



Ngala (Suing on behalf and suing as Administrator of the Estate of Ngala Ziro Ngala) & another v Mombasa Parents Club t/a Nyali School Complex Mixed Boarding High School & another (Environmental and Land Originating Summons 119 of 2014) [2025] KEELC 4452 (KLR) (13 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4452 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 119 OF 2014**

FM NJOROGE, J

JUNE 13, 2025

BETWEEN

ALI SAFARI NGALA (SUING ON BEHALF AND SUING AS ADMINISTRATOR OF THE ESTATE OF NGALA ZIRO NGALA) 1ST PLAINTIFF

CHIVATSI NGALA ZIRO 2ND PLAINTIFF

AND

MOMBASA PARENTS CLUB T/A NYALI SCHOOL COMPLEX MIXED BOARDING HIGH SCHOOL 1ST DEFENDANT

KENGA KILUMO CHAI 2ND DEFENDANT

JUDGMENT

Originating Summons

1. By way of a Further Amended Originating Summons filed on 19/6/2019, the Plaintiffs herein sought a determination of the following questions: -
 1. Whether the subdivisions known as Kilifi/Vyambani/368 and Kilifi/Vyambani/373 derived from the parcel of land previously Kilifi/Vyambani/290 should be cancelled, revoked and reverted back to the original title number known as Kilifi/Vyambani/290;
 2. Whether the Plaintiffs/applicants have acquired the said property known as Kilifi/Vyambani/290 by reason of adverse possession against the Defendants/respondents herein;
 3. Whether the Plaintiffs/applicants should be registered as the proprietors of the land known as Kilifi/Vyambani/290 on the ground that on diverse dates prior to 1946 the Plaintiffs/



applicants have been openly and peacefully enjoying occupation for over twelve (12) years preceding the presentation of this summons;

4. Whether the Defendant/respondent should execute a transfer and all acts necessary to convey the said title to the Plaintiffs/applicants as the rightful proprietors and enable it to be registered as such and in default the Deputy Registrar be authorized to sign the relevant documents in behalf of the Defendants;
 5. Whether the Plaintiffs/applicants are entitled to costs of the suit.
2. It is pertinent to note that the Originating Summons was first filed on 25/6/2014 and amended severally, and in all those instances supported by an affidavit sworn by Ngala Ziro Ngala (now deceased), with the most recent sworn on 8/4/2016 and 20/3/2017. According to Ngala Ziro Ngala, his grandfather, one Bemuhache Ngala, entered the land that would later be identified as Kilifi/Vyambani/290 over 100 years ago when the same formed part of public land owned by the government; that sometime in the year 1989, the government then declared Vyambani area an Adjudication Section, when it was later established that the portion his family occupied was Plot No. 33. He stated that despite being in occupation thereof, Plot No. 33 was allocated to one Gideon Nguma Mwandege, necessitating the filing of Objection Proceedings No. 63/94-95 and 18/94-95 (exhibited in the OS as “NZN-2”). He added that, it would later happen that the said Gideon cancelled his allocation and on 2/10/1990, Plot No. 33 was allocated to one Mohamed Salim Bukia vide their own agreement. Subsequently, the latter subdivided the said plot into Kilifi/Vyambani/290 (the suit property) and Kilifi/Vyambani/291, which he sold to the 2nd Defendant and one Hassan Mohamed Hassan respectively and who were registered as proprietors.
3. The deponent further stated that sometime in the year 1992, the 2nd Defendant, who was also the then Councillor, called for a meeting through the local area chief, where he informed them of his proprietorship and acknowledged the presence of the Plaintiffs on Kilifi/Vyambani/290, by undertaking in an agreement (exhibited as NZN-5) not to interfere with their peaceful occupation. He added that they have all along been in open, peaceful and continuous occupation thereof and to demonstrate that, he exhibited photographs of their semi-permanent houses and trees as “NZN 6” and “NZN 7”. According to the deponent, the suit property was later subdivided into 6 portions being Kilifi/Vyambani/ 368, 369, 370, 371, 372 and 373, without their knowledge; that the Plaintiffs are now in occupation of plots no. Kilifi/Vyambani/ 368 and Kilifi/Vyambani/ 373 which are registered in the names of the 1st and 2nd Defendants respectively (with their title deeds exhibited as “NZN 8” and “NZN 9”). The deponent added that the 1st Defendant has continued to ignore the order of status quo granted by this court and has threatened to evict the Plaintiffs.

