



**Kilonzo v Muka Mukuu Farmers Co-operative Society Limited & 2 others (Environment and Land Case E071 of 2022) [2025] KEELC 6238 (KLR) (24 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6238 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND CASE E071 OF 2022  
NA MATHEKA, J  
SEPTEMBER 24, 2025**

**BETWEEN**

**NICHOLAS MUTUA KILONZO ..... PLAINTIFF**

**AND**

**MUKA MUKUU FARMERS CO-OPERATIVE SOCIETY LIMITED .... 1<sup>ST</sup>  
DEFENDANT**

**DISTRICT LAND SURVEYOR MACHAKOS ..... 2<sup>ND</sup> DEFENDANT**

**DISTRICT LAND REGISTRAR MACHAKOS ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated 5<sup>th</sup> September 2022, the Plaintiff's father exchanged a plot he owned with Raphael Makau who was the original proprietor of Plot No. 5-148 through balloting with the 1<sup>st</sup> Defendant. Plot No. 5-148 was slightly larger than the plot the Plaintiff's father exchanged with Raphael Makau requiring him to add some amount to complete the transfer of the plot to the Plaintiff's father's name. The Plaintiff avers that the exchange of the properties between the Plaintiff's father and Mr. Makau was done privately without the involvement of the society. The Plaintiff's father did not have the money required as payment and sought the Plaintiff's help promising to contribute to the money the Plaintiff already had and would register Plot No. 5-148 under the Plaintiff's name. In 1994, the Plaintiff avers that the completed the payment prompting the 1<sup>st</sup> Defendant to issue the Plaintiff with a share certificate stating that Share No. 1933 and Plot No. 5-148 were under the Plaintiff's name. In 1996, the Plaintiff's father was compensated with Plot No. 5-312 when the 1<sup>st</sup> Respondent took over his Plot No. 5-147 for the construction of a dam vide a letter dated 12<sup>th</sup> July, 1996. The 1<sup>st</sup> Defendant requested the original owner of Plot No. 5-312, Mr. Musau Kata, to report to them to be issued with a new plot since he had not settled in Plot No. 5-312 and they wished to give the said plot to the Plaintiff's father in exchange for Plot No. 5-147.



2. Despite many attempts by the Plaintiff's father until his death in 2000, the 1<sup>st</sup> Defendant failed to show him where Plot No. 5-312 was located on the ground or the development map. The Plaintiff avers that he and his family lived on the property without any interference from anyone since 1987 upto 2008 when a lady by the name Priscilla claimed that the Plaintiff had encroached on her Plot No. 5-312. The 1<sup>st</sup> Defendant claimed and still claims that Plot No. 5-312 is located where the Plaintiff has erected his house in his Plot No. 5-148 despite Plot No. 5-312 not existing anywhere on the original development map that was used during the transfer of Plot No. 5-148 to the Plaintiff. The Plaintiff's father, after the transfer of Plot No. 5-148 to the Plaintiff, organized for a survey to be done and beacons were placed at the boundaries of Plot No. 5-148 indicating where the plot began and ended which reflected the same on the original development map. Since 2008, there have been several persons that have come forward claiming ownership of Plot No. 5-312, none of whom has ever been shown the location of the plot on the ground, including his father who was compensated the plot after his was acquired to construct a dam. The Plaintiff further avers that the 1<sup>st</sup> Defendant called them to their offices severally to determine the ownership of Plot No. 5-312 in addition to determining its location and the meetings concluded with all the parties involved agreeing that Plot No. 5-312 did not exist on the map. Despite reaching an agreement, the 1<sup>st</sup> Defendant continued to claim that the Plaintiff has encroached on Plot No. 5-312.
3. The Plaintiff prays for Judgment against the Defendant for:
  - a. A temporary order of injunction be issued against the 1<sup>st</sup> Respondent, their employees, workers, agents and/or whomsoever acting on their behalf or instruction jointly or severally restraining them from interfering with, transferring, disposing off, allocating, or subdividing Plot No. 5-148 by private sale or otherwise pending the hearing and determination of this suit.
  - b. A permanent order of injunction be issued against the 1<sup>st</sup> Respondent, restraining them, their agents, servants and/or employees or whomsoever acting on their behalf or instructions from entering, invading, moving into, trespassing upon and/or in any other manner whatsoever from interfering with the Applicant's ownership, use, occupation and/or possession of Plot No. 5-148.
  - c. Pending the hearing and determination of this suit, an order of injunction be issued against the Defendants compelling them to produce the allocation map used to allocate plots to their members and locate Plot No. 5-312 on the said map.
  - d. The 1<sup>st</sup> Respondent produces the findings of the arbitration hearing held with the Applicant and the people with an interest in Plot No. 5-312.
  - e. The Surveyor be ordered to resurvey Plot No. 5-148 as according to the allocation map and the plot record held by the Respondent.
  - f. The cost of this suit.
  - g. Any other axillary orders it may deem fit in the interest of justice.
4. The 1<sup>st</sup> Defendant contends that compensation of Plot No. 5-132 for Plot No. 5-147 subject to approval by the original owner namely Musau Kata who upon being requested to surrender the said plot he declined and the late Kilonzo Kyalo was subsequently allocated alternative land parcels which were shown to the Plaintiff's father. That Plot No. 5-148 is separate from Plot No. 132 with different owners and that the 1<sup>st</sup> Respondent has not in any way interfered and/or perpetuated any illegality with regard to the ownership and use of the suit.



