



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO 85B OF 2006

**JUSTUS KILONZI MUTUNGI.....1ST
PLAINTIFF**

**JUSTUS KILONZI MUTUNGI (Suing as the administrator of the
estate of the late
KITILO MUTUNGI KAMINA -
Deceased.....2ND PLAINTIFF**

=VERSUS=

**MUTUA
KAMINA.....1ST
DEFENDANT**

**KIMONDIU KISYANGA.....2ND
DEFENDANT**

JUDGMENT

1. The Plaintiffs instituted this suit vide Plaint dated 6th September 2006 and amended on 25th March 2022, seeking the following orders: -

a. Eviction from Land Title No. NZAUI/KALAMBA/55.

b. Costs of this suit.

c. Interest on (a) & (b) above at court rates.

d. Any other and/or further relief this Honourable court deems fit and just to grant.

2. The Defendants filed a statement of defence and counterclaim dated 21st March 2019, denying the Plaintiffs' claim. They urged the court to dismiss the suit with costs. In their counterclaim, the Defendants sought the following orders:-

a. Cancellation of the certificate of title for land parcel NZAUI/KALAMBA/55 in the names of the Plaintiffs.

b. A permanent injunction restraining the Plaintiffs, either by themselves, their agents, and/or employees and/or servants from interfering with the Defendants' quiet possession and peaceful stay on their respective portions of land in NZAUI/KALAMBA/55 jointly measuring 4.2 acres.

c. A declaration that the Defendants are the lawful owners of 4.2 acres comprised in L.R. NZAUI/KALAMBA/55.

d. An order directing the Land Registrar Makueni to register the Defendants as the owners of 4.2 acres comprised in L.R. NZAUI/KALAMBA/55 and issue title documents to that effect.

e. ALTERNATIVELY

f. An order that the Defendants have acquired prescriptive rights of ownership in respect to 4.2

acres comprised in NZAUI/KALAMBA/55 by way of adverse possession for having been in quiet, open, and uninterrupted possession and occupation adverse to the title of the Plaintiff.

g. Costs of the suit.

3. The Plaintiffs filed an amended reply to the defence and defence to the counterclaim dated 28th March 2022.

THE PLAINTIFFS' CASE

4. The Plaintiffs called one witness in support of their case.
PW1 Justus Kilonzi Mutungi adopted his witness statements dated 20th February 2017 and 21st March 2022 as his evidence in chief. He also produced the documents in his list and supplementary list as PEX 1-9.
5. He testified that the suit property is jointly registered in his name and that of the 2nd Plaintiff. He further testified that the Defendants have trespassed on his land since 2006 and have constructed illegal structures thereon.
6. He further testified that on 5th March 1993, Mutiso Mulinge Nguli had gazetted the loss of his title deed vide Gazette Notice No. 856. He also stated that Mutiso Mulinge later transferred the suit property measuring 3.4 hectares to Harrison Mulei Mutungi, who was issued with a title on 6th September, 1994. He testified that pursuant to Succession Cause No. 2897 of 2002, he was issued a title for the suit property, along with the 2nd Plaintiff.

7. He told the court that the 2nd Defendant could not have witnessed the sale agreement allegedly signed in 1972 because he was born in 1982. He further testified that Nditi Mutiso was Mutiso Mulinge's wife, not Kamene, as alleged by the Defendants. He maintained that Lazarus K. Muoki was the Chief of Nzau Location, in December 2012, not Onesmus Kyuma Kimuli, as claimed. Additionally, he denied the claims that Stephen Mulwa Kianga was the clan secretary.
8. He went on to state that despite demand having been made, the Defendants have refused to vacate the suit property. Concluding his evidence, he urged the court to grant the orders sought in the Plaint.
9. On cross-examination by Mr Kiluva, he reiterated his evidence as above. . He stated that the suit land was transmitted to him after Harrison Mulei's death, to hold in trust for his children, who were minors at the time.