1st Defendant’s Replying Affidavit

4. The 1st Defendant filed a replying affidavit sworn on 28/9/2016 by John Kombo, said to be the school’s Principal. He stated that the 1st Defendant’s interest over Kilifi/Vyambani/368 was acquired through a purchase and transfer from the 2nd Defendant. He pointed out that the Plaintiff’s claim is res judicata having been determined by the then Land Adjudication Tribunal/Committee where a judgment in rem was issued. He further stated that when the 1st Defendant took possession, it immediately commenced fencing and development of a school when the Plaintiffs started the commotions calculated to extend their farming activities to the portion registered to the 1st Defendant. The 1st Defendant thus requested its advocates to have a meeting with the Plaintiffs’ advocates and other occupants thereon, where it was established that there are 3 other families in occupation of the



suit property; and it was agreed that the 2nd Defendant would allocate portions to the said occupants, outside the land occupied by the 1st Defendant.

5. The deponent asserted that as a result of this suit, the 1st Defendant continues to incur a loss of Kshs. 10,000,000 every month for being unable to proceed with construction. He counterclaimed for the following orders against the Plaintiffs: -
 - a. That the Plaintiffs' claim be dismissed with costs and for an order of vacant and quiet possession on Plot No. Kilifi/Vyambani/368 in favour of the 1st Defendant;
 - b. That damages at the rates of Kshs. 10,000,000/- per month be assessed against the Plaintiffs from the date of the suit;
 - c. Costs and interest of the suit.

2nd Defendant's Replying Affidavit

6. Similarly, the 2nd Defendant swore and filed a replying affidavit on 8/2/2016, stating that he purchased the suit property from Mohamed Salim Bokia sometime in the year 1988 for a consideration of Kshs. 35,000, and when the government declared that area an adjudication section, and with the consent of the said Mohamed Salim Bokia and his family/clan members, and upon hearing of the objections raised, he was allocated the suit property measuring approximately 4.88Ha and issued a title thereto in the year 2005 (which was exhibited as "KKC-2" in the affidavit). He added that, when he purchased the suit property, the Plaintiffs were in occupation of a small portion thereof but as ground tenants to the family of the vendor. He exhibited a copy of an affidavit sworn by the vendor's nephew, one Justus Chivatsi Nguwa, stating that, until 1992, the Plaintiffs would pay annual ground rent to the vendor's family.
7. According to the 2nd Defendant, the document exhibited as "NZN-4" by the Plaintiffs refers to deliberations of the meeting at the Chief's office held on 10/3/1992. He stated that the Plaintiffs had misinterpreted the intentions for which the document was signed, and that the actual grievance of the Plaintiffs at that time was that they were being forced to continue to pay ground rent despite the same having been sold. He thus allowed the Plaintiffs to continue occupying the respective portions in good faith and for the sake of peaceful co-existence; that sometime later in 2014, he subdivided the suit property into the aforementioned 6 portions, and transferred Kilifi/Vyambani/368 to the 1st Defendant herein, which he asserted, does not include the area occupied by the Plaintiffs. The 2nd Defendant added that as per a letter dated 28/6/2015 (exhibited as KKC-5) from the Kilifi land Adjudication and Settlement Officer, the Plaintiffs were allocated Kilifi/Vyambani/42, a portion said to be about 1 kilometre away from the suit property.

EVIDENCE

Plaintiff's Evidence

8. The Plaintiffs' case was built on the testimonies of 3 witnesses. Ngala Ziro Ngala (now deceased) testified as PW1, and he relied on his written statement and sworn affidavits already produced hereinabove. He told the court on cross-examination by Mr. Alwenya, 2nd Defendant's counsel, that he is a member of the Mzaka Clan and that the suit property was given to his grandfather by one Mzee Mwandege of Maangua Clan. He could not identify Mohamed Salim or his clan. His testimony was that he occupied a large portion of the original Plot No. 33, and was not aware that Mohamed Salim was awarded the suit property at the objection proceedings. He told the court that, at the meeting held before the Chief in the year 1992, the 2nd Defendant allowed him to use the land without any payment.