5. The 1<sup>st</sup> Defendant avers that the Plaintiff only owns Plot No. 5-148 measuring approximately 4.947 acres which is separate and distinct but adjacent to Plot No. 5-132 measuring approximately 6.413 acres. The Defendant further aver that recently the Plaintiff started trespassing upon the Plot No. 5-132 alleging that the same was his, allegations that were later on established to be untrue.
6. The 1<sup>st</sup> Defendant further avers that despite numerous stakeholders establishing that it is indeed the Plaintiff who has trespassed and encroached upon Plot No. 5-132 the Plaintiff has continued with the said trespass and encroachment thus frustrating the owner of Plot No. 5-132 right to peaceful enjoyment of its land. The 1<sup>st</sup> Defendant avers that there was a valid notice to vacate Plot No. 5-132 issued upon the Plaintiff but the Plaintiff failed to honour the same. The 1<sup>st</sup> Defendant contends that the Plaintiff on the false pretence and allegations that Plot No. 5-132 does not exist has maintained his position to trespass upon Plot No. 5-132 and encroach the same. The 1<sup>st</sup> Defendants' claim is for a permanent injunctive order against the Plaintiff over Plot No 5-132 restraining the Plaintiff, his servants and agents, from entering on the said property, or from in any way interfering with the use and enjoyment of Plot No. 5-132 and an eviction order against the Plaintiff.
7. The 1<sup>st</sup> Defendants pray for Judgment against the Plaintiff for:
  - a. A declaration that the Plaintiff owns Plot No. 5-148 measuring approximately 4.947 acres while the Florence Mutisya owns Plot No. 5-132 measuring approximately 6.413 acres.
  - b. A permanent injunction order be issued against the Plaintiff restraining him either by himself or through his agents, servants, proxies, employees, relatives or any one acting on his behalf from entering, trespassing, encroaching or in any other way dealing with all that parcel of land known as Plot No. 5-132 measuring approximately 6.413 acres.
  - c. An order of eviction be issued directing the Plaintiff, his relatives, his agents, and or servants to vacate the parcel of land known as Plot No. 5-132 measuring approximately 6.413 acres.
  - d. Costs and interest of the suit.
8. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants aver that they were not party to the transaction or alleged transaction between the Directors and members of the 1<sup>st</sup> Defendant and only played a statutory role in registering interests as per the documents presented for registration and cannot be blamed.
9. PW1 testified that his father exchanged a plot he owned with Raphael Makau who was the original proprietor of Plot No. 5-148 through balloting with the 1<sup>st</sup> Defendant. Plot No. 5-148 was slightly larger than the plot the Plaintiff's father exchanged with Raphael Makau requiring him to add some amount to complete the transfer of the plot to the Plaintiff's father's name. that the 1<sup>st</sup> Defendant made adjustments to the allocation map without the reason, notice, knowledge and approval of the Plaintiff reducing the size of the Plaintiff's plot by more than half its original size. The 1<sup>st</sup> Defendant has attempted severally to have Plot No. 5-148 re-surveyed in the absence of the Plaintiff to support their fraudulent attempts to strip him of his plot. The 1<sup>st</sup> Defendant has and is constantly attempting to evict the Plaintiff from Plot No. 1-148 that he duly owns and has lived in undisturbed for more than 20 years without reason or any orders issued by the court of competent jurisdiction. That the 1<sup>st</sup> Defendant has refused to issue the Plaintiff with his Title Deed despite him being the proprietor of Plot No. 5-148. That several parties are claiming ownership of Plot No. 5-312 and none of the alleged owners of Plot No. 5-312 have ever been physically shown the location of the plot on the ground despite their several efforts throughout the years. That the exchange of Plot No. 5-148 with their neighbour, Mr. Makau was a private transaction not involving the 1<sup>st</sup> Defendant therefore their interference was unwarranted. PW1, the Plaintiff's did not produce any evidence to establish that the 1<sup>st</sup> Defendant made adjustments



to the allocation map without the reason, notice, knowledge and approval of the Plaintiff reducing the size of the Plaintiff's plot by more than half its original size.