THE DEFENCE CASE

10. The Defendants called nine witnesses in support of their case. DW1 Kamene Mutiso adopted her witness statement dated 1st October 2021 as her evidence in chief. She told the court that the suit property belongs to her late husband, Mutiso Mulinge, who was issued with a title in 1982. She further testified that her late husband did not sell or transfer the suit property during his lifetime.
11. She went on to state that her late husband had permitted his

sister, Kalunde Kamina (the grandmother of the 1st Plaintiff and mother-in-law to the 2nd Plaintiff), to settle on the suit property. She maintained that the Plaintiffs have no right to evict the Defendants from the suit property. Concluding her evidence, she urged the court to cancel the Plaintiff's title and revert it to her late husband's name.

12. On cross-examination by Mr Kituku, she testified that Kisyanga Kamina had trespassed on her land.
13. DW2 David Kimondiu Kisyanga adopted his witness statement dated 1st October 2021 as his evidence in chief. He produced the documents in the list dated 4th October 2021 as DEX 1, 5, 7-11, and 13.
14. He testified that the 1st Plaintiff is his step-cousin, while the 2nd Plaintiff is his step-uncle's wife. He further testified that in 1972, his father, along with his brother Mutua Kamina, purchased the suit property from Mutiso Mulinge in exchange for two goats and five cows.
15. It was his testimony that he was born on the suit property in 1982 and currently resides on a parcel measuring 4.5 acres within the suit property. He further testified that they were occupying the portion measuring 4.5 acres, which is on the right side of Emali Wote road prior to the institution of this suit. He further testified that his late father, brother, and mother are buried on the suit property. He argued that the Plaintiffs would not have permitted them to take possession and construct permanent houses on the suit property since 1972 if they were

not the rightful owners of the suit land.

16. He further argued that the suit property was fraudulently registered in the name of Harrison Mulei, since the original proprietor continued to hold the title.
17. He told the court that the Plaintiff's family had been encroaching upon and damaging crops on their land since the initiation of this suit. He further stated that his late uncle, Mutua Kamina, had sold some portions of their land to other people, who were barred from developing the land until this matter is resolved.
18. On cross-examination, he confirmed that he did not have a sale agreement for the suit land, nor did he witness any such agreement.
19. DW3 Joel Mutua Kamina adopted his witness statement dated 1st October 2021 as his evidence in chief. He informed the court that the 1st Plaintiff was his nephew, while the 2nd Plaintiff was his stepbrother.
20. It was his testimony that he has been in possession of the suit property since 1972 to the present day. He further testified that there was no dispute over the portion he was occupying during his late stepbrother's lifetime.
21. He testified that he purchased the suit property along with his late brother Kisyanga Kamina from Mutiso Mulinge in 1972 for a consideration consisting of two goats and five cows, and took possession thereof. He further testified that the suit property is comprised of two portions which are separated by the Emali

Wote road and that they settled on the portion on the right side of the road. He further testified that they requested Mutiso Mulinge to formalize the agreement in writing, and he promised to come with elders once he had paid the dowry for his wife, but never returned.

22. He went on to state that sometime in 1979, he explained the transaction to the area chief, who then wrote a letter to Mutiso Mulinge. When the chief inquired from Mutiso why he had not returned to formalize the agreement, he explained that he was busy building a home and requested permission to travel to Taveta to bring his ID and the elders so that he could formalize the agreement in writing, but he never returned.
23. He told the court that although the sale agreement was not reduced into writing, they had settled on the suit property, and several of their relatives are buried on the portion belonging to him and his late brother. He asserted that the registration of the suit property in the name of Harrison Mulinge is irregular and should be cancelled.
24. On cross-examination, he reiterated that he purchased the suit property from Mutiso Mulinge and acknowledged that there was no sale agreement between them.
25. In re-examination, he reiterated that he had given Mutiso Mulinge five cows and two goats in consideration for the land in 1972.
26. DW4 Onesmus Kyuma Kimuli, a former Senior Chief of Nzau Location, adopted his witness statement dated 1st October

2021 as his evidence in chief. It was his testimony that, after summoning Kimondiou's family to clarify the title deed, they informed him that the suit land had been sold to Mutua and Kisyanga, and that the seller had left for Taveta. He stated that the original title was handed over to the purchasers for transfer.

