



**Lusala v Ambani (Environment & Land Case 88 of 2019)
[2025] KEELC 4805 (KLR) (30 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4805 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 88 OF 2019**

**DO OHUNGO, J
JUNE 30, 2025**

BETWEEN

PAUL KIVISU LUSALA APPLICANT

AND

ROBAI KAVAI AMBANI RESPONDENT

JUDGMENT

1. The Applicant/Plaintiff moved the Court through Originating Summons dated 19th July 2019, wherein he averred that he had become entitled to the whole of the parcel of land known as Kakamega/Viyalo/300 (the suit property) though adverse possession. He therefore sought determination of the following questions:
 1. Whether the late Eboso Embayi, who was the father of the Respondent herein, was the initial registered proprietor of L.R No Kakamega/Viyalo/300.
 2. Whether the Respondent is the present registered proprietor of Plot 300.
 3. Whether the Applicant has been in occupation and use of the entire Plot 300 since the year 1998.
 4. If the occupation and utilization by the Applicant with regard to Plot 300 has been in excess of 12 years and in an open, peaceful and uninterrupted manner;
 5. If such occupation and utilization by the Applicant over Plot 300 has been adverse to the proprietary interests of the Respondent;
 6. When did time necessary to constitute adverse possession in favour of the Applicant begin to run;



7. If having been in possession and use of the parcel of land in a peaceful and open manner for a period in excess of 12 years, whether the Applicant has acquired ownership of the same through prescription;
 8. If the proprietorship of the Respondent with respect to the parcel of land is nevertheless, subject to the prescriptive rights of the Applicant;
2. Hearing of the matter proceeded by way of oral evidence. The Plaintiff testified as PW1 and adopted his witness statement dated 24th April 2023. He produced copies of the documents listed as item numbers 1 to 5 in his list of documents dated 24th April 2023. He stated in the statement that the Respondent/Defendant is his cousin, a daughter to Timona Eboso Imbaye (deceased) and Belisi Eboso. That Timona was an elder brother to PW1's father Thomas Lusala and that Timona was the proprietor of the suit property while Thomas was the proprietor of parcel number Kakamega/Viyalo/301.
 3. PW1 went on to state that on 7th October 1992, the Respondent disposed of the whole of the suit property to the late Jamin Livete Mafunu for a consideration of KShs 75,000 out of which she received a part payment of KShs 11,000. That the transaction faced resistance from clan members as a result of which PW1 was approached to purchase the suit property from Belisi for a consideration of KShs 31,000 on condition that PW1 would cater for her general welfare for the rest of her life since she was residing all alone. That on 23rd May 1995, he paid an initial sum of KShs 11,000 to Belisi who in turn gave it to Tafroza Livete, the widow of the late Jamin who by then was deceased, as a refund of the sale price earlier paid. He added that on 21st May 2000, he paid a final instalment of KShs 20,000.
 4. PW1 further stated that sometime in the year 2017 just before the passing on of Belisi, the late John Luzinga was introduced to the clan as a son of Timona and upon being satisfied that John was indeed Timona's son, the clan beseeched PW1 to allocate John a portion of land and PW1 complied. He added that John's remains were interred in the portion and that before his demise, John leased out a portion of his land to a church which was still on site as of the date of the statement. He concluded by stating that he had physical possession of the suit property for a period in excess of 12 years and that he should get the suit property with John's portion being inherited by John's son.
 5. Under cross examination and re-examination, PW1 conceded that his name was not in the agreement through which he claimed to have purchased the suit property and stated that their parents acquired the suit property and Kakamega/Viyalo/301 by inheritance from PW1's grandfather. He also stated that the two parcels share a boundary and that he was residing on Kakamega/Viyalo/301 and farming on the suit property as of the date of his testimony. He further testified that part of the suit property was used by John and another part by a church. That Belisi also lived on the suit property until her death in the year 2017. He concluded by stating that the land has never been surveyed but he was claiming half an acre.
 6. Jethro Bwabwa Alegana (PW2) adopted his witness statement dated 3rd June 2024 wherein he stated that he witnessed Belisi receive the KShs 11,000 from the Plaintiff and that as the Plaintiff's neighbour, he had witnessed the Plaintiff use the suit property since late 1990s to the date of his statement.
 7. Under cross examination and re-examination, PW2 stated that Belisi, who was the Defendant's mother, lived on the suit property from her marriage until her death in the year 2017. That Rachel, one of Belisi's daughters, also lived on the suit property together with her family and that he could not tell which portion or the size of land Belisi used.
 8. The Plaintiff's case was thereby closed.