He added that during the adjudication process, he was not allocated any land within the Vyambani Section.

9. On further cross-examination by Mr. Mulwa, counsel for the 1st Defendant, PW1 told the court that he was given the suit property during the adjudication process, and that there were other families occupying the suit property. The witness further stated that he was never given a parcel number.
10. Ali Safari Ngala (PW2) testified that he is in occupation of the suit property, and specifically plot 368 and 373, and that he has lived thereon since he was born in 1971; that they have built 4 houses thereon, one of which is permanent. He added that they have dug a borehole and have a burial site where they have buried deceased members of his family. He told the court that the suit property was given to his grandfather by someone many years back, but that it was wrongly registered in the name of Gideon Nguma Mwandege, who later wrongfully chose to give the same to Mohamed Rukiya's clan; that the said Mohamed then sub-divided the original land into 10 portions amongst them the suit property herein (Kilifi/Vyambani/290). He stated that his father and grandfather were induced into signing a certain agreement at the Chief's office, by being made certain promises.
11. PW2 told the court in cross-examination by Ms. Ndeto, counsel for the 1st Defendant, that his house is built on Portion No 290 while the 1st Defendant's school occupies Portion No 291. On further cross-examination by Mr. Alwenya, he stated that the first allotment of the original Plot No 33 was to Gideon Mwandege, from the Mwangua Clan, and that his own clan, Mzaka, had no land in Vyambani; that the suit property was given to his family following the marriage of his father's aunt to Mzee Mwandege. He denied ever paying rent over the suit property. The witness added that Kilifi/Vyambani/42 was leased by his father for purposes of farming, and that his family now occupies plots 368 and 373.
12. Chivatsi Ngala Ziro (PW3) adopted his statement dated 27/10/2015 as part of his evidence-in-chief. He testified that the Plaintiffs have not been paying any ground rent to the said Mohamed, and that the 2nd Defendant never gave them permission to stay on the suit property.

Defendants' Evidence

13. The Defendants' case equally stood on the testimonies of three witnesses.
14. Kenga Kilumo Chai (DW1), the 2nd Defendant herein, adopted the statements in his replying affidavit of 8/2/2016 as part of his evidence-in-chief together with the annexures thereto, and urged the court to dismiss the Plaintiffs' case.
15. In cross-examination by Mr. Nyange, counsel for the Plaintiffs, he stated that he purchased the suit property in 1988 from Mohamed Salim, and that he was never part of the Objection proceedings before the tribunal. He testified that there were tenants on the suit property when he purchased the suit property.
16. John Kombo (DW2) relied on his affidavit, reproduced earlier in this judgment. He added on cross-examination that the 1st Defendant purchased two plots which he could not recall the numbers thereof. He confirmed that one of the plots was vacant, but the other was occupied by some few people.
17. George Msuko Nyambu (DW3) equally adopted his statement dated 8/3/2014 as his evidence-in-chief. He told the court that he used to live on the suit property together with the Plaintiffs, and when Mzee Mwandege died, his sons begun to collect rent from the occupants thereof, including his father and Ngala Ziro Ngala. He added that the suit property was later sold to the 2nd Defendant and subsequently subdivided and sold to the 1st Defendant on the agreement that the 2nd Defendant would relocate the occupants to an adjacent plot.