27. He further testified that when Mutiso Mulinge's family initiated succession proceedings to transfer the property to Mutua and Kisyanga, they discovered through a search that the suit property had already been transferred to Harrison Mulei. He asserted that the transfer to Harrison Mulei was fraudulent because the original title was still in their possession.
28. On cross-examination, he testified that he assumed the position of chief in 1982 and subsequently transferred it to Lazarus K. Muoki in 1994. He also stated that he served as the Chief of Kalamba location, which was under his jurisdiction. He confirmed that the letter dated 25th April, 1998, indicates that the parties were disputing over the ownership of the suit property. He acknowledged having seen some sale agreements related to the suit property. He maintained that Mutiso Mulinge did not transfer the suit property to Harrison Mulei.
29. In re-examination, he stated that he served as the Chief of Nzau Location, from 1982 until December 2012. He further explained that Kalamba was under Nzau Location during that period and noted that Lazarus took over as the Chief of Kalamba Sub-Location. He asserted that he had the authority

to write the letter because the land was within Nzau Location at that time.

30. DW5 Justus Mbithi Nzioka adopted his witness statement dated 1st October 2021 as his evidence in chief. He also produced a letter dated 31st May 1999 as DEX 10.
31. It was his testimony that the suit property was initially registered in the name of his father-in-law, Mutitso Mulinge Nguli. He further testified that after his father-in-law's death, they discovered that the suit land was occupied and transferred to Harrison Mulei Mutungi. He insisted that his father-in-law did not sell the suit property. He testified that he handed the original title to the 2nd Defendant in 2016. He maintained that any transfer of the property other than to the beneficiaries of Mutitso Mulinge's estate would constitute a fraudulent act.
32. On cross-examination, he testified that the suit property is registered in the name of Harrison Mulinge and that his children live on the suit property. He further testified that he did not see any application or letter of consent related to the suit property. He maintained that his father-in-law was unaware that his land had been transferred. He also mentioned that his father-in-law's relatives are the ones living on the suit property. He asserted that his father-in-law told him that he did not sell the suit land.
33. DW6 Stephen Mulwa Kianga adopted his witness statement dated 1st October 2021 as his evidence in chief. He testified

that in 1979, he was the clan secretary when the suit property was subdivided between Mutungi and Mutua Kamina.

34. He further testified that in a clan meeting held on 14th April 1979, it was established that Mutua Mutungi and Mutungi Kamina had purchased the suit property. He explained, that Mutua Mutungi received the land on the left side of the road, while Mutua Kamina received the portion on the right side, and no one challenged the decision.
35. On cross-examination, he confirmed that the people present at the meeting did not sign or stamp the minutes.
36. DW7 Wilson Nzuvi Yumbya adopted his witness statement dated 1st October 2021 as his evidence in chief. He testified that the suit property was initially registered in the name of his deceased uncle, Mutiso Mulinge. He further testified that sometime in 1982, he accompanied his late uncle to Machakos, where he obtained the title for the suit property. He told the court that his late uncle told him that he had allowed the Defendants to live on his property in 1972, but did not inform him that he had sold the suit property.
37. On cross-examination, he testified that his deceased uncle did not sell his land to Mutua Kamina or Kimondiu Kisyanga.
38. In re-examination, he stated that the Plaintiff and the 2nd Defendant reside on the suit property.
39. DW8 Micheal Mutua Kamina Mumbu, a retired Ward Agricultural Officer, testified that he prepared a report on the damaged fruit trees dated 12th October 2021.

40. On cross-examination, he admitted that his report does not include the parcel number or the neighbor's name suspected of damaging the farm.
41. DW9 Catherine Makau, a Land Registrar based at Makueni Lands Registry, testified that the green card indicates that Mutiso Mulinge transferred the suit property to Harrison Mulei on 6th September 1994.
42. She further testified that the Succession Cause Number was not recorded on the green card as it should have been. Additionally, she stated that they could not trace the documents related to the transfer to Harrison Mutungi and the Plaintiff.
43. After the close of the hearing, parties agreed to file and exchange their written submissions.

THE PLAINTIFFS' SUBMISSIONS

44. The 1st Plaintiff filed his Submissions dated 23rd February 2025. On behalf of the Plaintiff, Counsel submitted that the Defendants did not present any evidence to challenge the title for the suit property. To buttress this argument, reliance was placed on the evidence on record. Concluding his submissions, Counsel urged the court to dismiss the counterclaim with costs.

