



**Mbogani & another v Mwangi & another (Environmental and Land Originating Summons E004 of 2023) [2025] KEELC 124 (KLR) (22 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 124 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E004 OF 2023**

**CK NZILI, J  
JANUARY 22, 2025**

**BETWEEN**

**SOLOMON ASINZU AFUDE MBOGANI ..... 1<sup>ST</sup> PLAINTIFF**

**LYDIA OSITA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**APPOLOS KENNEDY MWANGI ..... 1<sup>ST</sup> DEFENDANT**

**HORAN MUNA MWANGI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiffs moved this court through an Originating Summons dated 13/6/2023 seeking to be declared owners of 1.2 acres out of the defendants' LR No. Waitaluk/Kapkoi Block 9/Gutongorio/4 which is currently registered as LR. No. Waitaluk/Kapkoi Block 9/Gutongorio/582 on account of adverse possession. The application is supported by grounds on its face and an affidavit sworn by Lydia Osita Etole on 13/6/2023.
2. The plaintiffs' case, as advanced by Lydia Osita Etole, who testified as PW1 is that they obtained the suit parcel of land for value, which is currently registered in the names of the defendants as per a copy of the green card. The plaintiffs told the court that on 18/2/2008, they bought one acre of the land from the agent of the 1<sup>st</sup> defendant for Kshs.300,000/=, which they paid in full, and later, on 4/2/2009 and 17/10/2010, they acquired an extra 0.2 acres of the land.
3. The plaintiffs told the court that after paying the total purchase price for 1.2 acres, they took vacant possession, started developing the land, and have since been in exclusive use, possession, and occupation of the same since 18/2/2008, and no one has evicted them from the land.
4. PW1 relied on a copy of the authority to prosecute suit from the 1<sup>st</sup> plaintiff, as P. Exhibit No. (1), copy of the Green Card as P. Exhibit No. (2), copies of Sale Agreements dated 18/2/2008, 2/2/2009 and



4/2/2009 and 17/10/2010 as P. Exhibit Nos. (2), (4), and (5), copies of the affidavit dated 16/6/2016 by Ben Nyongesa Wanjala as P. Exhibit (6) and photographs showing the development on the Suitland as P. Exhibit No. 7(a) and (b). The plaintiffs told the court that they deposited the purchase price in the account belonging to the defendants.

5. Though the defendants were served with the Originating Summons and an affidavit of service duly filed, they have not opposed or participated in the hearing of this suit.
6. The plaintiffs rely on written submissions dated 20/1/2025 which the court has considered.
7. The issues calling for my determination are:
  1. If the plaintiffs have proved the ingredients of adverse possession.
  2. Whether the plaintiffs are entitled to the reliefs sought in the Originating Summons.
  3. What are the orders as to costs?
8. 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 an intruder for a period of 12 years. In *Mtana Lewa -vs- Kahindi Ngala Mwangandi* [2015] eKLR, the court observed that adverse possession springs into action essentially by default or inaction by the owner, the prerequisite being that the possession of the land is neither by force or stealth nor under the license of the owner.
9. In *Mbui -vs- Maranga* [1993] eKLR, the court observed that the occupation by the intruder who seeks adverse possession must be non-permissive use, and if entry was out of permission of the actual owner, possession does not become adverse before the end of the period during which one is permitted to occupy the land. Further, the court said that where adverse possession arose out of a sale agreement under which the payment of the purchase price by the adverse possessor was by way of installments and the agreement has failed, the period of limitation to afford an action for adverse possession only arises after the last and final payment has been made to complete the agreed purchase price.
10. In *Peter Mbiri Michuki -vs- Samuel Mugo Michuki* [2014] eKLR the court cited *Public Trustee -vs- Wanduru* [1984] KLR 314 that adverse possession should be calculated from the date of payment of the purchase price for the entire span of 12 years if the purchaser takes possession of the property because, from that date, the actual owner is dispossessed of the land purchased and time for adversity begins to run in favor of the adverse possessor.
11. Adverse possession must also be actual, open, notorious, exclusive, and adverse to the actual owner's interests for the period of 12 years as held in *Mombasa Teachers Co-operative Savings and Credit Society Ltd -vs- Robert Muhambi Katana & Others* [2018] eKLR. In *James Maina Kinya -vs- Gerald Kwanduka* [2018] eKLR, the court observed that the fact that the plaintiff had extensively developed the Suitland was a demonstration of *anninus possidendi*, to the exclusion of the defendants, and that using or occupying the land in contrast to the title holder, usage was a sign of adverse possession.
12. The period for adverse possession must not be broken for 12 years. The land sought for adversity must also be definite, identifiable, and defined with a clear boundary. See *Gatimu Kinguru -vs- Muya Gathangi* [1976] KLR. In *Wakio & 101 Others -vs- Mombasa* (Civil Appeal E061 of 2021 [2024] KECA 316 [KLR] (22<sup>nd</sup> March, 2024) (Judgment), the court observed that time for adverse possession was interrupted when attempts were made to remove and relocate the appellants and also when the actual owner asserted ownership and the appellants acknowledged ownership of the land by the actual owners when they sought to be assigned the land. The court cited *Samuel Kihamba -vs- Mary Mbaisi*



[2015] eKLR that in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, without force, without secrecy, and with an intention to have the land. The court further cited Wines and Spirits (K) Ltd & Another -vs.- George Mwachiru Mwangi [2018] eKLR that occupation must be within the knowledge of the registered owner for time for adverse possession to start running, and where with such knowledge that valid owner does nothing to assert his rights on the property for at least 12 years.

13. In *Wambui Gikwa -vs.- Paul Kimani Muraba* [2016] eKLR, the court observed that time stops to run when the title holder asserts his title to the land in question, when the adverse possessor admits the title holder's right, or where the valid owner makes an effective entry or institutes legal proceedings to regain possession.
14. Applying the foregoing case law, there is no dispute that the entry into the land was permissive on 18/2/2008. The sale agreement dated 18/2/2008 shows that the balance of Kshs.80,000/= was to be paid by 18/6/2008. Entry into the land and occupation of the land was followed by the date of payment of the last installment on 17/10/2010 is not disputed by the defendants. So, 12 years expired on 17/10/2022. The defendants have not disputed the adverse developments on the land by the plaintiffs. There is, therefore, evidence that the plaintiffs have been in exclusive use, possession, and occupation of the land for a period of 12 years. The plaintiffs have proved the two key elements of adverse possession dispossession and discontinuance of possession of the true owner as held in *Wambugu -vs- Njuguna*.
15. The upshot is that I find that the plaintiffs are entitled to declaratory orders to 1.2 acres of land out of title No. Waitaluk/Kapkoi Block 9/Gutongorio/4 currently known as Waitaluk/Kapkoi Block 9/Gutongorio/582. The defendants are hereby ordered to subdivide, and excise a portion of the suit land equivalent to 1.2 acres occupied by the plaintiffs and to sign or execute subdivision and transfer form in their favor in this two months from the date hereof, in default, the Deputy Registrar of this Court to do so. Costs to the plaintiffs.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE THIS 22<sup>ND</sup> DAY OF JANUARY 2025.**

**HON. C.K. NZILI**

**JUDGE, ELC KITALE.**

