



**Nyantika v Nyant & 2 others; Ogega & another (Plaintiffs to the Counterclaim);
Nyantika & 3 others (Defendant to the Counterclaim) (Environment & Land
Case 26 of 2018) [2025] KEELC 4579 (KLR) (17 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4579 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 26 OF 2018**

**M SILA, J
JUNE 17, 2025**

BETWEEN

SIMEON ONGONDI NYANTIKA APPLICANT

AND

ORECHI NYANT 1ST RESPONDENT

TERESA KEMUNTO OGEGA 2ND RESPONDENT

JOSEPHINE OMBATI ONTIRI 3RD RESPONDENT

AND

TEREA KEMUNTO OGEGA PLAINTIFF TO THE COUNTERCLAIM

JOSEPHINE OMBATI ONTIRI PLAINTIFF TO THE COUNTERCLAIM

AND

SIMEON ONGONDI NYANTIKA DEFENDANT TO THE COUNTERCLAIM

NYAKENYANYA NYANTIKA DEFENDANT TO THE COUNTERCLAIM

KENNEDY ZAKAYO DEFENDANT TO THE COUNTERCLAIM

WILLIAM ZAKAYO DEFENDANT TO THE COUNTERCLAIM

JUDGMENT

[Applicant seeking portions of two properties by way of adverse possession; applicant claiming that his possession is between the two properties and straddles parts of the two properties; 1st respondent, owner of one of the two properties deceased and the case against him abated; 2nd and 3rd respondents, joint proprietors of the second property filing counterclaim for eviction of the applicant and other



persons; applicant filing a defence claiming the land by way of trust; ingredients that one needs to prove in a case of adverse possession; no ground report by the applicant to demonstrate his possession of the property of the 2nd & 3rd respondents and nothing to support his contention on the acreage occupied or the manner of his possession; time that possession commenced not clear; court not persuaded that the applicant has proved the ingredients in a case of adverse possession; court not persuaded that there is any proof of a trust; applicant's suit dismissed; counterclaim allowed]

1. This suit was commenced through an originating summons that was filed on 31 August 2018. The applicant contends that he has acquired, through adverse possession, a portion measuring 8 acres from the titles Nyaribari Masaba/Bomobea/397 and 398 [hereinafter simply referred to as parcels No. 397 and 398]. He avers that the land parcel No. 397 belongs to the 1st respondent and the land parcel No. 398 belongs to the 2nd & 3rd respondents. In the Originating Summons, he has pleaded that he has been in occupation of the portion he claims for “over 30 years”, after acquiring the same from the original owner. He avers that the respondents want to take possession despite him being in occupation for over 40 years. He adds that he and his family have homes, permanent crops, trees, “and other appliances” on the suit land. In the supporting affidavit it is deposed that the respondents are his blood relatives and they share a common ancestry. He deposes that they all got their parcels of land from one Nyantika “over 50 years ago”. That by design the respondents got registered as proprietors of the land parcels No. 397 and 398. He claims that his share struts both parcels of land with clear marked boundaries. He deposes that he and his family have been in continuous, open and uninterrupted occupation of the “entire” of the suit land. He states that he has settled on the portion of the suit land which he has used for “over 40 years” and that on the ground there are distinct boundaries marking the existence of his parcel. He avers that his family has carried out considerable development on the portion of the suit land by planting trees, some of which are as old as 40 years, tea bushes, and homes for himself and sons.
2. I have seen nothing filed by the 1st respondent and it was later said that he died in 2019. No substitution was undertaken and any claim against him is now abated. It would mean that there is no suit to be tried in respect of the parcel No. 397.
3. The 2nd & 3rd respondents filed a defence and counterclaim. They denied that their title has been extinguished by way of adverse possession and denied that the applicant has been in possession for over 40 years. They pleaded that the applicant's claim got extinguished after the death of the original proprietor of the parcel No. 398 one Christopher Ogega Nyantika on 5 September 1998; he was husband and father in law of the 2nd & 3rd respondents. They pleaded that his claim became null and void when they applied for and obtained a confirmed grant of the estate of the late Ogega on 21 September 2017. In the counterclaim they sued the applicant and three other persons being Nyakenyanya Nyantika, Kennedy Zakayo and William Zakayo. They pleaded that around April 2016 the persons sued in the counterclaim trespassed into their land and started erecting structures. In the counterclaim they ask for an eviction order against the defendants in the counterclaim, a permanent injunction to restrain them from the land parcel No. 398, and costs.
4. The applicant filed a defence to the counterclaim. He pleaded that he is a brother of the late Christopher Ogega Nyantika and that he held the land parcel No. 398 in trust for him as it was ancestral land bequeathed to them by their late father. He pleaded that he has his portion of land clearly demarcated with homes and cash crops and that he has been in this portion for over 30 years. He pleaded that they have co-existed side by side for this period of time and that the counterclaim is a ruse to deny him ancestral land given to him by his late father.
5. In his evidence the applicant relied on his supporting affidavit and also gave oral evidence in court. He testified that he stays between the parcels No. 397 and 398 on land measuring 5 acres which land has