10. Section 109 of the [Evidence Act](#) Cap 80 is clear that;

“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 by any law that the proof of that fact shall lie on any particular person.”

11. The well-known mantra “he who asserts must prove.” Was well pointed out by the Court of Appeal in Jennifer Nyambura Kamau vs Humphrey Mbaka Nandi (2013) eKLR as follows;

“We have considered the rival submissions on this point and state that Section 107 and 109 of the [Evidence Act](#) places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the [Evidence Act](#) provides that “whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the [Evidence Act](#) provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

12. In James Muigai Thungu vs County Government of Trans-Nzoia & 2 others (2022) eKLR it was held that;

“It is now settled law that whosoever asserts the existence of a legal right or liability is vested with the burden to prove it except in so far as the law may expressly exempt him or her. Section 107 of the [Evidence Act](#) Chapter 80 Laws of Kenya succinctly states:

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

Also, further, Section 108 of the Act states thus:

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

Again Section 109 of Act refers to the burden of proof of a particular fact. It states that:

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 by any law that the proof of that fact shall lie on any particular person.

13. The 1<sup>st</sup> Defendant does not dispute that the Plaintiff is the proprietor of Plot No. 5-148 despite not having a title. But maintains that the Plaintiff has encroached onto Plot 5 – 312 belonging to a third party. That there were intentions to compensate the Plaintiff's father with Plot 5 – 312 after part of his Plot No. 5-147 was used to contract a dam but this never materialized. The 1<sup>st</sup> Defendant has produced a map showing that all the two plots exist on the ground of which the Plaintiff owns Plot No. 5-148 measuring approximately 4.947 acres while Plot No. 5-132 is measuring approximately 6.413 acres.



The Plaintiff testified he has no prove of the acreage of Plot No. 5-148 but they had occupied the suit land for decades. That Plot No. 5-132 had a dispute and that his father was compensated with other plots which the brother took. It is in evidence that Kyalo Kilonzo was allocated four plots in the central farm, being plot numbers KYC 516, KYC 517, KYC 518 and KYC 519 in exchange for plot No 5-147. By a letter dated 25<sup>th</sup> January 2022 the 1<sup>st</sup> Defendant provided the history of the plots and informed the Plaintiff of the ownership of plot No 5-148, Plot 5- 312 and Plot 5-147. The Plaintiff cannot now turn around and say the plot No 5-148 which he occupies had no acreage.

14. The Plaintiff further submitted that his occupation of Plot No. 5-148 amounts to adverse possession as he has been in occupation since 1980. That his occupation had not been challenged and it had been continuous, open, exclusive for more than 12 years.
15. The doctrine of adverse possession in Kenya is founded under *Limitation of Actions Act*, CAP 22 Laws of Kenya. Section 7 of the said Act places a bar on actions to recover land after 12 years from the date on which the right accrued. Further section 13 of the same Act, provides that adverse possession is the exception to this limitation:
  - 1) A right of action to recover land does not 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 Section 9, 10, 11, and 12 a right of action to recover land accrues on a certain date and no person is in adverse 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 a fresh 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.”
16. On the other hand, Section 38 of the Act allows a claimant to apply to Court for orders of adverse possession and provides that;

“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.”
17. The doctrine of adverse possession was aptly defined in *Mtana Lewa vs Kahindi Ngala Mwangandi* (2015) eKLR where the Court of Appeal held that;

“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 person in assertion of his title for a certain period, in Kenya is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force of stealth not under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”



18. From the above definition, adverse possession can only arise out of non-permissive possession and uninterrupted. From the facts of this case, the Plaintiff gained entry into the land after purchase and their stay has not been peaceful and uninterrupted adverse possession cannot apply in the circumstances. I find that the Plaintiffs has failed to prove his case on a balance of probabilities and I dismiss it with costs. I find that the Defendants have proved their counter claim on a balance of probabilities and I grant the following orders;

1. A declaration that the Plaintiff owns Plot No. 5-148 measuring approximately 4.947 acres.
2. A permanent injunction order be issued against the Plaintiff restraining him either by himself or through his agents, servants, proxies, employees, relatives or any one acting on his behalf from entering, trespassing, encroaching or in any other way dealing with all that parcel of land known as Plot No. 5-132 measuring approximately 6.413 acres.
3. The Plaintiff, his relatives, his agents, and or servants are to vacate the parcel of land known as Plot No. 5-132 measuring approximately 6.413 acres within 90 days upon service of this order and in default eviction order to issue.
4. Plaintiff to the bear the costs of the counterclaim.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 24<sup>TH</sup> DAY OF SEPTEMBER 2025.**

**N.A. MATHEKA**

**JUDGE**