THE DEFENDANT'S SUBMISSIONS

45. The Defendants filed their submissions dated 24th March 2025. On behalf of the Defendants, Counsel outlined the following issues for the court's determination:-

a. Whether or not the Plaintiffs sold the suit property, and whether or not the Defendants contributed?

b. Whether or not the Defendants have been in the suit land since 1970?

c. Whether the Defendants have satisfied the condition for the grant of adverse possession and whether they deserve the orders sought in the counterclaim?

d. Whether or not the Plaintiff obtained the title to the suit land through fraud and a corrupt scheme?

46. On the first issue, Counsel relied on DEX 6, 9, and 13 to submit that a land transaction occurred between Mutiso Mulinge and the Defendants or their parents. It was submitted that the dispute was settled by the clan in the presence of the 2nd Plaintiff, who signed the proceedings. Counsel further submitted that the Defendants sold parts of the suit property, and the Plaintiff did not object.
47. Regarding the second issue, Counsel submitted that the Defendants have occupied the suit property since 1970 and their relatives are buried there without any objection from the Plaintiffs.
48. Regarding the third issue, Counsel submitted that there was no dispute over the suit property until 2006, when the instant suit was filed. It was argued that the Defendants have occupied the suit land for the last 34 years. Counsel referred to the case of **Munyaka Kuna Company Ltd v Bernado Vicezo De Masi (2018) eKLR** to outline the conditions for a claim of adverse

possession. Further reliance was placed on the case of **Mtana Lewa v Kahindi Ngala Mwangandi (2015) eKLR**. Counsel submitted that the Defendants have demonstrated that they have been in open and continuous possession of the suit property since 1972, and that the Plaintiffs were aware of their presence on the land.

ANALYSIS AND DETERMINATION

49. Having considered the pleadings, the evidence on record, and the submissions by the parties, the following issues fall for determination:-

- a. *Whether the Plaintiffs are entitled to the orders sought in the Plaintiff?*
- b. *Whether the Defendants are entitled to the orders sought in the counterclaim?*

50. The dispute between the parties herein revolves around the ownership of the suit property. The Plaintiffs insist that they are the owners of the suit property. Accordingly, the Plaintiffs are seeking an order to evict the Defendants from the suit property on the grounds that they are trespassers. This court is thus called upon to determine whether the Defendants are indeed trespassers on the suit property.

51. **Black's Law Dictionary, 10th Edition**, defines trespass to land as follows;

“A person's unlawful entry on another's land

that is visibly enclosed.”

52. In the case of **Municipal Council of Eldoret vs Titus Gatitu Njau (2020) eKLR**, the Court of Appeal cited the case of **M’Mukanya Vs M’Mbijiwe (1984) KLR 761**, where the ingredients of the tort of trespass were stated as follows;

“Trespass is a violation of the right to possession, and a Plaintiff must prove that he has the right to immediate and exclusive possession of the land, which is different from ownership, see Thomson v Ward (1953) 2 QB 153.”

53. To establish trespass, the Plaintiffs must prove they were either lawfully in possession of the property or that they are the rightful owners and that the Defendants entered the property without any justifiable cause.

54. In the case of **Gitwany Investments Limited vs Tajmal Limited & 3 Others [2006] eKLR**, the Court held that title to land carries with it legal possession. This means that even if one does not have actual possession of the land, so long as they have a title to the land, it is deemed to be possession for the purposes of trespass.

55. In the matter at hand, the Plaintiffs produced the title for the suit property to support their claim. The Plaintiffs maintained that the Defendants have been trespassing on the suit land since January 2016. To prove trespass, the Plaintiffs relied on the particulars of trespass set out in paragraph 4 of the amended Plaint as follows:-

a) Building illegal structures on the said land.

b) Cultivation in the said land.

c) Grazing on the said land.

56. The Defendants, on the other hand, claimed ownership of 4.5 acres of the suit property, which they purchased from Mutiso Mulinge in 1972. They argued that although the sale agreement was not documented in writing, they had been in possession of 4.5 acres within the suit property and that their family members are buried there. They further contended that the suit property was fraudulently registered in the names of the Plaintiffs.