defined boundaries. He stated that he has been here since 1969 and this is where he has established his home. He averred that he was given the land by his late father. He stated that he has grown tea bushes, bananas and other crops on the land. He stated that the parcel No. 397 measures 5.0 Ha and the parcel No. 398 measures 6.0 Ha and that both parcels initially belonged to his late father. He described the deceased 1st respondent as his step brother and the 2nd respondent [Teresa] as his sister in law while the 3rd respondent is his niece. He testified that the family of the 1st respondent has no problem with him. He wished to have the respondents transfer 5 acres from the parcels No. 397 and 398 after a survey. He stated that in 2018 the 2nd & 3rd respondents brought a surveyor to the land who found out that the matter was a land claim and not a boundary dispute.

6. Cross-examined, he reiterated that he occupies 5 acres straddling the parcels No. 397 and 398 and that he has planted tea bushes. He acknowledged that this information is not in his pleadings. He denied that the 2nd & 3rd respondents have ever demanded that he vacates the land. He testified that their ancestral home is in Kegati and that is where his parents were buried. He denied that he has a large parcel of land at the ancestral home. He stated that his father died before obtaining a title deed and that some of his brothers got titles because they were old enough to follow up on the same. He denied being a trespasser asserting that the disputed land belonged to his late father.
7. PW – 2 was Eric Kebaso Nyantika. He stated that he did not know what issue the applicant has with the respondents as everyone has their land and that there are boundaries demarcating each person's land. He stated that they have lived this way for a very long time. He added that he was among those who subdivided the land into the three houses. He did not know whether the applicant got his title deed. He stated that the applicant has planted tea on his portion and has houses.
8. Cross-examined, he elaborated that the father of the applicant had 3 wives. He stated that the applicant's father and all his wives [including mother to the applicant] were buried in Kegati which is a different constituency from where the suit land is located. He added that their father had land in both Kegati and Nyaribari Masaba [where the suit land is located]. He did not know why the applicant did not get title. He nevertheless denied that he does not have title because he was not allocated the disputed land by his father and that he deserves land from his mother's share in Kegati.
9. With the above evidence the applicant closed his case.
10. DW – 1 was the 2nd respondent. She denied that the applicant has been on her land for 40 years and contended that he has only lived on the land for 7 or 8 years. She stated that he is occupying the land by force together with the other persons sued in the counterclaim. She elaborated that the other persons came to the land earlier and have been on it for about 30 years. She testified that the land was initially in the name of her late husband, Christopher Ogega, and they became registered as proprietors after filing succession.
11. Cross-examined, she affirmed that the applicant is a brother of the 1st respondent and are sons of Nyantika. She denied that her late husband was also a son of Nyantika. She stated that the applicant lives between her land and the 1st respondent's land and has built a house on her land. She denied that he planted tea. She stated that the tea was her's and that he took it by force though she could not recall when. She stated that it is after the death of her husband that the applicant came to the land. She denied that the applicant was given the land by his father.
12. DW – 2 was Josphine Kwamboka Ontiri the 3rd respondent. She stated that she was born in 1957 and knows the history of the land very well. She described Teresa as her aunt. She stated that they are not related to the applicant She testified that the applicant was born at Kegati and his brothers live there and that is where they have their land. She testified that the applicant's parents were buried at Kegati.



She stated that Nyakenyanya Nyantika [2nd defendant in the counterclaim] is brother of the applicant whereas the 2nd and 3rd defendants in the counterclaim [Kennedy Zakayo and William Zakayo] are brothers. She stated that they should vacate the land and go back where they came from. She denied that the applicant has been on the land for 40 years and stated that they have been on the land for about 10 years. She testified that she and Teresa are both widows and that the applicant and defendants in the counterclaim took over the land by force.

