



REPUBLIC OF KENYA



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Mae & 45 others v Nyamweya & 3 others (Environment & Land Case 141 of 2020 & 222 of 2019 (Consolidated)) [2025] KEELC 4832 (KLR) (25 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4832 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 141 OF 2020 & 222 OF 2019 (CONSOLIDATED)
SM KIBUNJA, J
JUNE 25, 2025

BETWEEN

CECIL CHARO MAE & 44 OTHERS & 44 OTHERS PLAINTIFF

AND

WENDY BRYANT NYAMWEYA & 2 OTHERS & 2 OTHERS DEFENDANT

AS CONSOLIDATED WITH

ENVIRONMENT & LAND CASE 222 OF 2019

BETWEEN

LEAH NTHAMBI BRYANT & 2 OTHERS PLAINTIFF

AND

FREDEREICK BARAKA KAINGU & 4 OTHERS DEFENDANT

JUDGMENT

1. In ELCC No. 141 of 2020, the plaintiffs sued the defendants through the originating summons dated 22nd September 2020 seeking for adverse possession orders in respect of parcels of land known as 11286/I/MN and 11287/I/MN (Original number 274/4), suit properties, for having stayed on the two parcels for over 15 years.
2. The defendants opposed the claim through their defence dated 1st November 2021, inter alia disputing that the 1st to 4th defendants are of sound mind and had authority to file the suit on behalf of the others. They also refuted that the plaintiffs have been living in the suit properties earlier than 2019, or that they had been evicted by armed people in 2014, 2015, 2018 and 2019. They averred that the plaintiffs have been selling portions of the suit property while ELC 222 OF 2019 was pending in court.



3. In ELCC No. 222 OF 2019 the plaintiffs sued the defendants through the plaint dated 22nd November 2019, seeking for inter alia vacant possession of the suit properties, permanent injunction and damages with effect from 1st March 2019 until vacant possession.
4. The defendants opposed the plaintiffs' claim through their defence dated 4th March 2020, filed through Ms. Obinju Rondo & Co. LLP, inter alia pleading that the suit was bad in law and an abuse of court process; that they have occupied the suit property as squatters and adverse possessors from 2003, continuously for over 12 years; that they have erected temporary and permanent houses thereon; that the plaintiffs' attempted to evict them in 2018, but the defendants filed Mombasa CMCC ELC No. 2543 of 2018 which is still pending and a status quo order was issued; that this suit is therefore sub judice and should be dismissed with costs. The 1st & 2nd defendants filed opposed the claim through their statement of defence dated the 5th October 2020, filed through Ms. Otieno B. N. & Associates Advocates, and amended on 12th February 2021 to included all the five defendants, inter alia averring that the suit properties do not belong to the plaintiffs and the same has been acquired by the defendants through adverse possession, for having been in continuous, uninterrupted and exclusive possession for over 15 years. They also disputed the court's jurisdiction.
5. The record on the proceeding of 23rd June 2022 confirms that counsel for the parties agreed the two suit be heard together, with the plaintiffs in ELCC No. 141 of 2020 being the plaintiffs and the plaintiffs in ELCC No. 222 of 2019 being the defendants. The proceedings took place in ELCC No. 141 of 2020.
6. The plaintiffs called Cecil Charo Mae, the 1st plaintiff and Athman Karisa Fondo, Chief Mwembegeza Location, who testified as PW1 and PW2 respectively. PW1 testified that he was born in 1989 on plot numbers 11286 & 11287, the suit properties, which are in Mwembegeza area, behind Zawadi Apartments. That his father, who died in 2007, had built a 'mtomo house' which is a house built with small stones and put together with mud and cement. That he has renovated that house with building stone blocks. He testified that the plaintiffs have been residing on 5 acres, out of the 200 acres land, and 100 acres is still unoccupied. During cross-examination, he told the court that he invited Omar Baya, and Halima Abdalla to the land in 2009, while the third person he invited was one Dennis Kiboi in 2010. That he sold a portion to the Fredrick Kaingu and his brother, Tumaini Kaingu in 2019. PW 1 added that he also sold portions of the land to others people like Shamir Ali Mohamed, Zakaria Amos, Ali Mohamed, and Jasper Tembo but could not remember the exact year. That he sold portions of land to Samuel Kiboi in 2010 and Chebet Koech in 2017. He referred to the surveyor's report prepared on order of the court issued in ELC 222 OF 2019 that was conducted on 3rd March 2021 on plot 11287/ I/MN, and pointed out several houses belonging to different plaintiffs. He claimed to have found some plaintiffs namely Halima Abdalla, John Mwaiwe Mdungu, and Fatuma Kalonzi Mwanzije on the land. He stated that they were never removed from their land and their houses were never destroyed in 2013 to 2015. He stated that he wants 3 acres for himself and those he invited. He also concluded that he is of good mental status. PW2 produced a letter dated 27th July 2020 which he authored, and another letter dated 10th July 2020 authored by the then acting chief, Victor Kyalo Karisa. In his letter was a list of the plaintiffs some of whom he knew personally and mentioned Cecilia Mai, Frederecik Kaingu, Omar Baya, George Kyalo, Tatu Kweke, Juma Karisa, Mwana Juma oMar, John Mwaiwe, Chebet Koweche, Florence Cicidi and Halima Abdalla Mohamed. He stated that he received the list from the village elder and that those he knew personally were born on the suit land. He stated that he did not know the 1st defendant. During cross-examination, PW2 could not tell whether the people in the list had previously been allocated land or had applied to be allocated land. He was not aware that Mr. Frederick Kaingu came to the suit property after a portion was sold to him by PW1. He stated that the NLC came to the suit land in 2015 when he was the acting chief but he did not participate in the discussions.



