



**Mwebia v M’Inoti & another (Environmental and Land Originating Summons  
13 of 2023) [2025] KEELC 4778 (KLR) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4778 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 13 OF 2023**

**JO MBOYA, J  
JUNE 26, 2025**

**BETWEEN**

**ELIAS MWEBIA ..... PLAINTIFF**

**AND**

**JAMES MUTHOMI M’INOTI ..... 1<sup>ST</sup> DEFENDANT**

**EUGENIA NCERI MWITI (SUED AS THE LEGAL REPRESENTATIVE OF  
CYPRIAN MWITI M’MBURUGU – DECEASED) ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff herein has approached the court vide Originating Summons [OS] dated 20<sup>th</sup> November 2023 and wherein the Plaintiff has sought various reliefs and or declarations. The declaration sought at the foot of the originating summons are as hereunder;
  - i. Is the land Nkuene/Taita/2473 measuring approximately
  - ii. Has the defendant obtained a portion of L.R Nkuene/Taita/2473 measuring 20ft by 20ft by way of adverse possession and *Limitation of Actions Act*, Chapter 22, Laws of Kenya.
  - iii. Is the plaintiff entitled to be registered as a proprietor of a portion measuring 20ft by 20ft out of L.R No. Nkuene/Taita/2473
  - iv. Whether the registration of the names of the defendants as proprietors of L.R No. Nkuene/Taita/2473 should be rectified and a portion measuring 20ft by 20ft be excised from the suit land and be registered in the suit land and registered in the plaintiff’s names.
  - v. Should orders be made to that effect
  - vi. Who pays the costs of the suit?



2. The Originating Summons [OS] is premised on various grounds which have been enumerated in the body thereof. In addition, the originating summons is supported by the affidavit sworn by Elias Mwebia [the deponent] on even date. Furthermore, the deponent has annexed various documents including a copy of the green card pertaining to the suit property and which shows that the suit property is registered in the name of Cyprian Mwiti Mburugu.
3. Additionally, the Plaintiff has also annexed a copy of the decree issued vide Meru ELC No. 32 of 2014 pertaining to and concerning the judgment issued in favour of the 1<sup>st</sup> Defendant and wherein the court proclaimed the first defendant to have acquired the suit property by way of adverse possession.
4. The 1<sup>st</sup> Defendant duly entered appearance on 13<sup>th</sup> December 2023; and thereafter filed a replying affidavit sworn on 8<sup>th</sup> March 2024. The replying affidavit contains various annexures including a copy of the amended originating summons filed vide Meru ELC No. 32 of 2014, the judgment of the court rendered on 22<sup>nd</sup> March 2023; a copy of the certificate of title issued in favour of the 1<sup>st</sup> defendant; and also the decree that arose in respect of Meru ELC 32 of 2014.
5. The 2<sup>nd</sup> defendant does not appear to have entered appearance and or file any response to the originating summons. In any event, none was obtainable on the Court Tracking System [CTS].
6. The Originating Summons came up for directions on 19<sup>th</sup> February 2025; whereupon the advocates for the parties intimated to the court that same would proceed vide viva voce evidence. To this end, the court proceeded to and issued directions in accordance with the provisions of Order 37 Rules 16, 17 & 19 of the Civil Procedure Rules 2010.
7. The Plaintiff's case is premised on the evidence of two witnesses, namely; Elias Mwebia and Jackson Kinja. Same testified as PW 1 and PW, respectively.
8. It was the testimony of PW 1 [Elias Mwebia] that same is the Plaintiff in respect of the instant matter. Furthermore, the witness averred that by virtue of being the plaintiff same is therefore conversant with the facts of this matter. In addition, the witness averred that same is conversant with the 2<sup>nd</sup> defendant herein.
9. It was the further testimony of the witness that same bought/purchased a portion of land from the husband of the 2<sup>nd</sup> defendant [now deceased]. The witness further averred that same purchased a portion of land measuring 20ft by 20ft. Moreover, the witness testified that the purchase was undertaken in the year 1999.
10. Additionally, it was the testimony of the witness that upon purchase of the designated portion of the suit property same entered upon and took possession. Besides, the witness averred that he thereafter proceeded to and developed the portion which he had bought. In any event, the witness testified that he has been in occupation of the designated portion of the suit property for over 26 years.
11. It was the testimony of the witness that the 1<sup>st</sup> defendant herein has tried to evict him from the suit property. Moreover, the witness averred that same is aware of some judgments that was issued by the court in favour of the 1<sup>st</sup> defendant and wherein the said Defendant was declared as the owner of the suit property vide Adverse possession.
12. On the other hand, the witness testified that same has recorded a witness statement in respect of the instant matter. To this end, the witness sought to adopt and rely on the witness statement as his evidence in chief. Instructively, the witness statement was duly adopted and constituted as the evidence in chief of the witness.