13. Cross-examined, she testified that she came to the land after being married in 1973. She did not find the applicant when she came to live on the land. Neither did she find the other defendants in the counterclaim. She stated that the tea was planted in 1980. She stated that she made a report to the Chief that the applicant was harvesting their tea and he advised them to take him to court. She insisted that the defendants in the counterclaim are in their land and not that of the 1st respondent. They live there with their families and have been here for over 10 years. Re-examined she stated that they have been on the land for 10 years.
14. With that evidence, the respondents closed their case.
15. I invited counsel to file submissions and I have taken note of the submissions filed by Mr. G.J.M Masese, learned counsel for the applicant, and Mr. Bigogo, learned counsel for the 2nd & 3rd respondents/counterclaimants.
16. The case of the applicant is one for adverse possession, though in the defence to counterclaim, he appears to also plead that the land parcel No. 398 is held in trust for him. The 2nd & 3rd respondents/counterclaimants want him and the other persons that they have sued in the counterclaim evicted and permanently restrained from the land.
17. The land parcel No. 398 is registered in the name of the 2nd & 3rd respondents and unless the applicant proves that he has a claim over this land, whether in trust or in adverse possession, I will have to enter judgment in favour of the 2nd & 3rd respondents/counterclaimants. I therefore opt to first make an assessment of the case of the applicant both in adverse possession and in trust.
18. For one to prove adverse possession, one needs to demonstrate occupation of land, nec vi, nec clam, nec precario, that is without force, without secrecy [i.e open possession] and without permission. Such possession needs to be for a continuous uninterrupted period of at least 12 years. Indeed, where such possession is established, the *Limitation of Actions Act*, at Section 17, prescribes that the title of the land holder shall stand extinguished.
19. In my opinion, to establish these ingredients, the claimant needs to prove the following :
 - I. When he came into possession.
 - II. How he came to be in possession.
 - III. How he has continued being in possession upon his entry.
 - IV. Demonstrate his actual possession through facts and evidence preferably backed by a ground report through a surveyor or such qualified person.
 - V. Where part of the land is being claimed, demonstrate the actual acreage of the land that he is in possession of, through facts and evidence preferably backed by a ground report from a surveyor or such qualified person.
20. Let me elaborate why these five ingredients are important.



21. The first point, i.e the time when a person came into possession is critical because it is from that time that time starts running. You see, you need a starting point when you can start counting the period of time, for you need to demonstrate that you have been on the land claimed for at least 12 years. Without a starting period, then you would have no basis of starting the 12 year countdown. The second point, i.e how a person came into possession is vital for purposes of demonstrating that the entry and possession thereof has been without permission of the registered proprietor. For example, one can demonstrate that he only found vacant land that was unoccupied and he opted to keep possession of it; or show that he came into possession after he purchased the land so that from the time of purchase he was no longer living on the land with the permission of the registered proprietor. He could also demonstrate that he may have come into possession with permission, but that permission terminated at a particular period, so that from that time onwards, his possession became adverse to that of the registered proprietor. The third point, i.e how the person has kept possession for the 12 years duration is important for that is aimed at demonstrating continuous, open, uninterrupted possession. For example, one can show that he has a home which he has lived in with his family peacefully and every person in the village identifies this as his home; or he can demonstrate that he has been cultivating a particular land and it is notoriously known as his farm. Or he planted trees which he can show have been on the land for over 12 years without anybody interfering with the same. The fourth point is a question of tangible evidence. You need to provide evidence of your possession. It is not enough to say 'I am in possession.' What proves that you are actually in possession of the land that you claim? Sometimes you may think that you are in possession of parcel A, but in reality, you are in possession of parcel B. That is where a surveyor's report comes in. This is especially so where parties are not in full agreement of the actual location of possession or the possession, or nature of it, is disputed. Now, a surveyor's report would even be more critical when only a part of the land is claimed, for this part being claimed needs to be fully demonstrated and proved. You cannot just say, 'I am in possession of two acres out of five' and hope that this is sufficient; it may not be, because no-one has verified this two acres and confirmed exactly where it is. A court has to be careful not to give away land which is not proved, for in doing so a court can actually give a claimant more land than he is in actual possession of. At the end of the day, we must remember that these ingredients that support a claim of adverse possession are questions of fact which must be proved to the required standards. One should not take it for granted that he can just come to court, orally say that he lives in a Plot 10, and has been there for 12 years and hope for a judgment in his favour. In most cases, this may not be sufficient to reach the threshold of a balance of probabilities, especially when the claim is contested and facts disputed.
22. I have already pointed out the various ingredients that an adverse possessor needs to prove. The first is the time of entry. In our case, I actually have no precise time of entry, or even a rough estimate of the time of entry, from where I can start counting down the 12 years. I cannot even tell for how long the applicant has actually been on the land for his pleadings and evidence are conflicted. In his Originating Summons, the applicant claimed to have been in occupation "for over 40 years." In his supporting affidavit, he deposed that he got the land from Nyantika "over 50 years ago." In his defence to the counterclaim, he pleaded that he has been on the marked portion for "over 30 years." In his evidence in court he mentioned that he took possession "in 1969." The inconsistency is apparent to see. What the applicant needed to do was to be precise on the day that he came to possession and maintain that precision throughout the case and even have it supported by other independent evidence. It is the only way that the court can be persuaded of the time of entry. As it is, the 2nd & 3rd respondents contend that the applicant only came into possession around about the year 2016. Thus, it was the onus of the applicant to prove when he came into possession, and given the disjointed pleadings and evidence, I am afraid that I have no date or period that I can say has been proved by the applicant as the date of entry into possession. The applicant did not even come with an extract of the register to cover a period