7. For the defendants Timothy Bryant, the 2nd defendant, Moses Kibunja Kibui, Dennis Marebeka, Leah Nthambi Bryant, 3rd defendant, Albert Mutinda Mbiti Mwendwa, Caroline Nyanduko Ndege, and Charles Joseph Mundia Muriuki, a veterinary surgeon testified as DW1 to DW7 respectively. DW1 relied on his witness statement dated 22nd November 2019 and the list of documents of even date. He testified that his late mother purchased the suit land, original title No. 274/I/MN, measuring 200 acres, in 1960's using a loan from AFC. He added that they did dairy farming on it for about 25 years. That his late mother subdivided the land before she passed away in 2005. He explained that High Court Constitutional and Judicial Review petition No. 69 of 2015 was about 55 subdivisions, which occurred during the lifetime of his late mother, and included portions which were given to JCC Church and Justice Daniel Musinga, who was then an advocate of his late mother. He narrated that sometime in 2015, there was some trouble brewing from a neighbouring land which spilt over into the suit properties leading to the arrest of some people who were taken to Shanzu Law courts and the filing of the afore mentioned High Court Constitutional and Judicial Review Petition No. 69 of 2015. He stated that the court directed the Deputy registrar to conduct a site visit to confirm whether or not there were squatters on the land in dispute. That the visit took place on 4th March 2016 and no squatter was found on the suit properties, and that position has not been challenged to date. That the houses built on the suit land were built without their consent and despite the status quo order issued by the court in 2021. He admitted that he did not attend the said site visit in 2016, but his sister, the 1st defendant, attended. He added that before 2019, the suit land was vacant and they had offered it the Attorney General and Police headquarters for building a police station. He further alleged that he did dairy farming up to 1997 and sold the milk to advocates and Bamburi Cement. DW2, a conveyancing clerk, relied on his statement dated 1st November 2021, and testified that he was present with the 1st defendant during the site visit and no squatters were found. That squatters started coming onto the land sometime in 2018 and 2019. That he used to visit DW1 when he was doing dairy farming, and the suit properties were then vacant, but there are now permanent structures and tarmacked roads. He admitted that during the site visit, they did not visit all 200 acres of the original title. DW3, a land surveyor, testified that acting under court order issued on 15th February 2021 and under instructions from one Mulaa, he conducted a joint survey on the suit properties and found 19 permanent houses and 14 semi-permanent houses as well as 96 adults on the suit property. He testified that he had done a similar survey in 2019 and produced his letter dated 19th August 2019, which is on page 27 of the plaintiffs' application dated 4th June 2020 in ELCC 222 OF 2019. In the said letter, he had indicated 6 permanent structures and 9 temporary ones on plot 11286/I/MN, and 7 temporary structures on 11287/I/MN. During cross-examination, he could not tell whether those structures were old ones that had been demolished and then replaced. DW4, 3rd defendant, testified that DW2 and herself, were present when the Deputy Registrar visited the suit properties in 2016, and that they drove through the entire land for about an hour, accessing it through JCC church. She stated that she lived on the land until 1980, when she went to school abroad and returned there in 2002, and stayed until 2003/2004, when it became insecure and had to move to another house. She added that they returned their cattle onto the land until 2023 when they disposed of them. She stated that they had left a house on the land when they left in 2004, but it was destroyed in 2012/2013. She testified that on the land were permanent structures serving as their servant quarters. DW3 told the court that JCC Church had bought their parcel in the 1990's and had built a permanent structure at that time. She could not tell whether the report by the D/R mentioned the parcel bought by JCC Church. DW5 relied on his statement dated 1st November 2021, as his evidence in chief. He testified that he lived in Bwigi farm, Utange from 1977 to 1981 and thereafter in Butson from 1982 to 2009. He stated that he does not know the area chief where the suit properties are located, but he knew "Mrs Bryant" had spoken of subdividing the land and is aware that JCC, Blue Shield Insurance and Justice Musinga



