



Kinyutu & another (Suing as the Legal Representative of the Estate of Kinyutu Mulandi Kivati alias Kinyitu Mulandi Kivati) v Wambua & 2 others (Environment and Land Case E02 of 2024) [2025] KEELC 6170 (KLR) (23 September 2025) (Judgment)

Neutral citation: [2025] KEELC 6170 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CASE E02 OF 2024
NA MATHEKA, J
SEPTEMBER 23, 2025**

BETWEEN

**DANIEL MUTAMBU KINYUTU 1ST PLAINTIFF
MARGARET MBENEKA KINYUTU 2ND PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KINYUTU
MULANDI KIVATI ALIAS KINYITU MULANDI KIVATI**

AND

**PETER MUTUNE WAMBUA 1ST DEFENDANT
JOHN MUSAU WAMBUA 2ND DEFENDANT
MBITHI WAMBUA 3RD DEFENDANT**

JUDGMENT

1. The Plaintiffs aver that at all material times relevant to this suit the Plaintiff's father was/is the owner of all that parcel of land known as Plot No. 345 Wamunyu/Kambiti within Machakos County. That the Plaintiffs and their families have been in quiet possession of the suit land since the demise of their father, where they have been carrying out farming and grazing activities, planting of trees on the same parcel of land. That the Defendants on diverse dates without any color of right, and/or consent from the Plaintiffs trespassed onto the suit property and started laying claim and asserting proprietary interest over the suit property and further constructing illegal permanent structures, carrying out acts of wanton destruction by cutting down trees as well as illegally cultivating and digging trenches. The Plaintiffs further aver that the Defendants have illegally constructed permanent and temporary structures on the suit property, which is not only prejudicial to the Plaintiff's interest but also denies the Plaintiff use of his property.



2. The Plaintiffs pray for Judgment against the Defendants jointly and severally for;
 - a. An order of permanent injunction restraining the Defendants, and/or their agents, relatives/ heirs and whosoever from entering, cutting trees, claiming ownership, disposing of and/or dealing and doing any activities whatsoever on the land parcel of land known as Plot No. 345 Wamunyu/Kambiti within Machakos County.
 - b. A declaration that the land parcel of land known as Plot No. 345 Wamunyu/Kambiti within Machakos County absolutely belongs to the Plaintiff's fathers' Estate.
 - c. An order of immediate eviction against the Defendants from all that the parcel of land known as Plot No. 345 Wamunyu/Kambiti within Machakos County and the Defendants do give vacant possession of the suit property to the Plaintiffs, in default, the Defendants be forcibly evicted from the suit property.
 - d. An order for immediate demolition of the illegal structures constructed by the Defendants on Plot No. 345 Wamunyu/Kambiti.
 - e. That the OCS Wamunyu Police Station be directed to observe compliance of the above orders.
 - f. Costs of this suit and interest thereon.
3. The Defendants state that the suit land namely Wamunyu/Kambiti/345 was initially part of plot number 138 which was the original land measuring approximately 37.4 hectares which was acquired by Matu Kivati - now deceased sometimes in the 1950s. That during adjudication the said land was given the original plot number 138. That it happened that the Matu Kivati - now deceased had a brother by the name Mulandi Kivati (deceased) who had settled in Kiteta - Mbooni but had passed on leaving his family there. That subsequently, Matu Kivati invited the entire family of his brother to come join him and settle at Wamunyu in plot number 138 so that it would be easier for him to take care of his brothers' family and assist in education. That the family of his brother comprised of his wife and his two sons namely Nzuuna Mulandi and Kinyutu Mulandi shifted and settled in plot number 138 with Matu Kivati. That on the part of Matu Kivati he had two sons namely Mwanza Matu and WAMBUA MATU. That further this being a big parcel of land people were settled in different parts of the land without any issue since 1998 and before. That later on when survey came, Matu Kivati who was blind directed that the land be subdivided into two equal portions, one for himself and one for Mulandi Kivati. The one for Mulandi Kivati was then to be shared between Nzuuna Mulandi and Kinyutu Mulandi who are the two sons of his brother.
4. That unknown to Matu Kivati, one Kinyutu Mulandi cunningly caused the land to be subdivided unequally and he gave himself 19.0 hectares, gave Nzuuna Mulandi 10.4 hectares but allocated him only 8.0 hectares. That the unequal subdivisions did not affect occupation because the Defendants continued to occupy some parts of the original land which had now been hived and registered as Wamunyu/Kambiti/345 since the year 1998 and have therefore acquired prescriptive rights over the said portions of the suit land by way of adverse possession. That the 1st Defendant has built his house on part of Wamunyu/Kambiti/345 while the 2nd and 3rd Defendants have been cultivating on portions of the said land since 1998. That the Defendants have openly, uninterrupted, without secrecy and without the Plaintiff's permission been using the specific portions of the suit land since 1998 upto today.
5. The Defendants pray for Judgment as against the Plaintiff for the following orders:-
 1. The Plaintiff's suit be dismissed with costs.



