



**Lomilio v Maina & another (Environment and Land Case E053 of 2022)
[2025] KEELC 6320 (KLR) (25 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6320 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE E053 OF 2022
AA OMOLLO, J
SEPTEMBER 25, 2025**

BETWEEN

MOURICE LORUKIA LOMILIO PLAINTIFF

AND

ANTHONY GAKURU MAINA 1ST DEFENDANT

STELLA WANGECI GACHANJA 2ND DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff filed an amended originating summons dated 19th August 2024, accompanied by supporting and supplementary affidavits sworn by Mourice Lorukia Lomilio on 5th October 2022, and 22nd February 2023 respectively. The Plaintiff is seeking the following orders;
 - i. A declaration that the Plaintiff is entitled to be registered forthwith as the owner of all that parcel of land known as Nairobi/Block149/1415 (formerly Title Number I.R.136365, L.R. 13862/1) which the Plaintiff has been in adverse possession of since 1990 to date for a period of more than Twelve (12) Years immediately preceding the presentation of this suit and on which he has lived openly and continuously as of right and in adverse possession without any interruption from the Defendant or his predecessors in the above title and that the Defendant's title to parcel Number Nairobi/Block 149/1415 (formerly Title Number I.R.136365, L.R. 13862/1) has been extinguished in favour of the Plaintiff under sections 37 and 38 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
 - ii. That an order do issue cancelling Defendants' Title and vesting all that parcel of land Title Number Nairobi/Block 149/1415 (formerly Title Number I.R.136365, L.R. 13862/1) in the Plaintiff and



10. That despite their mutual understanding that the Plaintiff would vacate the premises by the end of 2020, he later issued a demand for over Kshs 4.4 million in alleged unpaid dues and refused to leave the suit property. The Defendant disputes that the Plaintiff was employed by his father. That he had always been under his direct supervision, as shown in the salary payments and assistance, including educational support for the Plaintiff's children.
11. He added that following the Plaintiff's refusal to vacate the suit land, he filed Nairobi ELC Case No. E248 of 2020 seeking eviction orders. Although the Court issued conservatory orders, the Plaintiff defied them, continuing to occupy the property illegally and even breaking back after being evicted by police in June 2022. The Defendant alleges that the Plaintiff and his associates have now unlawfully taken over the main house, resulting in substantial property damage and threats to the Defendant's family, who are unable to access their own home.
12. The 1st Defendant avers that he believes the Plaintiff is being used by land cartels in a fraudulent scheme to take over his valuable property, now worth over Kshs 75 million. He also emphasised that the Plaintiff's actions have caused significant financial and emotional harm, including being forced to rent another home despite owning a completed house.

The Evidence rendered:

13. The Plaintiff testified as PW1 and the sole witness. He adopted his affidavits as his evidence in chief. He stated that it was Samuel Kareinye who put him on the suit property in 1990, and he put up a fence in the same year. The fence collapsed, and he put another one in the year 2000. He testified to the passing of Samuel in 2016 and his involvement in the arrangement of the deceased's burial in collaboration with the family. That he first met the defendant in the year 2000 when fencing the suit property, but he did not employ him.
14. During cross-examination, the Plaintiff confirmed that he had met the family of Samuel Kareinye during his employment tenure and knew the Defendant as his son, but did not know that the suit property was registered in the name of the Defendant's mother. He denied that he instructed the firm of Ndeda & Co. Advocates to write the letter dated 24/11/2020 and rejected the contents of the letter dated 22/2/2017 from the Office of the Ministry EAC.
15. The Plaintiff further denies receiving any money from the defendant and denies the signatures on the acknowledgements produced at pages 43-49 of the Defendant's bundle. He asserted that he was known by the neighbours and used to attend meetings as a "mwenyeji", not "mfanyi kazi." He was aware of the meeting scheduled for January 31, 2023.
16. The Defendant called two witnesses and gave his evidence as DW1. He adopted the contents of the replying affidavit dated 2/7/2024 and witness statement dated 18/9/2024 as his evidence in chief. The Defendant states that the original allottee of the suit property was his mother, who transferred the same to him.
17. He avers that his relationship with the Plaintiff was one of an employer-employee relationship, and the letter dated 22/2/2017 confirms the same. He asserts that he is the one who subdivided the land in the year 2009 and that he is the one who delivered construction materials used for building the house currently occupied by the plaintiff. It is evidence that the materials were delivered weekly and he also visited to check on the materials/work
18. Under cross-examination, DW1 insists that he sent the plaintiff money for daily labour, although he could not confirm how much the contractor paid the plaintiff. He affirmed that he had not produced in evidence the development permission for his construction on the suit property. He also stated that