bought portions of the said land. That the land was around 300 acres and had been subdivided into 100 acres each, and people have been taking possession after purchasing portions at different times. That “Ms Bryant” is his cousin, and that he has chauffeured some potential buyers through the land. DW6 Caroline Nyanduko Ndege relied on her statement dated 1st November 2021 and testified that she has lived in Utange since 2013 and has even bought land there near the suit properties. That she used to see the suit land when exercising and that it was vacant. She also stated that the Leah Bryant had taken her around the land severally in 2013 and 2015. In cross-examination, she stated that the Bryant’s owned 4 to 5 acres because she was there in 2016 and it was vacant. She narrated that in 2019 some structures were erected thereon and Bryant brought police. She admitted that the portion she bought was from Bryant, but is not included in the suit. DW7 relied on his statement dated 30th October 2021, and he testified that he visited the Leah Bryant’s land between 2014 to 2020 to tend to her livestock. He stated that he would find her workers in their quarters and would then be taken to where the animals are, as at that time the Leah Bryant lived in Nyali. He told the court he could not tell the acreage of the land, but the farm could hold up to 10 cows on rotational grazing basis. He said that sometime in 2018 and 2019, he started seeing makeshift structures, which had been erected on the pasture land.

8. The learned counsel for the plaintiffs and defendants filed submissions on diverse dates which the court has considered.
9. The issues for the court’s determinations in both suits are as follows:
 1. Whether the plaintiffs in ELCC No. 141 of 2020 met the required threshold for adverse possession.
 2. Whether the plaintiffs in ELCC No. 222 of 2019 are entitled to vacant possession/eviction orders sought.
 3. Who bears the costs in both suits?
10. The court has meticulously considered the pleadings, oral and documentary evidence tendered, submissions by the both counsel, superior courts decisions cited and has come to the following determinations:
 1. There is no contestations on who the registered owners of the suit properties are. The defendants are the registered owners of the suit property. Adverse possession is provided under sections 13 and 38 of the Limitations of Actions Act chapter 22 of the Laws of Kenya. In the case of Mbira –v- Gachuhi, (2002) IEALR 137 the court held that:

“..... 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....”

In the case of Alfred Welimo -v- Mulaa Sumba Barasa, [CA No 186 of 2011](#), this Court expressed itself thus:

“It is trite that adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it; for as Robert Megarry aptly observed in his Megarry’s manual of the Law of Property, 5th ed. page 490, the owner may have little present use for the land and that land may be used by others, without the users demonstrating a possession inconsistent with the title of the owner. So the mere fact that the appellant abandoned possession of the suit



property and went to live at Ndalu scheme by and of itself does not establish adverse possession. The abandonment of possession must be coupled with the respondent taking possession of the land with animus possidendi (the intention to possess) and asserting thereon rights that are inconsistent with those of the appellant as the owner of the land....”

Further, in the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] KECA 942 (KLR), the Court of Appeal held as follows:

- “ 36. For a claim founded on adverse possession to succeed, the person in possession must have a peaceful and uninterrupted user of the land. Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are important factors in a claim for adverse possession.
37. In this appeal, the appellant had the burden to prove not mere possession of the suit property, but possession that was *nec vi, nec clam, nec precario*. (See *Kimani Ruchine -v- Swift, Rutherfords Co. Ltd.* [1980] KLR 1500 and *Karnataka Board of Wakf -v- Governemnt of India & Others* [2004] 10 SCC 779).
38. In this appeal, the learned judge held that the appellant’s occupation of the suit property was interrupted in 1992 when he filed suit before the Bungoma Principal Magistrate’s Court.
39. In *Wambugu -v- Njuguna*, (1983) KLR 173, this Court held that adverse possession contemplates two concepts: possession and discontinuance of possession. It was further held that the proper way of assessing proof of adverse possession is whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.”