of 12 years. What I have is a search brought by the 2nd & 3rd respondents showing them as registered proprietors from 21 September 2017. So how does this court account for any period before that? The court needs to be satisfied that there is demonstration of a title that covers at least 12 years against which time could run.

23. Secondly, the applicant has not elaborated how he came into possession. Was he born here? Was he brought here by his father? Did they settle here at the same time with his brothers? Was he invited by his brothers? Did he have another home before he came to the disputed land? Did he enter the land forcefully after the death of the husband of the 2nd respondent? That is not clear. He claimed that he missed out on getting a title because his brothers were older but he doesn't proceed to say how old he was when titles were being issued. PW -2 claimed that he is the one who demarcated each person's land but he did not say when he did this and under what auspices he was doing so. From what I could gather, he was a cousin to the applicant, and I find it unusual that he would be the person demarcating land and not the father or uncle of these people.
24. Thirdly, the fact of continued possession is barely proven. The applicant simply stated that this is where he lives. So how does he live here. Does he have his wife or wives here; does he have his children here and if so how many? If so, have they developed the land, and how? He did mention that there are mature trees that he planted which are over 40 years old but this was merely word of mouth. No tangible evidence whatsoever of mature trees that he may have planted was presented. He also stated that he planted tea in 1975 but yet again no proof. If indeed he planted tea in 1975 he could easily have proved this by presenting tea harvesting records dating back to this period and covering the entire period up to the time of filing suit. None was presented. It will be remembered that the 2nd & 3rd respondents in fact disputed that it was the applicant who planted this tea. They asserted that it is them who planted this tea and the applicant took it over by force after her husband died and has been plucking it for about 7 years. To support his case of continued possession for over 12 years, these are issues that the applicant needed to prove and I find that he has not.
25. Fourthly, the applicant presented no surveyor's report to demonstrate his possession and also prove exactly what size of land he claims and where it is located. In the Originating Summons, the applicant claimed adverse possession for 8 acres out of the land parcels No. 397 and 398. He did not give any elaboration of how many acres he claims from the parcel No. 397 and how many acres he claims from the parcel No. 398. We have already seen that the claim for any land in respect of the parcel No. 397 must collapse for reason that the owner thereof, who is the 1st respondent, is now deceased and there has been no substitution. Without the applicant elaborating the acreage he claims from the parcel No. 398, and demonstrating this acreage through something tangible, say a surveyor's ground report, this court cannot even know what to give him out of the land parcel No. 398, assuming that he is entitled to part of it. He is of course in some sort of possession, otherwise there would be no counterclaim for his eviction, but for purposes of getting a decree in his favour, he must be precise on exactly what land he wants from the parcel No. 398. Even the acreage claimed by the applicant is not clear. In his pleadings, he claimed possession of 8 acres out of the land parcels No. 397 and 398. In his evidence, he testified that he is in possession of 5 acres straddling both parcels No. 397 and 398. So is his claim for 8 acres or 5 acres? The applicant needed to be clear on exactly what he claims. This is critical and has been subject to authority.



26. In the case of Joseph Macharia Mwangi v Jonah Kabiru [2008] eKLR, the applicant filed suit alleging to have acquired 3 acres out of 5.1 acres of the title. The court [Kasango J] was not persuaded that he had put forth sufficient evidence of what he was in occupation of. It was held as follows :

“It was essential in the plaintiff’s claim for him to state in the evidence the exact or definite and distinct land he was claiming out of the five acres of the suit property. Such identification is an integral part of proving a claim for adverse possession. Although in his originating summons plaintiff said he occupied 2 acres, in oral evidence he said that he did not know the exact acres he cultivated but he knew it was bigger than defendant’s. The plaintiff’s claim for that reason does fail.”

