



**Mwangi v Ndatho (Environmental and Land Originating Summons E004 of 2024)
[2025] KEELC 6302 (KLR) (Environment and Land) (25 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6302 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA
ENVIRONMENT AND LAND
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E004 OF 2024**

MC OUNDO, J

SEPTEMBER 25, 2025

**IN THE MATTER OF TITLE NO. NAIVASHA/OLJORAI PHASE II/16610 AND NAIVASHA/
OLJORAI PHASE II/16609 EACH MEASURING APPROXIMATELY 0.86 HECTARES.**

AND

**IN THE MATTER OF SECTION 17 & 38 OF THE LIMITATION OF ACTIOS ACT AND
IN THE MATTER OF THE REGISTERED LANDS ACT CAP. 300 LAWS OF KENYA.**

BETWEEN

SIMON KIBAKI MWANGI PLAINTIFF

AND

ANN WANJIRU NDATHO DEFENDANT

JUDGMENT

1. Vide an Originating Summons dated 5th March, 2024 brought pursuant to the provisions of Section 37 of the *Limitation of Actions Act* Cap 282 of the Laws of Kenya, Sections 1A and 1B, Section 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya and Order 37 Rule 1, 6 & 7 of the Civil Procedure Rules and all enabling provision of the law pursuant to Order 8 Rule 1 & 2 of the Civil Procedure Rules the Plaintiff herein sought for the following orders:
 - i. A declaration that the title for the said Ann Wanjiru Ndatho in parcel of land referred to as Naivasha/OlJORAI Phase II/16610 and Naivasha/OlJORAI Phase II/16609 each measuring approximately 0.86 Hectares had been extinguished by the Plaintiff's adverse possession thereof for a period of more than 12 years in terms of Sections 17 and 38 of the *Limitation of Actions Act*.



- ii. A declaration that the Plaintiff has acquired the ownership interest in land parcel Naivasha/Oljorai Phase II/16610 and Naivasha/Oljorai Phase II/16609 each measuring approximately 0.86 Hectares by his adverse possession thereof for a period of more than 12 years.
 - iii. An order do issue requiring and directing the Land Registrar Naivasha to register the Plaintiff Simon Kibaki Mwangi as the owner of parcel of land Naivasha/Oljorai Phase II/16610 and Naivasha/Oljorai Phase II/16609 each measuring approximately 0.86 Hectares in place of Ann Wanjiru Ndatho and in place of any other person succeeding the Defendant.
 - iv. That the Respondent Ann Wanjiru Ndatho whether by herself or through their employees, servants, agents or otherwise however be restrained by an order of permanent injunction from entering upon, evicting, cultivating, grazing, occupying, transferring, alienating, disposing, tilling, leasing or in any way interfering with the Applicant/Plaintiff's occupation and quiet possession of parcel Nos. Naivasha/Oljorai Phase II/16610 and Naivasha/Oljorai Phase II/16609 each measuring approximately 0.86 Hectares.
 - v. The costs of the Originating Summons be provided for.
2. The Originating Summons is premised on the grounds stated on the face of it as well as on the Supporting Affidavit of equal date sworn by Simon Kibaki Mwangi, the Plaintiff herein.
 3. In her Replying Affidavit dated 24th July, 2024 the Defendant opposed the Originating Summons for the reason that false and misleading statements had been deponed therein and that the same was fatally defective and an abuse of the court process. She explained that pursuant to her application to the Settlement Fund Trustees (SFT) to be allocated a plot, vide a letter dated 29th August 2011, the Government through SFT had offered her plot No. 253 measuring approximately 1.20 Ha at Oljorai Phase II Settlement Scheme in Naivasha District.
 4. That she paid the requisite purchase price and the sums to effect transfer, wherein on 13th December 2012, the SFT had discharged the charge on the said property and issued her with a Title Deed for Naivasha/Oljorai Phase II/253 in her name on 8th October 2013.
 5. She clarified that at the time of being allocated the said property, the Plaintiff had not been in occupation of the same. That immediately after acquiring the aforementioned property, she had embarked on planting trees and farming and had since been enjoying peaceful and uninterrupted possession to the exclusion of the Plaintiff herein.
 6. That subsequently she subdivided the said property giving rise to Title Nos. Naivasha/Oljorai Phase II/16609 and 16610 (the suit land herein). That she has since disposed off Title No. Naivasha/Oljorai Phase II/16609 vide an Agreement dated 13th March 2023.
 7. That the Plaintiff was her neighbour who had also applied for and had been allocated plot No. 257 measuring approximately 1.20 Ha at Oljorai Settlement Scheme in Naivasha District wherein he had processed the title and was owning the same to date. That subsequently, it was evidently clear that the Plaintiff's sole intention was to deprive her of her parcels of land by laying false and unfounded allegations to the effect that he had been in continuous and quiet occupation of the suit land since the year 2003 up to date.
 8. That in any event, she had acquired the suit land in the year 2013 thus if indeed the Plaintiff had been cultivating the suit land, he had not acquired adverse possession of the same in the year 2013 by virtue of having entered thereon in the year 2003.



