



REPUBLIC OF KENYA



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**Kiarie & another v Ngutuku (Environment and Land Appeal
E025 of 2023) [2025] KEELC 5111 (KLR) (30 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 5111 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E025 OF 2023**

**A NYUKURI, J
JUNE 30, 2025**

BETWEEN

JOHN WAITHAKA KIARIE 1ST APPELLANT

JOHN WAITHAKA KIARIE 2ND APPELLANT

AND

COSMAS WAFULA NGUTUKU RESPONDENT

(Appeal herein challenges the judgment of Honourable J.N Maragia (Principal Magistrate) delivered on 19th April, 2023 in Kakamega CMC ELC No. 113 of 2019.)

JUDGMENT

Introduction

1. The appeal herein challenges the judgment of Honourable J.N Maragia (Principal Magistrate) delivered on 19th April, 2023 in Kakamega CMC ELC No. 113 of 2019. In the impugned judgment, the learned trial magistrate dismissed the plaintiff's claim for a permanent injunction and general damages as against the defendants and allowed the defendant's counter claim of adverse possession in regard to the parcel of land known as Kakamega/Mautuma/846 measuring 0.72Ha (suit property).

Background

2. Vide a plaint dated 27th May, 2019, the plaintiffs who are the appellants herein, averred that they were the registered proprietors of the suit property having inherited the same through succession proceedings from their father the late Albert Kiarie Waweru. They accused the defendant of trespassing on the suit property and stated that he continues with illegal dealings thereon. They sought the following orders;



- a. A permanent injunction be issued restraining the defendant, his employees, agents, servants and/or officers from evicting/putting up a construction or in any way interfering with the quiet possession enjoyed by the plaintiff over that parcel of land known as Kakamega/Mautuma/846 measuring 0.72 Ha pending the hearing and determination of this suit.
 - b. General damages
 - c. Costs
 - d. Any other relief that this Honourable court will deem fit to grant.
3. In a defence and counter claim dated 30th August, 2019 and amended on 15th October, 2020, the defendant denied the plaintiffs' claim and averred that since 2003 up to date, he had been in peaceful, quite and uninterrupted occupation and use of the suit property having lawfully purchased it on 18th February, 2023 from one Richard Waweru who had previously purchased the same on 8th January, 1986 from Albert Kiarie Waithaka. That despite failure to transfer the land to him, he had acquired it by way of adverse possession as the plaintiffs title thereto had been extinguished. He accused the plaintiff of breach of contract and maintained that he had occupied the entire suit property measuring about 2 acres for a period of over 12 years continuously and peacefully and none of the plaintiffs' family members have claimed the same for the period stated.
 4. He stated that the plaintiffs' registration was subject to his overriding interest of adverse possession. In his counter claim, he sought the following orders;
 - a. That plaintiffs title to land parcel no. Kakamega/Mautuma/846 got extinguished by operation of the law.
 - b. That the defendant is entitled to land parcel Kakamega/Mautuma/846.
 - c. That the defendant be consequently be declared the owner of the whole parcel of land measuring approximately 2 acres and currently composed in the parcel of land known as Kakamega/Mautuma/846 whose boundary are clearly demarcated on the ground and is fully occupied by the defendant to which he is entitled by way of adverse possession so that the plaintiffs be compelled to transfer title to the said land directly to the defendant.
 - d. That the honourable court declare that the plaintiffs are holding title to the suit land in trust for the defendant herein so that they voluntarily transfer the same to the defendant and in default thereof the Honourable court make an order authorizing the Deputy Registrar, High Court of Kenya to execute all the relevant documents necessary to effect the transfer of the land known as Kakamega/Mautuma/846 in favour of the defendant.
 - e. That the costs of the suit be borne by the plaintiffs.
 5. The suit proceeded by way of viva voce evidence. The plaintiffs presented two witnesses while the defendant presented three witnesses. The witnesses adopted contents of their filed witness statements and produced their filed documents in their evidence in chief before being subjected to cross-examination.

Plaintiffs' evidence

6. PW1 was John Waithaka Kiarie, the 1st plaintiff. His testimony was that on 23rd May, 2016, together with the 2nd plaintiff they were registered as proprietors of the suit property. That they have never sold the suit property to anyone and that in April, 2019, on visiting the suit property, he was shocked to



learn that the same had been encroached upon and that cultivation was ongoing. That he reported to the office of the Assistant Chief, County Commissioner Lugari Division and that the defendant was summoned by the latter on 18th April, 2019 and that he continues to cultivate the suit property despite being asked by the County Commissioner to stop.