he is the one who fenced the property in 2002 by engaging the plaintiff to do it. He denied that the property had a title before the year 2002.

19. Stella Wangeci Gachanja, who is a joint owner of the suit property, testified as DW2 in support of the defendant's case. She adopted her written statement dated 18/9/2024 as her evidence in chief.
20. She reiterated Dw1's evidence that the Plaintiff was the Defendant's employee as a caretaker. It is her evidence that when the defendant started to buy building materials in 2011, she supported him as a wife by buying flowers to beautify the garden, and she brought the flowers to the Plaintiff to plant and water. That she would go to the site every Saturday morning to ensure the work is done.
21. In cross-examination, DW2 confirmed the suit property is jointly registered in their names as of 14th April, 2021. She affirms not producing photographs showing her visiting the land. That in 2010, they had not started building, but they were in the space. She admitted the Plaintiff was on the land from 2002 and is still on the property to date. This marked the close of the oral testimonies by both sides.

Submissions:

22. The Plaintiff filed submissions dated 7th May 2025 in which he outlined each party's case. He submitted that he had demonstrated that he meets all the elements required for adverse possession as outlined in the case of Wambugu v Njuguna [1983] KLR 172 and reaffirmed in Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR.
23. He stated that he had resided on the suit property openly, notoriously, and without interruption since 1990, a period exceeding the 12-year statutory threshold under Section 7 of the Limitation of Actions Act. That his presence and activities on the suit property were visible and known to the community and the Defendant, who took no action to assert his ownership until long after the 12-year period had lapsed.
24. He submits that the Defendant's attempt at eviction in 2020 was both unlawful and too late to defeat the Plaintiff's accrued rights. He contends that his occupation of the suit property was not with the permission of the Defendant or his father, and that the claim that he was merely a caretaker is unsupported by any employment records or contracts.
25. That he acted independently, without wages or supervision, and lived on the suit property as his own. He cited the case of Gabriel Mbui v Mukindia Maranya [1993] eKLR and Mbira v Gachuhi (2002) 1 EALR 137, which emphasised that possession must be non-consensual and inconsistent with the registered owner's rights.
26. The Plaintiff submitted further that he exercised actual, physical control over a clearly identifiable parcel of land, meeting the criteria in Gatimu Kinguru v Muya Gathangi (1976) KLR 253 and that he built a home, participated in community activities, and contributed to estate security, demonstrating both animus possidendi (intention to possess) and exclusive control.
27. In support, the Plaintiff cited the case of James Maina Kinya v Gerald Kwendaka [2018] eKLR, where it was held that the development and maintenance of the land, alongside exclusion of the legal owner, establishes the necessary intention to possess adversely.
28. The Plaintiff stated that he is entitled to be registered as proprietor under Section 38(1) of the Limitation of Actions Act, having established all elements of adverse possession. That the Defendant's title has been extinguished by operation of law, as reiterated in Chevron (K) Ltd v Harrison Charo wa Shutu [2016] eKLR and the doctrine laid out in Kasuve v Mwaani Investments Ltd [2004] 1 KLR 184,



which holds that the adverse possessor must show exclusive possession for 12 years, with an intention to exclude even the title owner.

