



**Nasiuma v Kakai (Environment & Land Case 16 of 2018)
[2025] KEELC 4010 (KLR) (19 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4010 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 16 OF 2018**

EC CHERONO, J

MAY 19, 2025

IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA

AND

IN THE MATTER OF LAND PARCEL NO. NDIVISI/ NDIVISI/ MUCHI/ 3250

BETWEEN

PROTUS MANDILA NASIUMA PLAINTIFF

AND

MARGARET NAMAEMBA KAKAI DEFENDANT

JUDGMENT

1. By an Originating Summons dated 23/04/2018, the plaintiff herein Protus Mandila Nasiuma, Sued The Defendant Margaret Namaemba Kakai for orders;
 - a. A declaration that the plaintiff is entitled to land parcel no. Ndivisi/Muchi/3250 measuring 0.05ha or thereabouts by virtue of adverse possession.
 - b. A declaration that upon expiry of 12 years, the defendant held land parcel no. Ndivisi/Muchi/3250 in trust for the plaintiff.
 - c. A declaration that upon the expiry of 12 years, the defendant interest in the said land parcel no. Ndivisi/Muchi/3250 measuring 0.05ha or approximately thereabouts got extinct.
 - d. A declaration that the defendants do transfer land parcel no. Ndivisi/Muchi/3250 to the plaintiff and/or in default the executive officer do execute all the necessary documents to effect transfer.



- e. A declaration that the registration of the defendants as the proprietor of land parcel no. Ndivisi/Muchi/3250 be cancelled.
 - f. An order under Section 38 of the *Limitation of Actions Act* Cap 22 Laws of Kenya that the plaintiff be registered as proprietor of land parcel no. Ndivisi/Muchi/3250 instead of the defendant.
2. The originating summons is supported by affidavit of Protus Mandila Nasiuma in which he averred that his late father William Wekesa Weyambira bought a portion of land from Patriba Wekhenya Nasomo in 1990 comprised in title no. Ndivisi/Muchi/1049 where he and his family have lived since then and buried his father upon his demise. That the said portion was later registered as L.R No. Ndivisi/Muchi/3250. That together with his deceased father, they established their homesteads and planted trees. That he has been in the suit land for over 12 years without any interruption from anyone and that his use has been open and without force.
 3. He averred that the defendant instituted charges of forceful detainer against him in Webuye SPMCCRC No. 453 of 2016 wherein he has appealed against the court's decision before the Bungoma High Court and the matter is pending. He argued that the defendant's registration as the proprietor of the land in question was fraudulent and ought to be cancelled. He set out particulars of fraud and reiterated his claim.
 4. The defendant's response was by a further amended defence and counter-claim amended on 15/06/2023. She averred that she has at all times been the sole proprietor of L.R No. Ndivisi/Muchi/3250, having acquired the same from her father Patriba Wekhenya Nasomo in the year 1990 and was registered as proprietor on 20/09/2013. That in the year 2016, she discovered that the plaintiff who was stranger had put up a structure on the land and planted trees. She disputed the plaintiff's claim that his occupation of the land was peaceful since she preferred criminal charges against him.
 5. That the plaintiff through an agreement dated 26/03/2018 had agreed to move out of L.R No. Ndivisi/Muchi/3250 by 26/04/2018. She averred that the said agreement relied by the plaintiff is a forgery and that his fathers' signature was forged. She sought judgment as follows;
 - a. Eviction of the plaintiff, his relatives, agents and any other person claiming through him from L.R No. Ndivisi/Muchi/3250.
 - b. A permanent injunction.
 - c. General damages
 - d. Costs of this suit.
 - e. Interests.
 6. After the pre-trial conference, the parties agreed to proceed for hearing by way of via viva voce evidence. The plaintiff testified as a sole witness while the defendant called two witnesses in support of his case.
 7. PW1 Protus Mandila Nasiuma Sought to adopted as his evidence-in-chief the contents of the originating summons, supporting affidavit, reply to counter-claim and witness statement dated 12/11/2024 and 11/11/2024. He produced as in his evidence a certificate of death P-Exhibit 1, mutation form- P-Exhibit 2, an agreement dated 08/08/1990- P-Exhibit 3, application for official search- P-Exhibit 4, certificate of official search – P-Exhibit 5 and judgment in Webuye SPCRC No. 453/201as P-Exhibit 6. On cross-examination, he confirmed the contents of the sale agreement produced as P-Exhibit 3. On re-examination, he testified that he was forced to sign the agreement to vacate.