13. On cross-examination by learned counsel for the 1<sup>st</sup> defendant, the witness averred that same has since recorded a witness statement and that the contents of the witness statement are correct. Furthermore, the witness averred that same has sued the 2<sup>nd</sup> defendant as the widow of the registered owner of the land. Nevertheless, the witness added that he does not know whether the 2<sup>nd</sup> defendant was ever appointed as the legal administratrix of the estate of Cyprian Mwiti Mburugu [now deceased].
14. While still under cross-examination, the witness averred that same entered into a sale agreement over a portion of the suit property. In addition, it was the testimony of the witness that the portion that he bought was measuring 20ft by 10ft.
15. It was the further testimony of the witness that same was aware that the 1<sup>st</sup> defendant was awarded the land in question. In particular, the witness testified that same is aware that the 1<sup>st</sup> defendant had filed a case against the 2<sup>nd</sup> defendant and the court entered judgment in favour of the 1<sup>st</sup> defendant. Furthermore, the witness testified that same instructed an advocate to file an application for joinder in the said case. Nevertheless, the witness averred that same does not know whether the application was dismissed.
16. The witness testified that though he is on a portion of the suit property, he has not brought before the court any photographs to demonstrate evidence of his occupation or possession of the suit property. Besides, the witness averred that same also did not file an appeal against the ruling that dismissed his application to be joined in the previous suit that was filed by the first defendant.
17. On re-examination, the witness testified that same is aware of an application that was filed on his behalf to be joined in the suit that was filed by the 1<sup>st</sup> defendant. Nevertheless, the witness testified that same is not privy to or aware of what became of the said application.
18. The 2<sup>nd</sup> witness who testified on behalf of the Plaintiff was Jackson Kinja. Same testified as PW2.
19. It was the testimony of the witness that same is a mason/builder. Furthermore, the witness averred that same is familiar with the plaintiff. Besides, the witness testified that he knows the Plaintiff because the Plaintiff engaged him [witness] to construct some houses for him [Plaintiff]. To this end, the witness averred that he indeed constructed houses for the plaintiff and thereafter plastered and painted the houses. For good measure, the witness testified that the houses are complete and have been rented out to various tenants.
20. Other than the foregoing, the witness testified that same has since recorded a witness statement dated 29<sup>th</sup> January 2025 and which witness statement the witness sought to adopt and rely on as his evidence in chief. Suffice it to state that the witness statement was duly adopted and constituted as evidence in chief of the witness.
21. On cross-examination by learned counsel for the 1<sup>st</sup> defendant, the witness averred that same is familiar with the 1<sup>st</sup> defendant. In this regard, the witness testified that he [witness] used to go through the premises belonging to the 1<sup>st</sup> defendant to reach out to the portion belonging to the plaintiff. However, the witness added that he does not know the plot number for the Plaintiff.
22. While still under cross-examination, the witness testified that he only constructed houses on the suit plot. However, the witness averred that he has not brought any photographs to show and or demonstrate the existence of any buildings or structures that were constructed on behalf of the Plaintiff.
23. With the foregoing testimony, the Plaintiff's case was closed.