7. On cross-examination, he stated that he knew the defendant and that the defendant was the one in possession of the suit property. He stated that the defendant had occupied the land for 13 years and that he had been very young and did not know the details of the sale agreement. That it was not true that the defendant had been using the land since. In re-examination, he stated that Richard was the caretaker of the suit property since 1987 having been employed as such by his father.
8. PW2 was Dominic Njihia Kiarie a nephew of the plaintiffs. His evidence was that the suit property initially belonged to his grandfather Albert Kiarie Waweru and that the same had never changed hands up to his death. That in 1998, his grandfather charged the suit property to Agricultural Finance Corporation hence he could not sell the suit property. He stated that the person who purported to have sold the suit property was his grandfather's caretaker, when they shifted to Rongai in Nakuru County. That they visited the suit property often and the caretaker assured them that all was well. He stated that in 2016 the plaintiffs told him they had visited the suit property only to find a stranger thereon purporting to have purchased the same from Richard Wainaina. That Richard filed a suit claiming adverse possession against the plaintiffs but the suit was dismissed after he acknowledged the plaintiffs' ownership. He stated that the defendant's occupation was unlawful.
9. In cross-examination, he stated that he was born in 1972 and that they had the title deed to show that his grandfather never transferred the land to the defendant. He also stated that he had no evidence to show that he had been visiting the suit property. That marked the close of the plaintiffs' case.

Defendant's evidence

10. DW1 was Cosmas Wafula Ngutuku. His testimony was that since 2003 to date, he had been in peaceful, quiet and uninterrupted occupation and use of the suit property having purchased it from one Richard Wainaina Waweru who had purchased it from Albert Kiarie Waithaka. He maintained that he had acquired the suit property by way of adverse possession having been in uninterrupted occupation for over 12 years since 2003, hence the plaintiffs' title is extinguished. He averred that upon sale of the suit property by Albert to Richard, the former applied for the consent to transfer to Richard from the Land Control Board and the same was granted on 2nd May, 1989. That they agreed that Richard was to obtain title and transfer the land to him.
11. He further stated that Richard filed Case No. 755 of 2018 seeking to be registered under the claim of adverse possession. That this case was transferred to Butali Law Courts being Butali ELC Case No. 133 of 2018 in which parties filed a consent. He averred that he has since 2003 been cultivating the suit property and that he learnt that the plaintiff through Nairobi Succession Cause No. 1089 of 2015 obtained grant which was confirmed on 5th April, 2016, resulting in their registration as owners of the suit property. He insisted that this registration was subject to his overriding interest as an adverse possessor. He stated that the plaintiffs have never been in possession of the suit property.
12. On cross-examination, he stated that he purchased the suit property from Richard who had in turn bought it from Albert. He stated that in the sale agreement, the balance of KShs. 80,000 was to be paid on issuance of title deed and that the plaintiffs colluded with the seller not to be his witness. In re-examination he stated that the plaintiffs never complained about his purchase from the time he purchased the land.