57. It is trite law that allegations of fraud must be specifically pleaded and proved. In the case of Vijay Morjaria vs Nansing Madhusingh Darbar & Others [2000] eKLR (Civil Appeal No 106 of 2000), Tunoi JA stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

58. Similarly, in the case of Kinyanjui Kamau vs George Kamau [2015] eKLR, the Court of Appeal held that:

“...it is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo Vs Ndolo [2008]1 KLR (G & F) 742 wherein the court stated that: “...we start by saying that it was the Respondent who was

alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in Criminal Cases...”

59. Although the standard of proof is not beyond reasonable doubt, it is higher than proof on a balance of probabilities. Section 107 (1) and (2) of the Evidence Act provides that:-

1) 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.

2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

60. It is clear from the above provisions that the burden of proof falls on the party alleging the existence of a fact which he wants the Court to believe.

61. To support their allegations of fraud, the Defendants relied on the particulars of fraud set out at paragraph 11 of their counterclaim as follows:-

a. Plaintiffs failure to inform the Defendants that they intended to obtain the title to land parcel Nzaui/Kalmba/55 while knowing that the Defendants had interest in the land.

b. Plaintiff's failure to give notice to the Defendants who were in possession of the property prior to the issuance of a new title.

c. Plaintiffs obtained the certificate of title illegally through a

corrupt scheme.

62. It is not in dispute that the Plaintiffs are the registered proprietors of the suit property. PW1 testified that Mutiso Mulinge sold the suit property to his brother, Harrison Mulinge, who was later issued with a title on 6th September 1994. He produced an application for consent by Mutiso Mulinge and a letter of consent dated 1st September 1994 to demonstrate how Harrison Mulinge acquired the suit property. He also produced a gazette notice dated 5th March 1993, which shows that Mutiso Mulinge had applied for a new title on the grounds that his title had been lost. Upon the demise of Harrison Mulinge, the Plaintiffs were registered as the owners pursuant to Succession Cause No. 2897 of 2002.
63. The Defendants stated they purchased the suit property in 1972 from Mutiso Mulinge. They also mentioned that attempts to formalize the agreement in writing were unsuccessful because Mutiso Mulinge did not record it.
64. They contended that the title has always been in the custody of the original owner, who never transferred his property. DW5 testified that he handed the title to the Defendants in 2016.
65. The Defendants produced the clan proceedings dated 15th April 1979 which show that there was a dispute between Mutua Kamina and Kamina Kalunde over a parcel of land. The clan held that Mutua Kamina and Mutungi Kamina had jointly purchased the land.

66. From the clan proceedings, it is not clear whether the suit property was the subject of the dispute before the clan. The proceedings do not indicate whether the land in dispute was purchased from Mutiso Mulinge.
67. It was their testimony that they acquired the land in 1972 and paid five cows and two goats to enable Mutiso Mulinge to pay bride price for his wife. DW1 testified that her husband did not sell his land, while DW7 denied the claims that Mutiso Mulinge sold the suit property to the Defendants. DW1 and DW5 contradicted the Defendants evidence when they stated that the deceased did not sell his land to the Defendants. If indeed the deceased had sold the land to the Defendants as claimed the Defendants claim should be against the estate of the deceased and not against the Plaintiffs.
68. Section 26 of the Land Registration Act provides that:-

The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.”

69. The Defendants did not present any evidence to show that the Plaintiffs acquired the land fraudulently or through corrupt means. The Defendants did not challenge the documents produced by the Plaintiff in support of their title.

70. In the case of **Munyu v Hiram Gathiha Maina Civil Appeal No. 239 of 2009**, where the court held that:-

“...the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal, and free from any encumbrances, including any and all legal interests which would not have been noted in the register.”

71. The gazette notice dated 5th March 1993 shows that Mutiso Mulinge had applied for a new title on the grounds that his title deed was lost. The letter of Consent dated 1st September 1994 shows that Mutiso Mulinge Nguli transferred the suit property to Harrison Mulei Mutungi in consideration for Kshs.12,000/=. DW5 testified that he handed the original title to the Defendants in 2016. He did not explain how he came to be in possession of the said title given that Mutiso Mulinge Nguli had petitioned for a new title on the grounds that he

had lost his title. Based on the foregoing, I find that the Plaintiffs have proved the root of their title. The Defendants have not proved their allegations of fraud on the part of the Plaintiffs. The Plaintiffs have demonstrated to the satisfaction of this court that they are the registered owners of the suit property.

