**Mwakalu & 3 others v Munga & 4 others (Enviromental and Land Originating Summons 66 of 2019) [2025] KEELC 5071 (KLR) (3 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5071 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MALINDI**

**ENVIROMENTAL AND LAND ORIGINATING SUMMONS 66 OF 2019**

**EK MAKORI, J**

**JULY 3, 2025**

**IN THE MATTER OF: PLOT NO. KILIFI/PINGILIKANI/1005**

**AND**

**IN THE MATTER OF: APPLICATION FOR DECLARATION THAT THE APPLICATION/PLAINTIFFS HAVE OBTAINED OWNERSHIP BY WAY OF ADVERSE POSSESSION (SIX POINT ZERO FIVE) 6.05HA.**

**BETWEEN**

**DAVIS NYALE MWAKALU ..... 1ST APPLICANT**

**ALI POLE BOJO ..... 2ND APPLICANT**

**ZIRO EPHANTUS MWABOZA ..... 3RD APPLICANT**

**PHURRY MWANGOLO MWABOZA ..... 4TH APPLICANT**

**AND**

**TSUMA MWAIDZA MUNGA ..... 1ST RESPONDENT**

**KATANA CHIDZYAYA CHILUMO ..... 2ND RESPONDENT**

**ONESMUS MKOMBE CHILUMO ..... 3RD RESPONDENT**

**ANDERSON MUNGA DECHE ..... 4TH RESPONDENT**

**MWAKALUNGO KUSA KALUA ..... 5TH RESPONDENT**

## JUDGMENT

1. The Originating Summons (OS) filed by the applicants on 13th August 2019, requests the court to declare and register them as the owners of land parcel Kilifi/Pingilikani/1005 through adverse possession, along with costs against the respondents.

2. Their claim is supported by the annexed affidavit sworn by Ziro Ephantus Mwaboza, the 3rd applicant, on 13th August 2019, on behalf of the other applicants.

3. The respondents filed their joint Defence statement on November 18, 2019, in response to the applicants' lawsuit.

4. Parties further relied on their written statements in support of their respective cases.

5. At the hearing, the applicants testified, with the 3rd Applicant serving as the lead witness and the others significantly adopting his testimony. Notably, the applicants stated that the suit property, Kilifi/Pingilikani/1005, with an estimated acreage of six acres, has been occupied by their ancestors for over one hundred years. They asserted that the respondents have never resided on the suit property, nor at any other location within the suit property.

6. The applicants argued that they had settled on the land with their respective families, cultivated it, and buried their loved ones there. They showed photographs to prove their actual occupation and the development of the suit property. Furthermore, they claimed that the respondents later obtained the title deed to the suit property and registered themselves without recognizing the applicants' longstanding interest and presence on the land. Additionally, they asserted that they had been declared the owners under the first registration in 1997, as evidenced by the adjudication register; however, they were mysteriously removed, and the register was altered in favor of the respondents. They also stated that a hearing was conducted at the committee stage, which they were never involved in. The applicants are seeking recognition of their ownership rights over the suit property and request that the title held by the respondents be extinguished in accordance with the doctrine of adverse possession.

7. The 3rd respondent, acting on behalf of the other respondents, testified that the suit property was acquired by the applicants when Mkombe Munga's grandfather borrowed Kshs. 3800 from Mr. Mwaboza Bojo, the applicants' grandfather. The land was pledged as security under the Chonyi Customary Land Tenure System and was intended to be redeemed upon repayment of the borrowed funds.

8. That, after the redemption monies were paid, the applicants refused to vacate and have continued to refuse to vacate to date.

9. In 1998, Donald Mwaidza Gambo filed legal action against Mr. Mwaboza Mwasambu Mwaboza to recover the property during the Adjudication Committee phase. It was alleged that Mwaboza failed to appear before the Committee, resulting in a default judgment being issued against him ex parte. Subsequently, the land was awarded to the respondents' family, and a title deed was issued in their name, as shown by the title document presented.

10. That no appeal was filed, and the Committee's verdict still holds sway to date.

11. The respondents assert that, based on the Committee's findings, this court cannot reconsider the issue and that adverse possession does not apply.

12. The parties were instructed to address the issues in the lawsuit through written submissions. Mr. Were, the learned counsel for the applicants, followed this instruction, whereas the respondents presented their submissions in person. The court appreciates their cooperation and the effort they put into presenting their cases.

13. Based on the materials and submissions before me, I identify the issues for this court's determination: whether the applicants are entitled to the reliefs they seek through the doctrine of adverse possession, whether the respondents' defense is valid, and who should bear the costs of the suit.

14. In the case of Gabriel Mbui v Mukindia Maranya [1993] eKLR, adverse possession was defined as:

> "..the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owner's enjoyment of land for purposes for which the owner intended to use it."

15. In Cheromei v Muigai (Environment & Land Case E005 of 2023) [2024] KEELC 5604 (KLR) (25 July 2024), the court outlined its view on the definition of adverse possession.

> "The doctrine of adverse possession was aptly defined in Mtana Lewa vs Kahindi Ngala Mwangandi (2015) eKLR, where the Court of Appeal held that:
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> > "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 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 of stealth not 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."

