



Magige & 4 others v Wasonga w/o Samwel Chacha (Enviromental and Land Originating Summons 96 of 2018) [2025] KEELC 5114 (KLR) (18 June 2025) (Judgment)

Neutral citation: [2025] KEELC 5114 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 96 OF 2018**

**FO NYAGAKA, J
JUNE 18, 2025**

BETWEEN

**MARWA IKANGA MAGIGE 1ST PLAINTIFF
CHRISTOPHER MWIKABE NYANCHERU 2ND PLAINTIFF
MWITA IKANGA MAGIGE 3RD PLAINTIFF
MWIKABE WANKIO 4TH PLAINTIFF
NYAMHUNDA IKANGA MAGIGE 5TH PLAINTIFF**

AND

MARGARET WASONGA W/O SAMWEL CHACHA DEFENDANT

JUDGMENT

1. This is a matter which, at the end of the Defendant’s evidence, a question that should forever remind everybody, particularly judges and judicial officers, that justice delayed is justice denied, was posed by the Defendant to the Judge herein. When the Court issued directions on the filing of submissions and gave a mention date for that, the Defendant, a ninety-two (92) year old lady asked (in Kuria tongue), “will the judgment be delivered when I am still alive?”.
2. While this Court moved with speed to deliver the judgment about two months later, hopefully when the litigant was still alive, this question has troubled the judge herein always since the woman had been in Court on this matter since 2013 when the suit was instituted in Kisii High Court. I still wonder how many litigants in other matters long for quicker dispensation of justice than is often given. It reminds all of us judicial decision makers that we are obligated to remove the pain of the litigants by acting justly and speedily. After all, from the Holy Bible (for those who believe in it) it is written, from Jesus’ advice, in Luke 18: 7 to 8, “And will not God bring about justice for his chosen ones, who cry out to him day



and night? Will he keep putting them off? 8 I tell you, he will see that they get justice, and quickly...”
We are bestowed with giving judgment on His behalf and we need to do our part.

3. That said, by way of an Originating Summons dated 27/10/2014, the Plaintiffs sought the following orders;
 1. Declaration that the Defendant’s right to recover the whole of LR. No. Bugumbe/Mabera/211 is barred under the Limitation of Actions Act, Chapter 22 of Laws of Kenya, and her title thereto extinguished on the grounds that plaintiffs herein have openly, peacefully and continuously been in occupation and possession of the aforesaid parcels of land for a period exceeding 40 years.
 2. There be an order that the plaintiffs be registered as the proprietors of the whole of LR. No. Bugumbe/Mabera/211, in place of the Defendant herein.
 3. The defendant herein be ordered and/or directed to execute and/or sign all the necessary transfer instruments, to facilitate the transfer and registration of the suit property, in the name of the plaintiffs and/or severally. In default, the deputy registrar of this honorable court be granted liberty to execute the transfer instruments in favour of the plaintiffs.
 4. There be an order restraining the defendant either by herself, agents, servants and or employees from interfering with the plaintiffs’ peaceful possession and occupation of the said parcels of land that is LR. No. Bugumbe/Mabera/211, in any manner whatsoever and/or howsoever.
 5. Costs of this originating summons be borne by the defendant.
 6. Such further and/or other orders be made as the court may deem fit and expedient, in the circumstances of this case.
4. The Originating Summons was based on several grounds. These were that parcel number LR. No. Bugumbe/ Mabera/211 which they referred to as the original parcel was hitherto registered in the name of Kihura Magige, now deceased. He was the father of the 1st, 2nd, 3rd, 5th, 6th and 7th plaintiffs and the husband of the 4th plaintiff. His registration as the owner was pursuant to the completion of the adjudication and demarcation process. Then one Samuel Chacha, now deceased secretly and fraudulently registered himself as the owner of the land in 1975, without the knowledge of the plaintiffs nor their consent. The defendants continued to further the fraud together with her co wives Mongina and Ontanchi who had since deceased by having their names registered. Notwithstanding the registration, the plaintiffs continued to live, farm and have occupation of the entire land measuring 33.5 hectares, believing and knowing all along that the parcel was family and ancestral land. Their occupation was open, continuous, and uninterrupted.
5. Even though the defendant became the registered proprietor of the land, she never entered it nor took possession thereof. The plaintiffs’ occupation and possession had been without interruption for 40 years. Further by the time of registering herself as owner of the suit land, the defendant was aware, knowledgeable and cognizant of the plaintiffs’ occupation. For that reason, the Defendant’s right to recover the whole suit land had been extinguished by effluxion of time. Besides, the plaintiffs continued to cultivate the whole suit property without the interference and interruption of the defendant.
6. The defendant had acquired and became the proprietor of the original parcel of land, subject to the rights and interests of the plaintiffs’ occupation. She had not taken any steps nor commenced any precipitate action to defeat the Plaintiffs’ occupation of the land. Their occupation was an overriding interest, and consequently the plaintiffs’ rights were sanctioned by Section 30 of the Registered Land