72. The Plaintiffs contended that despite demand, the Defendants refused to vacate the suit property. The Defendants having confirmed that they have built their homes on the suit property, this court finds and holds that they are trespassers.

73. I therefore find that the Defendants are trespassers on the suit property.

74. The Defendants are seeking an order that they have acquired prescriptive rights of ownership in respect of 4.5 acres comprised in the suit property by way of adverse possession.

75. The doctrine of adverse possession is embodied in Section 7 of the Limitation of Actions Act, which stipulates that:

“An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him or, if it is first accrued to some person through whom he claims, to that person.”

76. Further, Section 13 of the Limitation of Actions Act provides that: -

A right of action to recover land does not accrue 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 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.

1. 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.

For the purposes 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.

77. Section 38 gives guidelines on the procedure to be followed by a person claiming adverse possession.

78. The ingredients of the doctrine of adverse possession were discussed in the case of **Wambugu Vs Njuguna (1983) KLR 173**, where the Court of Appeal held that:

“Adverse possession contemplates two concepts; Possession and discontinuance of possession. It further held that the proper way

of assessing proof of Adverse possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.”

79. The ingredients were recently discussed by the Court of Appeal in the case of Mtana Lewa Vs Kahindi Ngala Mwangandi (2005) eKLR where it was held that: -

“Adverse possession is essentially a situation where a person takes possession of land, 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 of 12 years. The process springs into action essentially by default or inaction by the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force nor stealth nor under 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”.

80. It is well settled that a party claiming adverse possession ought to prove that his possession was peaceful, open, and continuous. The possession should not have been obtained through force, in secrecy, or without the owner's authority or permission.

81. For the Defendants to be entitled to the suit property by way of

adverse possession, they must demonstrate that they have been in continuous, uninterrupted occupation for a period of not less than 12 years.

82. In **Mombasa Teachers Co-operative Savings and Credit Society Limited Vs Robert Muhambi Katana & 15 Others [2018] eKLR**, the Court of Appeal stated that: -

“Likewise, it is settled that a person seeking to acquire title to land by adverse possession must prove non-permissive or non-consensual, actual, open, notorious, exclusive and adverse use/occupation of the land in question for an interrupted period of 12 years as espoused in the Latin maxim nec vi nec clam nec precario.”

83. It is not in dispute that the Plaintiffs are the registered owner of the suit property. The Defendants contended that they have been in continuous and uninterrupted occupation of the suit property for more than 12 years.

84. They produced photographs showing their homes established on the suit property. DW7 testified that his uncle informed him that he allowed the Defendants to reside on his land after he left for Taveta in 1972. It is therefore clear that the Defendants entered the suit land with the consent of Mutiso Mulinge. Based on the foregoing, I find that the Defendants were residing on the suit with the consent of Mutiso Mulinge. Harrison Mulinge obtained his title on 6th October

1994.

85. Section 37 of the Limitation of Actions Act provides that adverse possession can only apply where the land is registered. In my view, adverse possession can only run against the title of a registered proprietor. In the case of **Titus Kigoro Munyi Vs Peter Mburu Kimani (2015) eKLR**, the Court of Appeal held that the limitation period for purposes of adverse possession starts running after the registration of the land in the name of the Plaintiff. In the matter at hand, the time can be computed from 6th September 1994, when Harrison Mulinge was issued with a title for the suit property. The instant suit was filed in 2006.

86. Based on the foregoing, I find that the Defendants have not met the criteria required for adverse possession. In the end, I find that the Plaintiffs have proved their case on a balance of probabilities as required. I also find that the Defendants have not proved their counter claim as required by the law and the same is hereby dismissed.

87. In the end, I enter judgment for the Plaintiff against the Defendants in the following terms:-

- i) The Defendants are hereby ordered to vacate the land Title No. Nzui/Kalamba/55 within 180 days from the date of this judgment.**
- ii) Each party to bear its own costs. R/A**

.....

HON. T. MURIGI

JUDGE

**JUDGMENT DATED, SIGNED AND DELIVERED VIA
MICROSOFT TEAMS THIS 30TH DAY OF SEPTEMBER, 2025.**

IN THE PRESENCE OF:-

B. Kituku for the Plaintiffs

Kiluva for the Defendants

ORIGINAL