13. DW2 was Abraham Wanjala Macho a retired Chief of Mautuma Location. His evidence was that he was aware that the suit property had at one point belonged to the late Albert Kiarie Waithaka. That Mr. Kiarie Waithaka sold the suit property to Richard Wainaina Waweru who latter sold it to the defendant. He also stated that after the sale, Albert relocated to Nakuru County. He maintained that the defendant had been farming on the land since 2003 upon purchasing it. That the property had distinct boundary features and that the defendant had acquired ownership thereof by adverse possession. He maintained that the letter by the Chief used in the succession was from chief of Visoi area and not Mautuma area. That the plaintiff cannot lawfully claim that which their father had already sold.
14. In cross-examination, he stated that he did not witness the sale between Albert and Richard but that there was a sale agreement to that effect. He maintained that Richard was not Albert's caretaker and that Albert left the suit property in 1989.
15. DW3 was Patrick Wamalwa Wabuge. He stated that he witnessed the sale agreement between Richard and Albert which is dated 8th January, 1986. That upon sale of the suit property, Albert moved to Nakuru County and never returned to claim the same. He stated that he was aware that the defendant purchased the suit property from Richard in 2003 and immediately took possession where he does farming. That the suit property is next to the defendant's other parcel of land where his home is. He reiterated the evidence of PW1 and PW2 on the issue of succession.
16. On cross-examination, he stated that he witnessed the sale of land between Richard and Albert although he could not read the agreement. That marked the close of the defence case.
17. Upon considering the pleadings, evidence and rival submissions presented by the parties, the learned trial magistrate found that the defendant had proved his claim of adverse possession and allowed the amended counter claim as prayed. The trial court dismissed the plaintiffs' claim.
18. Aggrieved with the trial court's judgement, the appellants herein who were the plaintiffs in the court below, challenged the same vide a Memorandum of Appeal dated 16th May, 2023 citing the following eight grounds of appeal;
 - a. That the learned trial magistrate erred in law and fact in dismissing the appellants prayers of trespass upon property known as Kakamega/Mautuma/846 against the weight of the evidence on record.
 - b. That the learned trial magistrate erred in law and fact in deciding the case against the weight of the evidence on record and awarding the suit property known as KAKAMEGA/MAUTUMA/846 to the respondent through adverse possession.
 - c. That the learned trial magistrate erred in law and fact by awarding the remedy of adverse possession to the respondent without any proof or evidence of continuous uninterrupted possession of the suit property for a period of 12 years.
 - d. That the learned trial magistrate erred both in law and fact by failing to consider the evidence provided by the appellant on the means that they acquired the suit property and only relying on the evidence of the respondent.
 - e. That the learned trial magistrate erred in law and fact in failing to take into consideration the evidence on record that shows that the respondent had been a victim of fraud and at no point was in possession of the suit property for a period exceeding 12 years.



- f. That the trial magistrate erred to consider the evidence produced to show that the appellants had previously been subjected to proceedings of Adverse possession by a person known as Richard Wainaina in 2016 over the same suit property which was unsuccessful.
 - g. That the trial magistrate erred both in law and fact in making a proclamation that was not supported by any relevant authorities, guided by the doctrine of precedent, case law of similar facts and guided by the laws of natural justice.
 - h. That the proclamation of the trial court was against the weight of the evidence before the court and was without any consideration to the evidence before court and the submissions of the plaintiff's counsel.
19. Consequently, the appellants sought the following orders;
- a. Judgment of 19th day of April, 2023 be set aside.
 - b. The Honourable court be pleased to award the prayers set out in the plaint of a permanent injunction against trespass by the respondent.
 - c. The appeal be allowed with costs.
 - d. This Honourable court be pleased to make such further and other orders as it may deem just in the circumstances of the case.
20. The appeal was disposed by way of written submissions. On record are the appellants' submissions dated 15th December, 2023 and the respondent's submissions dated 7th February, 2024.

Appellants' submissions

- 21. Counsel for the appellant submitted that the trial court disregarded several facts including facts that Richard sued the appellants in Kakamega ELC No. 165 of 2021 seeking adverse possession, and that the respondent did not feature anywhere in those proceedings. Counsel argued that the evidence showed that Richard had occupied the suit property for 18 years and that he left in 2009.
- 22. Counsel also argued that the respondent did not prove having been in uninterrupted occupation of the suit property for over 12 years. Counsel contended that the appellants occupied the suit property through Richard who was their caretaker. Counsel further argued that the trial court disregarded the fact that Richard never owed the suit property and could not sell it to the respondent yet the respondent's claim is based on both purchase and adverse possession.
- 23. The court was referred to Section 26 of the *Land Registration Act*. Counsel also cited the case of Kasuwe –vs- Mwaani Investment Limited & 4 Others KLR 184 on the elements of adverse possession. Counsel argued that the appellants had demonstrated that they were the registered proprietors of the suit property as shown by the title deed and green card having succeeded the estate of late Albert Kiarie Waweru as shown by the certificate of confirmation of grant.
- 24. On whether the respondent had been in continuous, open and uninterrupted possession of the suit property, counsel argued that the respondent did not rebutt the allegation that Richard filed Kakamega ELC No. 165 of 2016 seeking ownership of the suit property through adverse possession. Counsel argued that those proceedings and the letter from the Deputy County Commissioner Lugari Sub county dated 8th August, 2016 showed that Richard was in occupation of the suit property until 2016 and that the respondent was not party to the dispute between Richard and the appellants.