27. In the case of Titus Mutuku Kasuve v Mwaani Investments & 4 Others, Court of Appeal at Nairobi, Civil Appeal No. 25 of 2002 [2004] eKLR, the appellant had filed an originating summons claiming two portions of land measuring 40 acres and 20 acres respectively by way of adverse possession. His suit was dismissed. The Court of Appeal upheld the dismissal, the claim for 20 acres being premature, and the claim for 40 acres being unmaintainable, inter alia for reason that the appellant had not proved exclusive possession of “any definite and distinct land ascertained to be 40 acres.”

28. As I have explained above, it is critical for one to be precise on exactly what land he claims and from where. I am afraid that the applicant has not and for this and the other reasons that I have pointed out, his case for adverse possession has no merit and must be dismissed.

29. What of the claim for trust ? It would appear that the applicant’s contention is that he was given part of the land in dispute by his father. He asserts that his two brothers, who were registered as proprietors of the parcels No. 397 and No. 398m held a portion of it in trust for him. Now a couple of things would need to be proven to support this claim. One is exactly when his brothers got registered as proprietors, for he claimed that they were mature at the time and he was not. He never brought any evidence of when the land parcels No. 397 and No. 398 were first registered. Secondly, he never even said how old he was when the land was registered. If his case is that he was young by then, then he needed to demonstrate how old he was, which he failed to do.

30. I did not see any search or green card in name of either the deceased 1st respondent or the late husband of the 2nd respondent, who would comprise his brothers. I also note that the parcel No. 397 is 5 Ha, which is just about 12.5 acres, and the parcel No. 398 is 6 Ha, which is about 15 acres. So if the two brothers were holding for him the land in trust, exactly how much was being held in trust by the 1st respondent, and exactly how much was being held in trust by the late husband of the 2nd defendant ? That again is not clear. You cannot prove trust by making vague claims that people are holding title on your behalf without being precise about the nature and extent of such holding. You must bring evidence of good quality to prove the fact of trust. The Supreme Court weighed in on this in the case *Isack M’inanga Kiebia v Isaaya Theuri M’Lintari & Another* [2018]Eklr where a customary trust was claimed. The court held as follows :

“... Each case has to be determined on its own merits and quality of evidence. It is not every claim of a right to land that will qualify as a customary trust. In this regard, we agree with the High Court in *Kiarie v. Kinuthia*, that what is essential is the nature of the holding of the land and intention of the parties. If the said holding is for the benefit of other members of the family, then a customary trust would be presumed to have been created in favor of such other members, whether or not they are in possession or actual occupation of the land. Some of the elements that would qualify a claimant as a trustee are:



1. The land in question was before registration, family, clan or group land
2. The claimant belongs to such family, clan, or group
3. The relationship of the claimant to such family, clan or group is not so remote or tenuous as to make his/her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, clan or group.”

31. I have very little to prove the foregoing, save only for the insinuation that the original owners of the parcels No. 397 and No.398 were step-brothers of the applicant. One being a step-brother by itself is not sufficient to prove that the other brother is holding whatever land he has in trust.

32. I am therefore not persuaded that the applicant has made out any case of trust.

33. Having dismissed the claim of the applicant through adverse possession and through trust, I have no reason not to enter judgment for the 2nd & 3rd respondents as they seek in their counterclaim. The 2nd, 3rd and 4th defendants to the counterclaim filed nothing to oppose the counterclaim and the applicant’s case has failed. The 2nd and 3rd registered are registered proprietors of the suit land, and as registered proprietors, it is them who are vested with rights over the suit land to the exclusion of all others.

34. I therefore allow the counterclaim. I order the applicant and the 2nd, 3rd and 4th defendants in the counterclaim to give vacant possession to the 2nd & 3rd respondents for the land parcel No. 398, within the next 60 days. In default the 2nd & 3rd respondents are at liberty to apply for an order of eviction. On lapse of the 60 days given above, the applicant and the 2nd, 3rd and 4th defendants in the counterclaim are hereby permanently restrained from entering, utilising, being upon, or in any other way interfering with the quiet possession of the 2nd & 3rd respondents of the land parcel No. 398. The 2nd & 3rd respondents will have the costs of the suit in the Originating Summons against the applicant, and also the costs of the counterclaim jointly and/or severally against the applicant and the 2nd, 3rd & 4th defendants in the counterclaim.

35. Judgment accordingly.

DATED AND DELIVERED THIS 17 DAY OF JUNE 2025.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII.

Delivered in the presence of :

Mr. G.J.M Masese for the applicant

Mr. Bigogo for the 2nd & 3rd respondents

N/A for the 2nd, 3rd & 4th defendants in the counterclaim