29. The Defendant filed submissions dated 30th July 2025, where he submits that the Plaintiff was at all material times an employee and caretaker on the suit property, having been hired in 2002 and paid monthly wages until his services were terminated in 2020. That this employment relationship is evidenced by signed payment acknowledgements, a letter from the Sub-County Children's Officer, and the Plaintiff's own demand letter for unpaid salary and terminal dues.
30. The Defendant stated that the Plaintiff's assertion that he worked for the late Samuel Maina Karienyé from 1990 is unsupported by any documentary or credible oral evidence, and is viewed as a strategic ploy to fabricate a more extended period of occupation to support a claim of adverse possession.
31. He also submitted that the Plaintiff's case has failed to meet the essential legal criteria for adverse possession as outlined in *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR, which requires the occupation to be non-consensual, continuous, open, and exclusive for at least 12 years. That since the Plaintiff occupied the land as an employee with the Defendants' consent, his presence cannot be considered adverse. The argument is reinforced by the authority of *Wambugu v Njuguna* (1983) KLR 173, which held that possession with permission does not satisfy the test for adverse possession.
32. Further, that the Defendants were in open and active possession of the property from 2002, including during the period of construction, 2011-2017, and at no time were they dispossessed of their land. The Defendant submitted that even if time were to be counted from 1990, the Plaintiff has not demonstrated that the late Samuel Maina Karienyé ever owned the property or that his occupation was adverse to a known legal titleholder.
33. That the legal title to the land belonged to Phyllis Wamuyu Maina, the 1st Defendant's mother and was transferred to the 1st Defendant in 2002, with formal subdivision creating the suit property in 2011. They cited the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, stating that mere occupation or presence on the land is insufficient. The Plaintiff must prove exclusive possession and the dispossession of the true owner.
34. That having failed to meet this standard, and with no 12-year uninterrupted adverse possession established, the Plaintiff's claim is without merit and ought to be dismissed in its entirety. The Plaintiff has also failed to demonstrate *animus possidendi*, the hostile intent to possess the land as his own and in support cited the case of *Samuel Kihamba v Mary Mbaisi* (2015) eKLR arguing that adverse possession must be "*nec vi, nec clam, nec precario*" (without force, secrecy, or permission).
35. It is the Defendant's submission that the Plaintiff only began asserting hostility in 2020 after being asked to vacate, and he demanded terminal dues through his lawyer, signifying a labour dispute rather than a claim of ownership. They added that throughout the years, the Plaintiff never undertook acts typical of an owner, such as fencing, building, or cultivating the land and instead complied with the Defendants' instructions.

Analysis and Determination:

36. The issue for determination in this matter is whether the Plaintiff's claim has met the threshold for adverse possession. The doctrine of land adverse possession is when a person obtains legal title to land by reason of actual, open and continuous occupation of it to the exclusion of the registered owner for a prescribed period which is 12 years in Kenya.
37. In the case cited of *Gabriel Mbui – Versus - Mukindia Maranya* [1993] eKLR, adverse possession was defined as the non-permissive physical control over land coupled with the intention of doing so, by



a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by the occupying stranger inconsistent with the true owner's enjoyment of land for purposes for which the owner intended to use it.

38. The doctrine is founded on the provisions of sections 7, 13 and 38 of the *Limitation of Actions Act*. Section 7 of Limitations of Actions 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.”

39. Further, provision of Section 13 of the *Limitation of Actions Act*, Cap. 22 provides:

“(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.

40. In his evidence, the Plaintiff stated that he was put in possession of the suit property by Samuel Maina Karienyedeceased. He went further to confirm that the said Karenyedeceased was the father of the 1st Defendant. Although it is the contention of the Plaintiff that he had no written contract with the deceased, he admits that he was retained him as a caretaker and a guard of the suit property around the year 1990.
41. The plaintiff said the deceased used to call him for assignments every now and then including in his Ol kalua home. It was his further evidence that on the demise of Mr Samuel Karenye in the year 2016, he participated in his burial arrangements showing that his relationship with the late Karenye did not sour. This begs the question of when the Plaintiff's occupation started to be adverse to that of the deceased who according to him was the registered owner of the suit land. Asked differently, if the deceased who is the father of the registered owner allowed him to stay on the suit property, when was the permission withdrawn?
42. The Plaintiff did not state the happening of the event which he considered in his view implied the permission from the deceased had been withdrawn. Assuming the permission was not withdrawn, the Plaintiff does not deny that when he was put in possession, there was only a temporary structure on the land. He does not also deny that a permanent house was built on this land, whether by the deceased, and or the 1st Defendant.
43. Nowhere in his evidence does the Plaintiff allude to be the one who built the permanent house which the Defendants assert is built by them. This makes me draw the inference that if the construction of this permanent house commenced in the year 2010-2011 before or after the demise of Samuel Karenyedeceased, then it means the Plaintiff was not in exclusive occupation as he contends.
44. Secondly, the construction of the said house corroborates the 1st Defendant's evidence that the Plaintiff was being paid for the services he rendered to them as per the payments acknowledged. It is my considered opinion that the denial of the signatures on the acknowledgement form was not sufficient when the Plaintiff does not explain his role on the suit property while the construction was on-going.