Respondent's submissions

25. Counsel for the respondent relied on the case of Kenya Ports Authority –vs- Kuston (Kenya) Ltd (2009)2EA 212 and submitted that the role of this court is to reconsider the evidence tendered and draw its own conclusions bearing in mind that it did not see or hear witnesses, hence make due allowance for that.
26. It was submitted for the respondent that the appellants failed to prove their case on the required standard. Counsel argued that grounds 1, 4(a) and (b) and 7 of the Memorandum of appeal are misconceived and ill informed as the trial court took time to evaluate evidence adduced, the pleadings and applicable law before reaching her decision which was sound and in tandem with the evidence.
27. Counsel submitted that the appellants in their pleadings stated that they obtained title in 2019, then altered the same to read 2016. Counsel submitted that although the appellants argued that Richard was a caretaker they conveniently avoided calling him as a witness. Counsel argued that from documents produced by the respondent, it is clear that Richard purchased the suit property from Albert and that Albert obtained consent for the transfer of the suit property to Richard.
28. It was contended for the respondent that the appellant conceded to the agreement between Albert and Richard and also confirmed the respondent having been in occupation of the suit property for 13 years. That they also admitted that there was no evidence of forgery and that there was no caretaker agreement. Counsel argued that the proceedings between Richard and Albert were meant to mislead the court to focus on a non-issue. Counsel argued that no criminal complaint of fraud was made against Richard, and that they only raised fraud against him in the suit.
29. Counsel argued that the respondent's testimony that he purchased the suit property on 18th January, 2003 and took immediate possession to date and has been in exclusive, notorious and open use of the suit property has not been challenged. Further that his evidence that Richard bought the suit property from Albert and obtained counsel of Land Control Board for transfer on 2nd May, 1989 was not controverted. Counsel argued that oral evidence cannot alter a written document.
30. Counsel argued that the plaintiff sought for permanent injunction pending hearing and determination of the suit hence that prayer cannot be granted in the decree as it is spent and could only be granted at the interlocutory stage. Counsel argued that even if it were to be argued that there was a clerical mistake, the appellant did not meet the threshold for granting the same. Counsel insisted that the appellants have never been in possession of the suit property which has all along been occupied by the respondent.
31. The court was referred to the case of Jennifer Kobilu Kandie –vs- James Ondiek Eldoret ELC Case No. 7 of 2017. Counsel argued that the appellants did not prove trespass against the respondent and that fraud was not proved.
32. Regarding grounds 2 and 3 of the appeal, counsel submitted that the respondent met the threshold in proving his claim of adverse possession, and that this was confirmed by the former Chief of Mautuma Location where the land is situated. Further that the appellants had no proof of having had possession after 1986 when the land was sold to Richard.
33. Counsel relied on the case of Stephen Mwangi Gatunge –vs- Edwin Onesmus Wanjau Muranga ELC Case No. 7 of 2021(OS) and submitted that the respondent's occupation of the suit property was clear and that the same has identifiable boundaries hence the threshold in order 37 of the Civil Procedure Rules was met.



34. On ground 5 of the appeal, counsel argued that the issues between Richard and Albert did not vitiate the respondent's claim and the sale between Richard and the appellant had never been declared as fraudulent. Regarding ground 6, counsel argued that the trial court considered precedent before arriving at its conclusion.

Analysis and determination

35. The court has carefully considered the appeal, parties' rival submissions and the entire record. This being a first appeal, the duty of this court is to re-analyze, re-evaluate and re-assess the evidence tendered before the trial court and make its own independent conclusions bearing in mind that it had no advantage of seeing or hearing witnesses and therefore make due allowance for that.