2. A declaration do issue that the Defendants have each acquired by prescription and by way of adverse possession of all that portion measuring approximately 1 acre contained and to be excised from all that land known as Wamunyu/Kambiti/345 registered in the name of Kinyutu Mulandi Kivati alias Kinyutu Mulandi Kivati - deceased.
3. An order do issue directing the Plaintiffs to execute all the necessary transfer forms, Land Control Board Consent forms and other relevant forms in order to effect the subdivision and transfer of a portion measuring 1 acre to each of the Defendants within 14 days of the Judgment and in default, the Deputy Registrar do execute the same.
4. The court do waive the requirement of Land Control Board consent in order to effect subdivision and transfer into the name of the Defendants.
5. Costs of this suit and the Counter-claim be awarded to the Defendants.
6. The court has considered the pleadings, evidence presented before it, submissions made as well as the authorities relied upon by the parties. The issues for determination are:
 - a. Who is the lawful proprietor of the land parcel known as Wamunyu/Kambiti/345?
 - b. What orders should this court issue?
7. The [Land Registration Act](#) is very clear on issues of ownership of land and Section 24(a) of the [Land Registration Act](#) provides as follows;

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”
8. Section 26 (1) of the [Land Registration Act](#) states as follows;

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

 - a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
9. The Plaintiffs led evidence that his father was/is the owner of all that parcel of land known as Plot No. 345 Wamunyu/Kambiti within Machakos County. The Plaintiffs produced the official search dated 17th July 2023 to prove this. The Plaintiffs aver that during the lifetime of the Plaintiff's father, the Defendant's father one Wambua Matu now deceased laid claim to the suit property after completion of the adjudication process at the Lands Tribunal, Yathui Division, the Provincial Tribunal, the Chief Magistrate's Court as well as the High Court but lost in all these avenues. Section 26 of the [Land Registration Act](#) which guarantees the concept of indefeasibility of title does not extend to any property that has been found to have been unlawfully acquired. The Court of Appeal in Attorney General vs



Torino Enterprises Limited (Civil Application 84 of 2012) (2022) KECA 78 (KLR) (4 February 2022) (Judgment) held that;

“We have considered the provisions of section 26 of the Land Registration Act (repealed) in light of the provisions of Article 40 of the Constitution which guarantees protection of right to property and it is our considered view that the concept of indefeasibility of title is subject to Article 40 (6) of the Constitution which states that: “The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.” Guided by the provisions of Article 40 (6) of the Constitution, we hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the suit land was unlawfully acquired. See Denis Noel Mukhulo & Another v. Elizabeth Murungari & Another [2018] eKLR.”

10. The Defendants testified that the suit land namely Wamunyu/Kambiti/345 was initially part of plot number 138 which was the original land measuring approximately 37.4 hectares which was acquired by Matu Kivati - now deceased sometimes in the 1950s. The Defendants stated that during adjudication, the Plaintiff's father one Kinyutu Mulandi a descendant cunningly caused the land to be subdivided unequally and he gave himself 19.0 hectares, gave Nzuuna Mulandi 10.4 hectares but allocated him only 8.0 hectares. That the unequal subdivisions did not affect occupation because the Defendants continued to occupy some parts of the original land which had now been hived and registered as Wamunyu/Kambiti/345 since the year 1998 and have therefore acquired prescriptive rights over the said portions of the suit land by way of adverse possession. 1st Defendant testified that he had build his home there. DW2 testified that he is not on the land and does not claim it. That the 3rd Defendant started cultivating the land from 1997. That there have been there for over 26 years. Be that as it may, it would appear that the Plaintiffs' and the Defendants' families have been having disputes over the said suit land from way back in 1996. The 1st and 3rd Defendants are said to be in occupation from 1997 and 1998. After the adjudication process the Plaintiffs have produced documentary evidence showing that there was a dispute at the Lands Tribunal, Yathui Division on the 8th April 2002, the Provincial Tribunal on the 17th December 2008, the Chief Magistrate's Court decree was on the 11th November 2009 as well as the High Court ruling was on 7th December 2010 dismissing the Defendants' claim over the suit land. I find that this matter had been determined by a court of competent jurisdiction and the decision still stand.
11. The averments that the 1st Defendant has built his house on part of Wamunyu/Kambiti/345 while the 2nd and 3rd Defendants have been cultivating on portions of the said land since 1998 openly, uninterrupted, without secrecy and without the Plaintiff's permission been using the specific portions of the suit land for a period of over 12 years has not been established by virtue of all the disputes mentioned. I find that the Defendants have failed to establish that they are the legitimate claim to the suit property and hence are not entitled to the same. Indeed their counter claim is res judicata.
12. 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."



13. 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.”

14. 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.

15. 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.

16. 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”.
17. 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.”
18. 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 nor 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.”
19. From the above definition, adverse possession can only arise out of non-permissive possession. Yet from the facts of this case, the Defendants gained entry into the land in 1998 and their stay has not been peaceful and uninterrupted. I find that the Defendants have failed to prove their counter claim on a balance of probabilities and I dismiss it with costs. I find that the Plaintiffs have proved their case on a balance of probabilities and I grant the following orders;
1. An order of permanent injunction restraining the Defendants, and/or their agents, relatives/ heirs and whosoever from entering, cutting trees, claiming ownership, disposing of and/or dealing and doing any activities whatsoever on the land parcel of land known as Plot No. 345 Wamunyu/Kambiti within Machakos County.
 2. A declaration that the land parcel of land known as Plot No. 345 Wamunyu/Kambiti within Machakos County absolutely belongs to the Plaintiff's fathers' Estate.
 3. The Defendants are to vacate from all that the parcel of land known as Plot No. 345 Wamunyu/ Kambiti within Machakos County and the Defendants do give vacant possession of the suit property to the Plaintiffs within 90 days from the date of service of this order and in default eviction order to issue.
 4. The Defendants to bear the costs of this suit.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 23RD DAY OF SEPTEMBER 2025.

N.A. MATHEKA

JUDGE