45. In the case *Mbira – Versus - Gachuhi* [2002] 1 EALR 137 the court stated as follows;

“.....a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption...”

46. In this scenario, the Plaintiff has affirmed that it was the father to the 1st Defendant who brought him to the suit property to guard it and also do work assigned to him by the owner. Thus, for all intents and purposes, his entry was permissive and consensual on the part of Karenje-deceased who he recognized as the father to the 1st Defendant. The claim against the Defendants can only accrue if the initial entry was without any permission. However, he gained entry with the knowledge and consent of the Defendants and or their deceased father.

47. The permissive entry was also discussed in the case of *Gabriel Mbui v Mukindia Maranya* (supra), a case cited by both parties, Justice R.C.N. Kuloba held as follows;

“.... Permissive occupation is inconsistent with adverse possession. The stranger must show how and when his possession ceased to be permissive and became adverse. The rule on permissive possession is that possession does not become adverse before the end of the period during which one is permitted to occupy the land. Accordingly, where a permissive possession or occupation accorded on the ground of charity or relationship was intended, limitation operates from the time when possession first became adverse; a licensee (whose possession is only permissive) cannot claim title only by possession was adverse to that of the licensor to his knowledge and with his acquiescence; where possession was consensual or contractual in its inception, it cannot be called “adverse”. Thus, when possession is given by the vendor in pursuance of a sale, it is by leave and licence of the vendor; it is not just taken. It does not matter how one describes the nature or the giving or taking of possession, but if the occupier did not go into possession against the will of the owner, and if the owner’s will accompanied the occupier’s possession, the owner thereby gives leave, permission, or consent to the occupier, and the occupier is not a trespasser or anything like that. The actual possessor must have usurped the land without leave. Possession by leave and licence of the owner is not adverse possession, for then the owner who has given leave has no cause of action during the time span of his permission or licence and the limitation period does not run against him until the licence has ended. If possession has commenced and continued in accordance with any contract, express or implied, between the parties in and out of possession, to which the possession may be referred as legal and proper, it cannot be presumed adverse. So also in cases between mortgagor and mortgagee. The ingredient of unpermitted occupation is usually expressed as “hostile” possession, to emphasize that “hostility” is the very marrow of adverse possession. And to say that possession is hostile means nothing more than that it is without permission of the one legally empowered to give possession. Any kind of permissive use, as by a tenant, licensee, contract purchaser in possession, or easement holder, is rightful and not hostile. Any time an adverse possessor and owner have discussed the adverse possession, permissive agreement may have occurred, and that destroys adverse possession (*Cobb v Lane* [1952] 1 All E R 1199; Denning, MR, in *Wallis’s Cayton Bay Holiday Camp Ltd v Shell-Mex and B P Ltd* [1974] 3 All ER 575 at p 580; *Chanan Singh, J, Jandu v Kirpal and another* (1975) EA 225 at pp 233, 234, 237;



Madan, J (as he then was), in *Gatimu Kinguru v Muya Gathangi*, 1[1976] Kenya L R 253, at pp 257, 258);”

48. In conclusion, in light of the evidence adduced, I am not persuaded that Plaintiff has proved a case to warrant his declaration as owner of the suit property by way of adverse possession. As result, I hold that the amended Originating Summons has no merit and is hereby dismissed with costs to the Defendants.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF SEPTEMBER, 2025.

A. OMOLLO

JUDGE