The Court of Appeal then listed the following requirements for adverse possession:

- (a) on what date he came into possession.
 - (b) what was the nature of his possession?
 - (c) whether the fact of his possession was known to the other party.
 - (d) for how long his possession has continued and
 - (e) that the possession was open and undisturbed for the requisite 12 years.
2. PW1, who testified on his behalf, and ostensibly, on behalf of the other plaintiffs in ELCC No. 141 of 2020, and defendants in ELCC No. 222 of 2019, claimed to have been born on the suit properties in 1989. There is however no documentary or other evidence presented to corroborate his claim, in the face of the registered owners contention that the land was vacant until sometimes in 2018/2019. He was not able to tell when he started school, which primary and secondary schools he attended. He also said in his testimony that when he came on the suit properties he found Halima Abdalla, John Mwaiwe and Fatuma Kalonzi Mwanzije, which begs the question? Was he really born on the suit property or did he come onto the land when



he was already mature enough to know who arrived there before the other? The admitted fact that his late father was buried in their ancestral land in Kilifi, and not on the suit property where PW1 claimed to have been born, taken against the testimony of the registered owners, leads the court to conclude that the PW1 had come from somewhere else. The only evidence in corroboration that he has lived there since birth is a letter dated 27th July 2020 from the PW2, who in his testimony admitted that he only knew a few of the individuals in the list that he had attached. That the list with names had been handed to him by the village elder, who was never called as a witness to testify. That evidence is therefore heresy. The evidence of PW2 on those in the list he knew, included Frederecik Kaingu, Omar Baya, George Kyalo, Tatu Kweke, Juma Karisa, Mwana Juma oMar, John Mwaiwe, Chebet Kowech, Florence Cicidi and Halima Abdalla Mohamed. Those individuals are among those PW1 claimed he had sold portions of the suit properties to and one wonders why they were not availed as witnesses in an adverse possession claim.

3. In civil suits, like these ones, the burden of proof is on the person who alleges and not the person defending themselves. Just on the evidence of PW 1 and PW 2, it is clear that the plaintiffs were not born on the land, but invaded the suit properties at some point. Time started running when they took possession, which according to the sum of all the defendants witnesses, was sometimes in 2018. DW7, a veterinary surgeon, who tended to the Bryants' cattle from 2013 stated that the property was vacant until sometime in 2018, when he saw makeshift structures. DW6 pegged the invasion at around 2019 as she lived in the area, and had bought some portion from the mother title of 274/I/MN to the suit properties. The evidence of the surveyor, DW3, shows that there was an increase of squatters from 2019 to 2021, as there were only six permanent structures in 2019 as compared to 19 in 2021. The court cannot ignore the report of 4th March 2016, by the Deputy Registrar, which inter alia placed the location of the suit properties to be past JCC Church, near Braeburn International School, and Zawadi Apartments. DW4 was present during the locus visit by the Deputy Registrar and she drove her for about an hour through the land. The Deputy Registrar in her report recorded that the land is vast and flat and one could see all around it and there were no squatters then. The fact that there was a case in 2015 demonstrates clearly, that had there been any adverse possessors on the land then, the time was interrupted. The court finds that the plaintiffs have all failed to demonstrate that they lived in open, continuous, notorious and exclusive possession of the suit properties for over 12 years, and their claim is for dismissal.
 4. It follows that the defendants in this judgement, who are the plaintiffs in ELCC No. 222 OF 2019, being the registered proprietors of the suit property, are entitled to the prayers of vacant possession and injunction against the defendants therein. The plaintiffs also sought for damages for the unauthorized use of suit properties. Damages for use and occupation of land would imply that there was a tenancy as was held in Rajan Shah T/A Rajan S. Shah & Partners versus Bipin P. Shah [2016] KEHC 1880 (KLR) which is not the case here, and that prayer is rejected.
 5. Under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow event unless where there is a good reason to depart from the same. That as the plaintiffs in ELCC No. 222 of 2019 have succeeded in their claim and in defending ELCC No. 141 of 2020, they are entitled to costs, in both suits.
11. Flowing from the determinations set out above, the court finds and orders as follows:
1. That the plaintiffs in ELCC No. 141 OF 2020, have failed to prove their case to the standard required under the law, and their claim is dismissed with costs.



2. That the plaintiffs in ELCC No. 222 of 2019, have proved their case on a balance of probabilities and judgement is entered in their favour against the defendants in terms of prayers (a), (b) and (d) of the plaint dated 22nd November 2019.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 25TH DAY OF JUNE 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Plaintiffs : Mr Otieno

Defendants : Mr Mukomba For Munyithya.

Shitemi/patrick-court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