16. This position was reaffirmed in the case of Rose Akello Otieno v Joseph Odote & another [2022] eKLR, where the court stated:

> "…. the occupation has been open, actual, continuous, uninterrupted, peaceful, exclusive, and with the knowledge but without the consent or permission of the registered owner for the prescribed period of 12 years. In Kimani Ruchure vs Swift Rutherfords & Co. Ltd (1980) KLR 10, Kneller J held that "the Plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion).

17. In the present case, it is undisputed that the applicants have held possession of the suit property for a long time, having inherited it from their ancestors with a generational occupation that dates back over a century. This fact is recognized by the respondents, who state that their grandfather mortgaged the land to the applicants' grandfather, and the debt was subsequently paid off; therefore, the land should have then reverted to the respondents' family.

18. There is no documentation to confirm that such a refund was made. The record, based on the ex parte verdict from the Adjudication Committee, shows that no refund was received and was, in fact, explicitly denied. Donald Mwaidza, the claimant, testified before the Committee that:

> "When registration of pingilikani adjudication was announced, I went together with my brothers Munga and Mwatsuma to see Mwaboza and his brothers, regarding agreement of the disputed land and we informed them that we wanted to give them their money, Ksh. 800 to redeem the land. We wanted to give them a portion to where they built their house and the rest portion we register ourselves and we agreed upon this. On the date of our discussion, the money was not accepted because one of Mwaboza's brothers was not present and that there was another amount of which one of our family members took maize.
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> One Wednesday, I did not go to Mwaboza but sent my two brothers, Munga and Mwatsuma, who attended, and they were chased away with their money. We decided to sue Mwaboza to the chief, and the outcome was that the money for the maize was Ksh. 3,000, and we agreed. The outcome to the chief was that we were refused to redeem the land because we were late and we were asked to pay the chief's committee allowance and we refused.
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> When demarcation came to the land, there was tension, and we were asked to go to the Pingilikani office, but when we reached there already, the defendant had been registered, and we were asked to sue him to the land committee."

19. Although the issue of the refund is minor, the applicants have shown how they settled on the suit property and were handed it over by their ancestors. As previously mentioned, the applicants have lived on the subject property for more than the statutory period of twelve years required for the doctrine of adverse possession to apply. They were born on that land. In contrast, the respondents inherited circumstances created by their grandfather, who mortgaged the land to the applicants' grandfather. The respondents have never occupied the land during their lifetime, nor have their parents. Neither the applicants nor the respondents participated in the adjudication process or related litigation. It has been an intergenerational feud. The respondents obtained titles through a process they did not attend.

20. The remaining question is whether the respondents' acquisition of title in 2013 can override the stay of the applicants, which has been in effect for decades.

21. The period of adverse possession begins when the applicant(s) takes possession. In this case, the exact time is unclear because they inherited the land from their ancestors. It is enough to say that they have been in possession for many decades, which surpasses the statutory 12-year limit.

22. In Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] KECA 248 (KLR), the Court of Appeal explained how to calculate time for adverse possession purposes:

> "With respect, we agree with the learned Judge that the appellant ought to have exercised diligence at the time it purchased the suit premises by inspecting it. The manner it dealt with the acquisition was evidently contrary to its own policy not to purchase land occupied by squatters or one with a dispute. As this court stated in Mweu v. Kiu Ranching & Farming Co-operative Society Ltd. [1985] KLR 430:
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> > "Adverse possession is a fact to be observed upon the land. It is not to be seen in the title even under Cap 300. A man who buys land without knowing who is in occupation of it risks his title just as he does if he fails to inspect his land for 12 years after he had acquired it."

> It follows therefore that when the appellant instituted the action in 2008 its title to the suit premises had been extinguished.
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> It was the appellant's contention that the learned Judge wholly misunderstood its case by basing his decision on the doctrine of adverse possession while the claim was premised on the tort of trespass to land; that the issue before the trial court was simply whether the respondent entered on the suit premises without its permission. We think it is futile to draw such a distinction. Sections 13 and 38 of the *Limitation of Actions Act*, respectively simply recognize "some person in whose favour the period of limitation can run" and "where a person claims to have become entitled by adverse possession to land....." Invariably all cases of adverse possession arise from claims to recover land from persons regarded as trespassers.
> "

23. The respondents, in their admission, have acknowledged that the applicants have been on the suit property since time immemorial and were settled there when their grandfather mortgaged the land to the applicants' grandfather. At the time of acquiring title to the suit property in 2013, the period of prescription had already started; their title had been long extinguished. The applicants have maintained possession of the suit property, which they inherited. Therefore, they cannot be evicted at this point.

24. Consequently, the applicants' claim succeeds as enumerated in the OS.

25. Regarding the costs, I find that the parties are related family members and have been disputing ownership of this land for decades; therefore, I will order each party to bear their own costs.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT MALINDI ON 3RD JULY, 2025.**

**E. K. MAKORI**

**JUDGE**

In the presence of:

1st Plaintiff.

2nd and 3rd Defendants.

Happy: Court Assistant