Submissions

Plaintiffs' Submissions

18. Mr. Kingsley of Kituo cha Sheria, the Plaintiffs' advocate, submitted that the 3 issues for determination are: - whether the Plaintiffs acquired the suit property by dint of adverse possession; whether the Plaintiffs should be registered as the proprietors of the suit property; and who shall bear the costs of this suit. He relied on the definition of adverse possession stipulated under Section 7 and 38 of the Limitation of Actions Act, and the principles as were set out in the case of *Tabitha Waitherero Kimani v Joshua Ng'ang'a* [2017] eKLR and *Isaac Maina Kamau v Rahab Wangare Gaciengo & another* [2014] eKLR.
19. Counsel submitted that the Plaintiffs' occupation has always been open, continuous, exclusive and notorious and that the 2nd Defendant was at all material times aware of their occupation. To him, the Plaintiffs had proven the basic limbs and principles of adverse possession, consequently proving their case on a balance of probabilities. Counsel submitted that the Defendants' titles were therefore subject to overriding interest by virtue of adverse possession as envisaged under Section 28 of the Land Registration Act. On the issue of costs, counsel urged the court to condemn the defendants to costs, and he relied on Section 27 of the Civil Procedure Act, and the case of *Beatrice Gicuku Mwaniki v Moses Nthiga Karuci & another* [2020] eKLR.

1st Defendant's Submissions

20. The 1st Defendant's issues were similar to the Plaintiffs'. Regarding the issue of whether the Plaintiffs have acquired the suit property by way of adverse possession, counsel argued that the Plaintiffs were mere licensees thereon having been allowed to utilize the suit property by the actual owner; that this issue was heard and determined in the adjudication proceedings where it was found that the Plaintiffs were licensees. Counsel urged the court to find that the claim for adverse possession has failed and that the Plaintiffs have no right to be registered as the proprietors of the suit property. To support his arguments, counsel relied on the cases of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi Civil Appeal No. 110 of 2016*, eKLR; *Wambugu v Njuguna* [1983] KLR 173; *Haro Yonda Juaje v Sadaka Dzengo Mbauro & another* [2014] KEHC 6665 KLR and *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another* [2015] KECA 728 KLR.

2nd Defendant's Submissions

21. In his submissions dated 2/4/2025, counsel for the 2nd Defendant submitted that the suit property falls under an adjudication scheme, and the same was first registered on 3/11/2005 to the 2nd Defendant; that the suit was filed on 25/6/2014, before the expiry of 12 years, hence it is premature and bad in law. To him, for purposes of adjudication, time in such cases would ordinarily run after the first registration, in this case on 3/11/2005. To support his arguments, counsel cited the case of *Thaitumu v Iguatha & 8 Others Civil Appeal No. 220 of 2019* [2024] KECA 1084 KLR and *Ongwen & another v Keya & another* [2003] KEELC 279 KLR.

Analysis and Determination

22. From the pleadings and the evidence adduced, this court frames the following questions as arising for determination: -
 - i. Whether the Plaintiffs have met the threshold for grant of orders of adverse possession;



- ii. Whether the 1st Defendant is entitled to damages as prayed;
 - iii. Who shall bear the costs of the suit.
23. The doctrine of adverse possession has been defined as a legal principle that allows a person to acquire valid ownership of land by possessing it for a certain period of time, in Kenya, 12 years, without the permission of the owner, and in a manner that is hostile, actual, open, continuous and exclusive. The doctrine is anchored on Section 7, 13 and 38 of the *Limitation of Actions Act*. Section 7 provides that:
- “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.”
24. Section 13 provides as follows:
- “(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of Limitation can run (which possession is this Act referred to as adverse possession), where under sections 9, 10, 11 and 12 of this Act 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 cease to be in adverse possession, the right of action is no longer taken to have accrued and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
 - (3) For the purpose of this section, receipt of rent under a lease by a person wrongfully claiming in accordance with section 12 (3) of this Act, the land in reversion is taken to be adverse possession of the land.”
25. The procedure for seeking relief on a claim based on adverse is provided for in Section 38 of the *Limitation of Actions Act* and Order 37 of the Civil Procedure Rules, 2010. Section 38 (1) provides as follows: -
- “(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, 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 proprietor of the land
 - (2) An order made under sub-section (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”
26. Order 37 Civil Procedure Rules provides as hereunder: -
- “(1) An Application under Section 38 of the *Limitation of Actions Act* shall be made by Originating Summons



(2) The summons shall be supported by an Affidavit to which a certified extract of the title to the land in question has been annexed.”