8. DW1 Magaret Namaemba Kakai testified that she discovered the plaintiff was in occupation of the land in the year 2016 when she wanted to sell it. She produced in evidence a certificate of title for LR No. Ndivisi/Muchi/3520-D-Exhibit 1, a copy of official search-D-Exhibit 2, judgment in Webuye SPCRC No. 453/201as D-Exhibit 3, an agreement dated 26/04/2018-D-MFI 4. She further relied on the contents of her Amended defence and counterclaim dated 09/04/2024 and witness statement dated 09/04/2024 as her evidence-in-chief.
9. On cross examination, she testified that her father owned LR No. Ndivisi/Muchi/1049 and that she was given LR No. Ndivisi/Muchi/3520 which was curved out of the above plot. However, she could not ascertain whether her father had sold the suit land or not. She testified that when she went to the suit land in the year 2016, she found that the plaintiff had put up structures and planted trees. That prior to that, she last visited the suit land in the year 1990 when her father showed her the land. That her father died in the year 1999 and thereafter, no succession has been done for his estate.
10. DW2 Rhoda Namaemba Kakai reiterated the evidence adduced by DW1.
11. After the parties closed their respective cases, directions were taken for the parties to file and exchange written submissions.
12. The plaintiff filed submissions dated 18/05/2025 while the defendant filed her submissions dated 07/03/2025. In her submissions, the defendant restated the provisions of Section 7,23 24,25 of the *Limitation of Actions Act* and Section 109 and 112 of the *Evidence Act*. She also relied on inter alia the cases of Cheremoi v Muigai (ELC Case No. E005 OF 2023) [2024] KEELC 5604 (KLR)(25 July 2024)(Judgment), Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 Others (2018)eKLR, Celina Muthoni Kithinji v. Safiya Binti Swaleh & 8 Others (2018)eKLR.

Analysis and determination.

13. The above constitutes a summary of the pleadings, the available evidence and exhibits produced, the opposing written submissions, and the cited authorities, all of which have carefully considered. I have also considered the relevant provisions of the law and in my view, the the following issues commend for determination;
 - a. Whether the plaintiffs proved their claim for adverse possession to the required standard.
 - b. What appropriate orders to issue?
 - c. Who should bear the costs of the suit?
14. For the reason that the first two issues are interconnected, they shall be dealt with together.
15. There is no doubt that the claim herein is for adverse possession. The common law doctrine of adverse possession is underpinned in our *Limitation of Actions Act* and provides it as one of the ways of acquiring land in Kenya. The relevant provisions are fortified in Sections 7, 13, and 38 of the Act. From settled case law, it is clear that even if a claim of adverse possession is undefended, the onus is on the claimant to proof his/her claim.
16. The guiding principles of adverse possession were set out in the Supreme Court of India case of Karnataka Board of Wakf vs. Government of India & Others (2004) 10 SCC 779) which was cited with



approval in the Court of Appeal decision of Raphael Kahindi Kawala v Mount Elgon Beach Properties Limited [2018] eKLR. The Karnataka Board case (Supra) summarized these principles as follows: -