36. The role of the first appellate court was discussed in the case of *Gitobu Imanyara & 2 Others v. Attorney General* [2016] eKLR, by the Court of Appeal as follows;

“An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must consider the evidence, evaluate it itself and draw its own conclusions, although it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

37. Having considered the grounds of appeal raised in the Memorandum of Appeal herein, the only issue that arise is whether the trial court was right in dismissing the appellant's claim and allowing the respondent's claim. It is not disputed that the suit property was registered in the name of the appellants in their capacity as heirs of Albert Kiarie Waweru, who was the previous registered proprietor. Section 26 of the [Land Registration Act](#) provides for conclusiveness of title as follows;

Certificate of title to be held as conclusive evidence of proprietorship

1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
38. Therefore, registration of land vests in the owner thereof, absolute and indefeasible rights unless such registration was obtained by fraud, misrepresentation, want of procedure, illegality or corruption, whether or not the registered owner was party to such illegalities. In this case, the legality of the registration of the suit property in the name of the late Albert Kiarie Waweru is not in contention as no illegality, fraud, misrepresentation, want of procedure or corruption was pleaded. All the respondent pleaded was that the appellants' registration of the suit property was subject to his overriding interest and right as an adverse possessor.



39. Section 28 of the [Land Registration Act](#) provides for overriding interests as follows;

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-

- a.
- b.
- c.
- d.
- e.
- f.
- g.
- h. Rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.”

40. Therefore, prescriptive rights including rights conferred by adverse possession, although not noted on the register, are overriding interests which registered land is subject to.

41. Thus, the only issue that arise in this appeal is whether the trial court was right in concluding that the respondent had proved his claim of adverse possession.

42. Adverse possession is a doctrine where a trespasser claims ownership of land owned by another person, upon having and as of right exclusively occupied the same, by dispossessing the true owner thereof for a continuous, uninterrupted period of twelve years.

43. The doctrine of adverse possession is predicated on provisions of the [Limitation of Actions Act](#). Sections 7, 13, 17, 37 and 38 thereof provides as follows;

Section 7 provides that

An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.”

Section 13 provides as follows;

1. “A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, whereunder Section 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
2. Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.



3. For the purposes of this Section, receipt of rent under a lease by a person wrongfully claiming, in accordance with Section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.”

Section 17 states as follows;

“Subject to Section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”

Section 38 (1) and (2) provides as follows;

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 of the Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

- (2) An order made under subsection (1) of this Section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

44. Therefore, where a claimant claims to have been in continuous and open possession of another person’s land for a period of 12 years, he may move the Environment and Land Court for the land to be transferred to him.

45. In the case of *Mtana Lewa vs. Kahindi Ngala Mwangandi* [2015] eKLR, the court of Appeal described adverse possession in the following terms;

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 Possession 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*, which is in these terms;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

46. Similarly, in the case of *Mbira vs. Gachuhi* [2002] EALR 137, the court held as follows;

“.....a person who seeks to acquire title to land by the method of Adverse Possession for the applicable Statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and Adverse use by him or those under whom he claims for the statutory prescribed period without interruption.”

47. The rationale for adverse possession was stated in the case of *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR where the Court of Appeal cited with approval the case of *Adnam v Earl of Sandwich* (1877) 2 QB 485 where it was held as follows;

“The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have,



by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties.”

48. In the instant case, the respondent pleaded to have entered the suit property in 2003 upon entering a sale agreement dated 18th January 2003 with Richard Waweru and stated that Richard Waweru had bought the suit property from Albert Waweru. He further stated that he had been in peaceful and uninterrupted occupation of the same. In the plaint, the appellant only stated that the respondent was a trespasser but did not mention when the trespass began. In the reply to amended defence and counterclaim, again the appellants did not mention the date of the respondent’s entry but only denied his averment that he had been in peaceful continuous and uninterrupted occupation of the suit property. In cross examination PW1 the 1st appellant, confirmed that the respondent had occupied the suit property for 13 years. PW1 further stated that he had been on the land up to 1988. From the respondent’s evidence on record and appellant’s own admission, it is evident that the respondent had been in occupation of the suit property from 2003 and at the time of filing suit in 2019, he had been in occupation thereof for 16 years, which is well over the statutory period of 12 years. In the premises, I find and hold that the respondent duly proved his case on the required standard before the trial court and therefore the trial court was right in concluding that he was entitled to the suit property by the doctrine of adverse possession.
49. For the above reasons it is my view that the trial court was right in dismissing the appellants’ claim and allowing the respondent’s counterclaim. In the premises I find no basis or justification to interfere with the trial court’s finding and I hereby dismiss this appeal with costs to the respondent.
50. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 30TH DAY OF JUNE, 2025

A. NYUKURI

JUDGE

In the presence of;

Mr. Mburu for the appellants

Mr. Milimo for the respondent

Court Assistant: M. Nguyai

