on behalf of the respective parties, I come to the conclusion that the determination of the instant matter turns on two [2] key issues, namely; whether the suit against the Defendant is competent and legally tenable or otherwise; and whether the Plaintiff has proven the requisite ingredients underpinning a claim for adverse possession or otherwise.
39. Regarding the first issue, it is instructive to recall and reiterate that the Plaintiff contended that same entered into a sale agreement with one Mutai Imanyara [now deceased]. Nevertheless, it is not lost on me that the Plaintiff did not tender and or produce a copy of the said sale agreement.



40. Furthermore, it is imperative to note that the suit property, which is stated to have been bought by the Plaintiff, belonged to and was registered in the name of the deceased. To this end, there is no gainsaying that any suit seeking to accrue title thereto could only be mounted against the estate of the deceased or the duly constituted legal administrator thereof. [See Section 82 of the *Law of Succession Act.*] [see also the decision in Edith Virginia Wambui Otieno versus Joash Ougo and another [1987] eKLR; Trouistick International Limited versus Jane Mbyu and Another [1991] Eklr; and Rajej Prajivan Chudasama versus Sailesh Prajivan Chudasama [2014] eKLR].
41. Be that as it may, the defendant herein contended that same has never been constituted as the legal administrator of the estate of the deceased. To this end, the Defendant posited that the suit as against him is therefore incompetent and legally untenable.
42. Furthermore, the Defendant averred that the suit property is still registered in the name of Stephen Mutai Manyara [deceased]. In this regard, it is therefore common ground that any suit seeking to propagate any claim in respect of the suit property ought to be mounted against the legal administrator.
43. I beg to state that despite the denial[s] by the Defendant, the Plaintiff herein did not find it appropriate to tender and or produce any evidence to demonstrate that a Grant of letters of administration had been issued in favor of the defendant. Absent Grant of letters of administration, the suit as against the Defendant is no doubt premature and misconceived.
44. Pertinently, the Defendant herein is not seized of the requisite capacity to be sued on behalf of the estate of Mutai Manyara [deceased]. To this end, it is therefore my finding and holding that the defendant is not seized of the requisite locus standi to be sued. [See the decision in the case of Juliana Adoyo Ogun'ga versus Francis Kiberenge Bondeva [2016] Eklr]
45. My answer to issue number one is to the effect that the Plaintiff's suit as against the defendant [who has not been constituted as the administrator of the estate of the deceased] is premature, misconceived and thus incompetent for all intents and purposes.
46. Turning to the second issue, it is imperative to highlight that whosoever wishes to canvass, or prtopagate a claim based on adverse possession is called upon to place before the court plausible and cogent evidence demonstrating possession, occupation and use of the designated property or, better still, a portion thereof, whichever is applicable.
47. Put differently, possession, occupation or use of the property the subject of adverse possession is critical and paramount. Instructively, adverse possession is dependent on proof of possession first and foremost. [See Ernest Wesonga Kweyu v Kweyu Omuto [1990] KECA 63 (KLR); Mbira vs- Gachuhi (2002) IEALR 137; and Jandu v/s Kirpal & Another 1975 EA 225].
48. Once an applicant has proven and established possession of the designated property, then the applicant is called upon to demonstrate that the possession (if at all) is adverse or hostile to the title of the registered proprietor. Furthermore, the applicant would be obliged to demonstrate that the occupation is also non-permissive and non-consensual. [See Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] KECA 942 (KLR); Wilson Kazungu Katana and 101 Others versus Salim Abdallah Bakshwein and Another [2015] Eklr; and Mutana Lewa Versus Katana Ngala Mwangandi 2015]
49. Has the Plaintiff proven the ingredients underpinning a claim for adverse possession? To start with, the Plaintiff herein did not tender and or produce before the court[sic] a copy of the sale agreement, if any, that was entered into with Mutai Manyara [deceased]. It is instructive to recall that the Plaintiff contended that his entry onto the suit property was premised on the said sale agreement.



50. Secondly, the Plaintiff contended that same indeed entered upon and took possession of the suit property. In this regard, it behoved the Plaintiff to tender and produce evidence of occupation, possession and use of the suit property. However, it is not lost on me that the Plaintiff herein did not produce any document or evidence to underpin his claim of possession or at all.
51. Thirdly, it is also imperative to highlight that the Defendant testified that it is him who has been in occupation and use of the suit property. On the contrary, the defendant averred that the Plaintiff has never entered upon and or taken possession of the suit property.
52. I wish to underscore that the testimony by the defendant, namely; that it is same who has been in possession of the suit property, was never controverted. In this regard, I am afraid that the Plaintiff did not discharge the burden of proof.
53. Pertinently, it is the Plaintiff who had filed the suit beforehand and contended that same had acquired adverse possessory right[s] to the suit Property. To this end, the burden of proof lies on the shoulders of the Plaintiff; and not on the Defendant.
54. Simply put, it was incumbent upon the Plaintiff to prove his claim on a balance of probabilities in line with the provisions of Section[s] 107, 108 and 109 of the Evidence Act, Chapter 80, Laws of Kenya]. [See also *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (Election Petitions) (20 September 2017) (Judgment) [Paragraph 132-133 thereof]; Gwer & 5 others v Kenya Medical Research Institute & 3 others (Petition 12 of 2019) [2020] KESC 66 (KLR) (Civ) (10 January 2020) (Judgment)[paragraph 49,50,51]; and Daniel Toroitich Arap Moi versus Mwangi Stephen Mureithi 2014 eKLR]*
55. In my humble, albeit considered view, the Plaintiff did not establish his claim for adverse possession. Suffice it to underscore that the decisions of the court are premised on evidence and not sympathy or empathy. [See section 3 of the Evidence Act Chapter 80 Laws of Kenya].

Final Disposition

56. For the reasons adverted to in the body of the Judgment, it must have become crystal clear that the Plaintiff's claim beforehand is devoid and bereft of merit[s]. Same courts dismissal.
57. Consequently, and in the premises the final orders that commend themselves the court are as hereunder:
 - i. The Plaintiff's suit be and is hereby dismissed.
 - ii. Cost of the suit be and are hereby awarded to the Defendant.
 - iii. The cost in terms of clause[iii] shall be agreed upon and in default be taxed by the Deputy Registrar of the court.
58. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 14th DAY OF JULY 2025.

OGUTTU MBOYA, FCI Arb; CPM [MTI-EA].

JUDGE

In the presence of:

Mutuma, Court Assistant.



Mr. Kimathi Kiara for the Plaintiff

Mr. Mutege for the Defendant.