27. The Plaintiffs’ claim that they acquired title to the suit property by operation of the doctrine of adverse possession. It was therefore upon them to adduce evidence that convinces the court that on a balance of probabilities, it proves the claim. This is envisaged under Sections 107, 108 and 109 of the Evidence Act which read: -

“Section 107(1):

Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Section 108:

The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

Section 109:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided for by law that the proof of that fact shall lie on any particular person.”

28. In the present case, the plaintiffs’ burden was to adduce some credible evidence to prove on a balance of probabilities, that they acquired the prescriptive rights; that their possession of the suit property was as of right and in a manner inconsistent with the rights of the registered owner that is to say, that the occupation has been open, actual, continuous, uninterrupted, peaceful, exclusive and with the knowledge but without the consent or permission of the registered owner for the prescribed period of 12 years. I find guidance in the case of *Mtana Lewa –v- Kahindi Ngala Mwangandi* [2015] e KLR where the Court of Appeal stated thus: -

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or in action of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

29. The Plaintiffs’ evidence was that the suit property initially belonged to their forefathers and that they entered the suit property prior to 1946; that sometime in the year 1989, the area was declared a settlement section and adjudication process commenced. It was a common ground that at that time, the original land was identified as Plot No. 33 which was initially allocated to one Gideon Mwandege. Resultantly, objections were filed and heard, and the land would later be allocated to one Mohamed Salim Bukia. The findings of the objection proceedings are dated 15/5/2000 and 19/5/2000. In the former, Plot No 33 was to remain with Mohamed Salim Bukia. From the latter proceedings, though largely illegible, it is evident that the deceased Ngala Ziro Ngala participated as a witness therein. The finding was that Plot No 33 was to be shared equally between the said Mohamed Salim and 4 members of the Mwandege family.



30. The Plaintiffs further claim that they entered the suit property by virtue of marriage, that Ngala Ziro's aunt was married to Mzee Mwandege. It is also not lost on me the contradiction in the Plaintiff's evidence. For instance, PW1 first told the court that the suit property was given to his grandfather by one Mzee Mwandege, but later told the Court that he was allocated the land during adjudication, yet he had to be allowed by the 2nd Defendant to continue staying on the suit property in the year 1992 at the meeting that was held by the chief.
31. PW2's version was slightly different. He told the court that the suit property was given to his grandfather by 'someone' many years back, but that it was wrongly registered in the name of Gideon Nguma Mwandege. This version contradicts PW1's because if the Plaintiffs' claim that they entered the suit property by virtue of a marriage between Ngala's aunt and the patriarch of the Mwandege family, it is baffling for them to claim that the suit property was wrongly allocated to Gideon Mwandege, a member of the Mwandege family. And even if we are to go by PW2's version that the suit property was given to his grandfather by 'someone', that 'someone' was not disclosed. With such contradictions, I am not convinced that the Plaintiffs have proven their case on a balance of probabilities.
32. In any event, PW1 admitted in Court that the 2nd Defendant granted him and his family, permission to utilize the portion of the suit property they occupied. It appears that the Plaintiffs' occupation, while it was open, actual and continuous, and with the knowledge of the owner, it clearly was not entirely peaceful, and it was indeed with the consent and permission of the 2nd Defendant, who was then the registered owner.
33. In the foregoing, I conclude that the Plaintiffs have failed to establish that they have acquired interest of any part of the suit property by way of adverse possession.
34. In their Replying Affidavit, the 1st Defendant sought to be awarded damages of Kshs. 10,000,000/- per month for being unable to proceed with the construction on the suit property as a result of this suit. I decline to grant the same for the reason that nothing was presented before this court to ascertain or substantiate the same.
35. Under Section 27 of the *Civil Procedure Act*, costs of any action, cause or other matter or issue shall follow the event. In the circumstances of this case it is in the interest of justice that the defendants are awarded costs and I do so award them. For clarity the final orders I make in this suit are as follows:
 - a. The plaintiffs' Further Amended Originating Summons filed on 19/6/2019 lacks merit and it is hereby dismissed;
 - b. The 1st Defendant's claim for damages of Kshs. 10,000,000/- per month for being unable to proceed with the construction on the suit property as a result of this suit is disallowed;
 - c. The plaintiffs jointly and severally shall meet the defendants' costs of the suit.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 13TH DAY OF JUNE 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