24. The 1<sup>st</sup> Defendant's case is premised on the evidence of one witness, namely; James Muthomi M'Inoti. The same testified as DW 1.
25. The witness averred that same was previously a Principal of a high school. Furthermore, the witness testified that he is the 1<sup>st</sup> defendant in respect of the instant matter. Besides, the witness averred that by virtue of being the 1<sup>st</sup> defendant, same is conversant with the facts of this case.
26. It was the further testimony of the witness that same has since filed a replying affidavit sworn on the 8<sup>th</sup> of March 2024. To this end, the witness sought to adopt and rely on the contents of the replying affidavit. Moreover, the witness also referenced the witness statement dated 13<sup>th</sup> February 2025; and which the witness statement sought to adopt and rely as his evidence in chief. Instructively, the replying affidavit sworn on 8<sup>th</sup> March 2024 and the witness statement dated 13<sup>th</sup> February 2025 were adopted and constituted as the Evidence in Chief of the Witness.
27. Additionally, the witness adverted to the list and bundle of documents dated 13<sup>th</sup> February 2025, containing 10 documents and which documents the witness sought to adopt and produce before the court. There being no objection to the production of the documents, same were produced and admitted as exhibits D1–D10 on behalf of the 1<sup>st</sup> defendant.
28. On cross-examination by learned counsel for the plaintiff, the witness averred that same has never met the Plaintiff. However, the witness testified that same bought land from one Cyprian Mwiti Mburugu [now Deceased]. In addition, the witness averred that the portion which he bought measured 0.022 ha. Furthermore, it was the testimony of the witness that the plot in question is near the market.
29. While still under cross-examination, the witness testified that same bought the plot in 1992. Thereafter, the witness averred that he entered upon and commenced occupation of the plot in question.
30. On the other hand, the witness testified that same is not aware of the details of the other persons occupying the neighbouring plot. Nevertheless, the witness clarified that same is aware of one neighbour called Kirigia.
31. On further cross-examination, the witness testified that same is the one in occupation of his plot. Moreover, the witness averred that same does not know the plot that is being occupied by the plaintiff.
32. With the foregoing testimony, the 1<sup>st</sup> Defendant's case was closed.
33. Upon the close of the hearing, the advocates for the parties [plaintiff and 1<sup>st</sup> defendant] sought time to file written submissions. To this end, the court proceeded to and prescribed the timelines for the filing and exchange of written submissions.
34. The Plaintiff proceeded to and filed written submissions dated 23<sup>rd</sup> April 2025 while the 1<sup>st</sup> defendant filed written submissions dated 14<sup>th</sup> April 2025. The two [2] sets of written submissions are on record and have been taken into account by the court.
35. Having reviewed the originating summons; the supporting affidavit thereto; the response by the 1<sup>st</sup> defendant; the evidence tendered [both oral and documentary] and upon consideration of 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 plaintiff has established and proved his claim to the requisite standard or otherwise; and whether the grant of any orders herein would be tantamount to impeaching the judgment rendered vide ELC 32 of 2014 [OS] or otherwise.



36. Regarding the first issue, it is instructive to recall and reiterate that it is the Plaintiff who filed the instant suit. In this regard, there is no gainsaying that the Plaintiff bears the burden or obligation of placing before the court plausible, cogent and credible evidence to demonstrate his claim to the suit property.
37. In so far as the Plaintiff's claim to the suit property is predicated on adverse possession, it was therefore incumbent upon the Plaintiff to demonstrate that same actually entered upon, took possession and has remained in possession of the suit property or better still, the designated portion of the suit property. Furthermore, it was incumbent upon the plaintiff to show that his occupation, possession and use [if any] have been continuous, uninterrupted, open and without force. Simply put, it behooved the plaintiff to satisfy the maxim namely *nec vi; nec clam; nec precario*.
38. Moreover, there is no gainsaying that a claimant, the Plaintiff herein not excepted, seeking adverse possession must demonstrate that his occupation, possession and use has attracted necessary publicity and notoriety. In this regard, the occupation and possession must be open and notable. Furthermore, the occupation and possession must not be stealth and or by force. [See *Mtana Lewa vs Kahindi Ngala Mwangandi* (2015) eKLR].
39. Be that as it may, the starting point is for the claimant to demonstrate occupation, possession and use of the suit property or the designated portion. Indeed, it is such possession that underpins a claim for adverse possession. For good measure, one must prove possession as the first ingredient. Absent possession, the plea of adverse possession dissipates into thin air. [see *Ernest Wesonga Kweyu vs. Kweyu Omuto CA Civil Appeal No. 8 of 1990*].
40. Did the Plaintiff prove possession or otherwise? It is not lost on me that even though the Plaintiff had contended that he bought a portion of the suit property and thereafter entered upon and took possession thereof, the plaintiff did not tender or produce any evidence of possession or at all. Furthermore, even though the Plaintiff spoke about constructing houses [structures] on his portion of the suit property, no photographic evidence was tendered.
41. Moreover, it is also worthy to recall that the plaintiff herein did not tender and or produce any documentary evidence at all. In this regard, the court is left in a wonderland.
42. It is instructive to posit that it is the duty of the claimant to tender evidence and prove his/ her claim. On the contrary, it is not the duty of the court to search for evidence to prop/ vindicate the case for a party. [see *Stanley Mombo Amuti vs The Kenya Anti-Corruption Commission* (2019) eKLR at paragraphs 83 & 84 thereof].
43. The law as it pertains to the burden of proof and on whom same lies has crystallized over time. In the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR the Court of Appeal stated thus;

It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.
44. Bearing the foregoing dicta in mind, I come to the conclusion that the plaintiff herein did not place before the court any plausible and or credible evidence to warrant a declaration of adverse possession. In any event, it is common ground that court orders must be underpinned by evidence in accordance with