9. The Defendant testified as DW1 and stated that the Plaintiff was her cousin and neighbour. That the Plaintiff's father and her father were brothers. She adopted her witness statement dated 9th November 2023 and produced copies of the documents listed as item numbers 1 to 10 in her list of documents dated 9th November 2023.
10. The Defendant stated in her witness statement that she lived in the suit property for over 70 years as of the date of her statement and that her father passed away in 1980 while her mother passed away in 2017. That after her mother passed away, she sent Rachael's daughter Sarah to the Land Registry to find out the status of the suit property and she discovered that the Plaintiff had lodged a caution. That the land Registrar later removed the caution after writing to the Plaintiff but in the year 2019, she went to the Assistant County Commissioner's office after receiving a letter from the said office. That she found the Plaintiff in the office, and he wanted documents to enable him to process the title in his name.
11. The Defendant further stated that the Assistant County Commissioner sent them away to go and resolve ownership of the suit property at home. That in the year 2022, she commenced the succession proceedings in respect of the estate of her late father and that certificate of confirmation of grant was issued on 27th August 2022. That when she went to the Land Registrar, she found another caution placed by Peter who was the Plaintiff's nephew. That after writing to Peter, the Land Registrar removed the caution and transferred the suit property to her. She also stated that she later made a report at Kilingili Police Station when discovered that the Plaintiff had felled trees in the suit property.
12. She went on to testify that she used the suit property together with her sister Rachel and her mother. That the Plaintiff chased them away from the suit property while armed with a panga.
13. Rachel Kamonya Aligula (DW2) testified that the Defendant is her younger sister while the Plaintiff is her cousin. She stated that she went to live on the suit property in the year 1980 when her marriage failed and added that the Plaintiff never lived on the suit property.
14. DW2 adopted her witness statement dated 9th November 2023 wherein she stated that they allowed John Luzinga to occupy their parents' house on the suit property and to cultivate the land until he passed away in the year 2019. That a church known as Full Life Ministry had also been on the suit property for over five years as of the date of her statement. Further, she reiterated DW1's testimony as regards succession proceedings in respect of their father's estate and ultimate transmission in the year 2023.
15. Lastly, Robert Isandula Zisaga (DW3) testified that he had known the Defendant since childhood and that their homes were about 400 metres apart. He adopted his witness statement dated 9th November 2023 in which he stated that the fathers of the parties herein were brother who inherited land from a larger parcel. That the Plaintiff resides on his father's land which is adjacent to the suit property. DW3 further testified that the Plaintiff was not using the suit property earlier but only entered it in the year 2021 or 2022.
16. The Defence case was then closed after which directions for filing and exchange of written submissions were given. The Plaintiff filed submissions dated 13th December 2024 while the Defendant filed submissions dated 16th May 2025.
17. I have considered the pleadings, evidence and submissions. The issues that arise for determination are whether adverse possession has been established and whether the reliefs sought are available.
18. The law on adverse possession is found at Sections 7, 13, 17 and 38 of the Limitations of Actions Act. The Court of Appeal discussed ingredients of adverse possession in the case of Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] eKLR where it held that a party claiming adverse possession



must assert hostile title in denial of the title of the registered proprietor. The process must start with a wrongful dispossession of the rightful owner and the proper way of assessing proof of adverse possession is whether the title holder has been dispossessed or has discontinued his possession for the statutory period of 12 years, as opposed to whether the claimant has proved that he or she has been in possession for 12 years. The party who claims adverse possession must demonstrate the date he came into possession, the nature of his possession, whether the fact of his possession was known to the registered proprietor and that the possession was open and undisturbed for the requisite 12 years.

19. In *Loise Nduta Itotia v Aziza Said Hamisi* [2020] eKLR, the Court of Appeal held:

In line with the Act, Kneller, J. (as he then was) in the case of *Kimani Ruchire vs Swift Rutherford & Co. Ltd.* [1980] KLR 10, outlined some tenets of adverse possession thus; “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). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it or by way of recurrent consideration.