Act, now repealed, and section 28 of the Land Registration Act, No. 3 of 2012. For that reason, their occupation had been adverse to the interests of the Defendant in respect of the suit property.

7. The defendant filed a Replying Affidavit dated 20/11/2014 in opposition to the claim. She deposed in it that she was a widow to the late Samwel Chacha Mango and was jointly registered with three other widows of the late husband, and they too were deceased. Thus, they too were the owners of the parcel of land known as LR. No. Bugumbe/mabera/211 (the suit property). She stated that her husband purchased the land from Kihuria Magige and a transfer was done in his favor. He was issued with a Land Certificate on 09/04/1975. Upon his demise, the widows conducted succession proceedings and she was issued with a Succession Certificate (a Grant of Letters of Administration as per the annexure attached in support of the fact) which she annexed and marked as MWC3. Her name, together with the other widow's names, were entered into the green card which she annexed as MWC4.
8. She pointed out that during the Succession proceedings, the plaintiffs never raised any objection. She added that she had been conducting her agricultural activities on the land in the absence of the Plaintiffs since 1975. Further, that the Plaintiffs showed interest in the land in 2013 when they visited their home in the area but after the meeting with family members they could not agree to meet the Plaintiffs' demands. In 2014 the Assistant County Commissioner summoned the Defendant to a meeting where the plaintiffs claimed a portion of land left by their father. The said meeting did not materialize as they wished. The Plaintiffs began to forcefully erect structures shortly thereafter alleging that the Assistant County Commissioner had authorized them to do so.
9. The defendant sought a remedy vide Migori SPMCC No. 241 of 2014. The court gave injunctive orders against the Plaintiffs in the matter. Further, she deposed that the Plaintiffs entry into the land was in 2014. They had been in occupation hardly for 4 years. She stated that the plaintiffs had not met the threshold for adverse possession. Further, that since the Plaintiffs were Tanzanians, they had no locus standi to file the suit. She urged the court to dismiss the entire suit.
10. The matter proceeded for full hearing with the 1st plaintiff as PW1. He testified that he has lived on the suit parcel since 1968 with all the other Plaintiffs. That they also do agriculture on the land, and the defendant has never made any attempt to move them out of the land. He adopted his witness statement as evidence in chief which was basically with the same content as the oral testimony.
11. In cross examination, he denied the contention of he (and the other plaintiffs) having moved from Tanzania in 2014. He stated, though, as old as he was, that he was issued with an identity card in 2017.
12. The Plaintiffs' then closed their case.
13. The defendant testified as DW1. She adopted her Replying Affidavit as her evidence in chief. She also adopted her documents as per the list of documents dated 26/03/2025. She produced the Certificate of death as DExh1, Green card for the suit parcel as DExh2, a certified copy of the Application for consent as DExh3, a certified copy of the Transfer of Land as DExh4, a copy of the consent as DExh5 and a certified copy of title deed as DExh6.
14. It was her testimony that the land was initially registered in the name of Samuel Chacha Mango and upon his demise, the same was registered in the names of his three widows, two of whom are deceased. She stated that she did not know the Plaintiffs and that she only knew of them after the case in 2014. She further testified that they forcefully entered the land in 2014 while armed, which she reported to the police. They started to live in the land in 2014.
15. In cross examination, she stated that the Plaintiffs came from Tanzania round 10 years ago (that is to say, at the time of giving her evidence) although she was not sure of the exact date. That they started residing on her land 10 years ago and that the police arrested them but after some time they returned.



16. The parties filed submissions on the issues.

Analysis & Determination

17. The issue that arises for determination is; Whether the Plaintiffs are the proprietors of the suit land by way of adverse possession.