- the provisions of section 3 of the [Evidence Act](#), Chapter 80, Laws of Kenya. [See *General & another v Hussein & 3 others* (Civil Appeal 100 of 2018) [2025] KECA 1022 (KLR) (5 June 2025) (Judgment).
45. Turning to the second issue, it is important to recall that the plaintiff herein conceded that there was a previous suit that had been filed by the 1<sup>st</sup> defendant, namely; Meru ELC No. 32 of 2014 (OS). Furthermore, the Plaintiff also averred that same instructed his advocates to file an application for joinder in the said case. Nevertheless, the plaintiff posited that even though an application for joinder was filed, same was not aware of what became of the said application.
  46. Notwithstanding the foregoing, it is common ground that the 1<sup>st</sup> defendant had previously filed the suit, namely; Meru ELC 32 of 2014 (OS) wherein the 1<sup>st</sup> defendant sought to be declared as having acquired the suit property by way of adverse possession. Suffice it to state the said case was heard and disposed of vide judgment delivered on 22<sup>nd</sup> March 2023.
  47. Moreover, it is common ground that the court proceeded and declared the 1<sup>st</sup> defendant as the owner of the suit property vide adverse possession. For good measure, the said judgment remains in situ. To this end, it is imperative to highlight that the judgment under reference was a Judgment in rem. [See Section 44 of the [Evidence Act](#) Cap 80 Laws of Kenya].
  48. I beg to state that for as long as that Judgment has not been set aside and or varied, this court cannot issue and or grant a contradictory judgment. Such an endeavor would be tantamount to impeaching the judgment of a court of coordinate jurisdiction, albeit through the back door. [See the decision of the Supreme Court in the case of *Kenya Hotel Properties Limited v Attorney General & 5 others* ([Petition 16 of 2020](#)) [2022] KESC 62 (KLR) (Civ) (7 October 2022) (Judgment) at paragraph 55 thereof].
  49. Other than the fact that the judgment under reference remains in situ, it is also worthy to recall that the current Plaintiff sought joinder in the previous suit. Furthermore, it is also evident that his application for joinder was dismissed. Nevertheless, instead of seeking to appeal the dismissal of his application or, better still, seeking to review the Judgment issued vide ELC No. 32 of 2014 [OS], the Plaintiff has filed the instant suit.
  50. In my humble view, the Plaintiff, having filed an application to be joined in the previous suit, same cannot now turn back and file the subject suit. To my mind, the instant suit is similarly prohibited by the doctrine of constructive res judicata. [See the court of appeal decision in *Muungano Wa Wanavijiji Akiba Mashinani Trust v Kihui & 3 others; Waweru & 5 others (Interested Parties)* (Civil Application E279 of 2022) [2023] KECA 946 (KLR) (28 July 2023) (Ruling) at paragraph 23 thereof].
  51. Consequently, and in the premises, my answer to issue number two [2] is two-fold. Firstly, the Judgment in favour of the 1<sup>st</sup> defendant vide Meru ELC No. 32 of 2014(OS) was a Judgment in rem. The said Judgment declared the 1<sup>st</sup> defendant as the owner of the suit property vide adverse possession. The said Judgment cannot be superseded by a judgment in another court without there having been an appeal.
  52. Secondly, in so far as the Plaintiff herein had previously sought joinder in ELC No. 32 of 2014 [OS], the Plaintiff cannot now be heard to propagate a separate suit. Moreover, the claims by the Plaintiff beforehand appear to be caught up by the doctrine of constructive res judicata. [See the provisions of Section 7 Explanation 4 of the [Civil Procedure Act](#), Chapter 21, Laws of Kenya].



**Final Disposition:**

53. Flowing from the analysis in terms of the judgment herein before, it must have become crystal clear that the Plaintiff has failed to prove his claim to the requisite standard. To this end, I come to the conclusion that the Plaintiff's case is devoid of merits.
54. Consequently, and in the premises, the final orders of the court are as hereunder;
- I. The Plaintiff's suit be and is hereby dismissed.
  - II. Costs of the suit be and are hereby awarded to the 1<sup>st</sup> Defendant only.
  - III. The Costs in terms of clause [II] above shall be agreed upon; and in default be taxed by the Deputy Registrar.
55. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MERU THIS 26<sup>TH</sup> DAY OF JUNE 2025.**

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

**JUDGE.**

In the presence of:

Mr. Mutuma- Court Assistant.

Mr. Kariuki for the 1<sup>st</sup> Defendant

No appearance for the Plaintiff

No appearance for the 2<sup>nd</sup> Defendant