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

17. Where a claimant seeks to acquire land based on adverse possession, Courts are required to apply a strict interpretation of the law. The claimant must satisfy not just some, but all the requisite elements of adverse possession. As emphasized in *Mweu v. Kiu Ranching & Farming Co-operative Society Ltd.* [1985] KLR 430, adverse possession is a matter of fact, discernible through occupation and use of the land. Further, it is well-settled law that such claims must be directed against the registered proprietor of the suit property, and the existence as well as registration of the said property must be proven.
18. In this case, the plaintiff alleged that he got into possession of LR No. Ndivisi/Muchi/3520 (hereinafter referred to as ‘the suit land’) after his deceased father, one William Wekesa Wayembila purchased a portion Measuring 50ft by 100ft from the one Baturoba Wakhanya. The Plaintiffs attached sale agreements. It was the Plaintiffs evidence that the purchase price was ksh. 15,000/= . He also alleged that he has been in possession and occupation of the suit land since the year 1990 and continued his occupation after the death of his father in the year 2001. In support of his claim, he attached a copy of a certificate of search dated 09/11/2017 which showed that the defendant is the registered owner of the suit land. With that, the first hurdle has been established.
19. On the second element, section 17 and 38 of the *Limitation of Actions Act* provides that at the expiration of the period of 12 years from the date of entry to land, a person cannot bring an action to recover land, and the title of the registered proprietor is extinguished and that an adverse processor can apply to the Environment and land court for it to determine the claim and upon a favourable determination, an order to register him/her as such takes effect on its registration, subject to any existing interest noted on the register.
20. In this case, the plaintiff's occupation of the suit land is not denied by the defendant who confirmed that when she visited the land in the year 2016, she found the him in occupation, having constructed structures thereon and planted trees. This court is therefore of the view that the issue of occupation has also been proved.
21. On the period within which the plaintiff has been in occupation, he argued that upon purchasing the portion in the year 1990, he has been in continuous possession and occupation of the suit land and has even buried his father who died in the year 2001. On examination of the sale agreement presented by the plaintiff, the same is dated 08/08/1990. The death certificate for his late father also confirms that he died on 18/11/2001. The defendant on her part stated that prior to the year 2016 when she discovered the plaintiff's occupation of the land, she last visited the land in the year 1990 when she was shown the same by her father. A calculation of the period translates to about 26 years which is more than the minimum required period of 12 years.



22. It is the plaintiffs' further evidence that his occupation was non-permissive, continuous, uninterrupted, and unbroken for the necessary statutory period of 12 years. From my consideration of the evidence presented, I find that this evidence was not controverted and there was no evidence that the registered owner ever possessed the suit property or claimed ownership until the year 2016. This is when criminal charges were preferred against the plaintiff. It is therefore my finding that the plaintiff has met the ingredients of adverse possession.
23. As for the agreement dated 15/06/2023, allegedly entered into by the parties and a probation officer, the same was not produced formally into evidence but was only marked for identification. Consequently, this court cannot rely on it in its determination as it carried no probative evidential value.
24. The originating summons dated 23/04/2018 is therefore merited. Consequently, the defendants counter-claim dated 15/06/2023 lacks merit and the same is hereby dismissed with costs.
25. As for costs of the suit, the same follows the event and in the absence of special circumstances, I award costs to the plaintiff which shall be borne by the defendant.
26. In the end, I make the following disposal orders;
 - a. A declaration be and is hereby made that the plaintiff is entitled to land parcel no. Ndivisi/Muchi/3250 measuring 0.05ha or thereabouts by virtue of adverse possession.
 - b. A declaration be and is hereby made that upon expiry of 12 years, the defendant held land parcel no. Ndivisi/Muchi/3250 in trust for the plaintiff.
 - c. A declaration be and is hereby made that upon the expiry of 12 years, the defendant's interest in the said land parcel no. Ndivisi/Muchi/3250 measuring 0.05ha or approximately thereabouts got extinct.
 - d. A declaration is hereby made that the defendants do transfer land parcel no. Ndivisi/Muchi/3250 to the plaintiff and/or in default the executive officer do execute all the necessary documents to effect transfer.
 - e. Costs of the originating summons and the counter-claim shall be borne by the defendant.
27. Orders accordingly.

DATED, SIGNED AND DELIVERD AT BUNGOMA THIS 19TH DAY OF MAY, 2025.

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HON.E.C CHERONO
ELC JUDGE

In the presence of;

Mr. Athunga for the plaintiff.

Defendant/Advocate-absent.

Bett C/A.