18. In order for a claim of adverse possession to succeed there are specific conditions that must be fulfilled. The doctrine of adverse possession 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.”

19. The [Limitation of Actions Act](#) makes further provision for adverse possession at Section 13 that:

“(1) A right of action to recover land does not accrue unless the land is in the 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, where under sections 9, 10, 11 and 12 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 afresh 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), the land in reversion is taken to be adverse possession of the land.”

20. Under Section 38 of the Act, a party may approach the court for a declaration that the property devolved to it in accordance with the doctrine of adverse possession. Section 38(1) of the Act states 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, 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 a proprietor of the land.”

21. The Court of Appeal in the case of *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & Another* [2015] eKLR sought to define what constitutes adverse possession. The court stated as follows:-

“From all these provisions, what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner,



lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.”

22. In *Kisumu Civil Appeal No 110 of 2016 Richard Wefwafwa Songoi v Ben Munyifwa Songoi* (2020) eKLR the court emphasized for a person to succeed in a claim for adverse possession must, inter alia, show:

- “(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.”

23. The Court of Appeal in the case of *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR stated as follows:-

“At the expiration of the twelve-year period the proprietor’s title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land.

Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner’s permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner’s enjoyment of the soil for the purpose for which he intended to use it. See *Littledale v Liverpool College* (1900)1 Ch.19, 21.”

24. It follows that in order for the claim for adverse possession to succeed the plaintiff must demonstrate to the court that; the land is registered in the name of another person, that the applicant is in open possession of the land in an adverse manner, and for a period of twelve years.

25. The Plaintiffs herein claim acquisition of the suit property by virtue of the legal principle of *nec vi, nec clam, nec precario* which means not by force, nor stealth, nor the licence of the owner. In *Munyaka Kuna Company Limited -Vs- Bernado Vicezo De Masi* (The Administrator of the Estate of Domenico De Masi (Deceased) (2018) eKLR, the Court held:

“To establish adverse possession, a litigant must prove that he has both the factual possession of the land and the requisite intention to possess the land (*animus possidendi*). Secondly, one must prove that he has used the suit land without force, without secrecy, and without persuasion (*nec vi nec clam nec precario*), for the prescribed limitation period of twelve years. Third, he must demonstrate that the registered owner had knowledge (or the actual knowing) that the adverse possessor was in possession of the suit property. Fourth, the possession must be continuous; it must not be broken or interrupted.”



26. Also, in Kisumu Civil Appeal No 27 of 2013 Samuel Kihamba v Mary Mbaisi [2015] eKLR the court stated;

“Strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land”

27. In this suit, it is not in dispute that the suit property was registered in the name of the defendant upon the demise of her husband as evidenced by the Succession Certificate and Green Card that the Defendant produced in court. However, on the issue of open possession of the property, the Applicants failed to prove the same. This is because the Plaintiffs’ occupation had resulted in the inclusion of the police to remove them from the land. The entry was not peaceful. In fact, without going too much into the nature of their occupation, all the evidence shows that the alleged occupation began in 2014, which was the same year the summons was filed. This rhymes with the Defendant’s oral testimony which was to the effect that the plaintiff’s moved onto the land over 11 years from the time she testified in the year 2025, which places their period of occupation as 2014. It is worthy of note that the Defendant who at the time of testimony was 92 years old vividly recalled how the Plaintiffs moved in with violence at the time of occupation some time in 2013 or 2014 and displaced her. Simultaneously, they filed this claim. Their claim of occupation for more than twelve years before this claim was not proved. It follows that the entire claim fails on the ground of time of occupation.

28. I have considered the evidence tendered by the Defendant in her replying affidavit and in her testimony in court. It is my considered view that her evidence was cogent and sufficient to disprove the Plaintiff’s case. In the premises the summons is dismissed in its entirety. I therefore order as follows;

1. The Applicants Originating Summons dated 27/10/2014 is dismissed with costs to the Respondent.
2. The Applicants are hereby ordered to vacate the land known as LR. No. Bugumbe/mabera/211 within the next thirty days.
3. The Respondent shall have the costs of the suit.

29. Orders accordingly.

JUDGEMENT DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THIS 18TH DAY OF JUNE 2025

HON. DR. IUR FRED NYAGAKA,

JUDGE

In the presence of,

Ochwangi Adv. for the Plaintiffs.

Agure Adv. for the Defendant.