20. The Plaintiff has traced his claim on the suit property to a sale agreement dated 7th October 1992. Beyond his claim that he purchased the suit property, it is apparent that the Plaintiff is not in occupation of the suit property. He resides on the adjacent parcel number Kakamega/Viyalo/301. While it is possible to establish adverse possession by using the land for the required period of 12 years even without residing on it, the Plaintiff neither demonstrated any particular date when such use commenced nor that such use continued for an uninterrupted period of 12 years. He testified that he was farming on the suit property but did not offer unmistakable evidence as to the date when he commenced the farming.

21. By its very nature, adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. The claimant must demonstrate that his occupation was without the proprietor’s permission. Entry and occupation pursuant to a sale agreement is *ipso facto* by permission of the proprietor and does not therefore amount to adverse possession. Nevertheless, once a purchaser completes paying the purchase price, his possession and occupation of the property is no longer by permission of the seller. In such a scenario, time for purposes of adverse possession starts to run in favour of the purchaser from the moment of final payment of the purchase price. See *Public Trustee v Wanduru Ndegwa* [1984] eKLR.

22. A perusal of the agreement dated 7th October 1992 reveals a purchase price of KShs 75,000. The document states that KShs 11,000 was paid. It does not address payment of the balance. In his testimony, the Plaintiff stated that there was a new transaction between him and Belisi pursuant to which he purchased the suit property at a consideration of KShs 31,000. He testified that he paid KShs 11,000 to Belisi on 23rd May 1995 and the balance of KShs 20,000 on 21st May 2000. In the Plaintiff’s own testimony, another condition of the sale was that he was to cater for Belisi’s general welfare for the rest of her life. He testified that Belisi died in the year 2017. He however did not tender any evidence on whether he performed the obligation to cater for her general welfare until her death. Whatever the case, the contractual period extended until Belisi’s death. Any possession during the period was contractual or consensual and not hostile to the proprietor’s title.

23. Assuming that the Plaintiff honoured the obligation regarding Belisi’s general welfare, time for purposes of adverse possession could only start running in his favour after Belisi’s death in 2017. By 23rd July 2019 when he filed this suit, hardly 2 years had passed since Belisi’s death. The requisite 12 years of possession have not been established.



24. There is another reason adverse possession is not applicable in this case. The parties are cousins. Their fathers were brothers. The suit property is part of land which was owned by the parties' grandfather. Indeed, the Plaintiff resides on his own father's land which is adjacent to the suit property. The parties have grown up together as members of one extended family. As happens in many extended families that live side by side, I would imagine that daily interactions and activities on the two adjacent parcels would not be odd occurrences.
25. The Court of Appeal had occasion in *Samuel Kihamba v Mary Mbaisi* [2015] eKLR to address the question of whether adverse possession could apply within families against close relatives. The Court held as follows:

The suit filed by the respondent against the appellant was founded on adverse possession where the respondent claimed to have acquired adverse rights over the suit land having occupied the same for over twelve years. Could the doctrine of adverse possession apply against the parties to the suit before the learned Judge who were related by being mother and step-son? We think not. We are persuaded by various dicta which we have quoted and relied upon in this judgement and must state that it would create havoc for families and the society of Kenya generally if the principle of adverse possession applied within families against close relatives.

26. In view of the relationship of the parties and the fact that the suit property is part of their ancestral land, I find that adverse possession is not applicable.
27. Another aspect of the case is that the Plaintiff conceded that there are other persons in possession of the suit property besides him. In particular, he mentioned John Luzinga and a church. DW2 identified the church as Full Life Ministry. Even though John passed away, the Plaintiff testified that John's son should inherit John's portion.
28. Identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. See *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another* [2015] eKLR. Such identification is not limited to just providing an extract of title. In a case where only a portion of the suit property is claimed, the portions and sizes must be clearly identified. Such identification should be detailed, and a survey map should be produced since after all, the claimant is seeking to obtain title to land. If he was acquiring a portion of a parcel in the open market, he would do no less. Survey is an elementary step in the process of identification and titling of land. The Plaintiff in this case testified that the suit property has never been surveyed. From a survey perspective, the portion he is claiming has not been identified.
29. In view of the foregoing discourse, I find that adverse possession has not been established. Consequently, the reliefs sought are not available. I find no merit in the Plaintiff's case, and I therefore dismiss it. Considering the family relationship between the parties, I make no order as to costs.

DATED, SIGNED, AND DELIVERED THROUGH MICROSOFT TEAMS, AT NYAMIRA, THIS 30TH DAY OF JUNE 2025.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the Applicant/Plaintiff

No appearance for the Respondent/Defendant



Court Assistant: B Kerubo