9. She asserted that the photographs annexed to the Plaintiff's Application as exhibit "SKM4" had not been taken from the suit property and that the same had been attached to misguide the court.
10. That whereas it was now trite law that a person claiming Adverse Possession must establish that the possession was open and undisturbed for the requisite period of 12 years, that she had acquired the suit property and title issued in her name on 8th October 2013 hence the period started running from that date which added up to 10 years thus falling short of the mandatory threshold for a claim of Adverse possession.
11. That in any event, there had been numerous antagonisms between the Plaintiff, herself and her workers culminating into his arrest and arraignment in court at Nakuru Law Courts where he had been charged with the offence of Forceful Detainer contrary to the provisions of Section 91 of the Penal Code and therefore did not enjoy peaceful, quiet and uninterrupted possession.
12. She thus sought for the Applicant's originating Summons to be dismissed with costs to the Defendant/ Respondents.
13. The Originating Summons then proceeded for hearing by way of viva voce evidence wherein the Plaintiff, Simon Kibaki Mwangi, testified that the suit land No. 253 had belonged to his brother called James Maina Mwangi (deceased) having been given the same by the late president Moi, as squatters in the year 1994. That upon the demise of his brother James in the year 2003, he had taken over the land because his deceased brother's children were young.
14. That in the year 2009, the Agricultural Development Corporation (ADC) had given the land to Settlement Fund Trustees (SFT) after which they had a public participation and chose a committee which had then identified the occupiers of the land and registered them. That the sub-chief was also a member of the said committee wherein the District Officer would sign the registry at the end of the exercise. That disputes were adjudicated upon on site wherein where there were no disputes, persons would occupy the land as it was.
15. That his brother's name had been recorded in the register jointly with Jennifer Metiny over the suit land measuring 6 acres. That when he noticed the second name, he had raised a claim which was adjudicated upon by the District Officer (DO) although they did not go to the ground and neither was the said Jennifer present, but that it had been the area Chief called Charles Koiba who had been advocating for Jennifer to go on the land.
16. That they took possession of the land wherein in the year 2013, the Defendant had brought the District Commissioner (DC) on the land wherein their dispute had been resolved and a decision had been made that the land belonged to Jennifer and himself. He then asked that the land be registered in the name his sister Margaret Nyambura Wamboi because he had his own land. That nonetheless, they waited for Settlement Office to send their allotment letters to no avail.
17. He explained that before they undertook the arbitration the Defendant had planted 7 trees on the land in the year 2012. That thereafter, in the year 2022, the Defendant requested that they talk but they did not reach any agreement because she denied having been given the land by either the District Commissioner or the District Officer after he informed her that they had concluded the arbitration. He admitted that in the same year 2022, the Defendant had him arrested.
18. His evidence was that the suit land was originally No. 253 but became No. Naivasha /Oljorai Phase II/16610 and 16609 after the sub-division in the year 2022 after the Defendant had brought surveyors on the land. That whereas he had been on the land from the year 2004 he only came to know that the Defendant in the year 2011.



19. He adopted his Supporting Affidavit as his evidence in chief before confirming that the criminal case had been brought against him in the year 2023 as per the charge sheet produced as Pf exh 1, but that he had not been summoned to defend the suit. That he had filed photographs taken in the year 2024 in relation to the land.
20. His evidence was that after the case had been finalized, the officer who had arrested him ploughed on one side of the land while the Defendant on the other side of the land. That he had planted Avocado, trees, cassava and sugar cane on the suit land and had been in occupation of the land for all those years save for the year 2023. He also adopted his witness statement dated 10th July 2023 as his evidence in chief and proceeded to testify that upon being advised by the Settlement office, he had placed a caution on Plot No. 253 in October 2022, which caution he produced as Pf exh 2. He also produced the photographs as Pf exh 3 (a - c)
21. That when the Defendant took possession of the land in the year 2023, he had planted maize therein which maize the Defendants had cut in September and since then, the Defendant had been ploughing on the land wherein she had uprooted and destroyed his cassava, sugar cane, avocado and had cut down the trees that he had planted. That he would like for peace to prevail as going on the land had brought a lot of hostility.
22. That although the Defendant has a title deed, there had been a register which had the names of the people on the land and that he did not know how the Defendant had processed the title deed. He confirmed that the settlement office had a register which they should produce so that they could know how the Defendant had obtained the land.
23. In cross-examination, and in reference to Paragraph 1 of the Originating Summons dated 5th March 2024, he confirmed that he had sued one Simeon Kibaki Mwangi. He also confirmed that whereas was in court on behalf of his late brother James Maina Mwangi who was the owner of land No. 253, he had not conducted Succession proceedings to his brother's estate and therefore did not have letters of Administration Ad- litem on behalf of his brother's estate. He also confirmed that his late brother was older than him and that he had a wife called Beatrice Wambui Maina and four children who were now adults and alive.
24. That Beatrice Wambui passed away around the year 2009, while his brother had died in the year 2003. He also confirmed that by the time he was filing the instant case against the Defendant, his brother's children were adults. He explained that he filed the instant suit so that the court could address the destruction on the land and that the Defendant should pay for destruction of Avocados, sugar cane and cassavas and that the land parcel No. 253 be given to his brother's children for peace to reign.
25. He also confirmed that in relation to the prayer sought in the Originating Summons, he had stayed on the suit land for more than 12 years and that he was in court on behalf of his brother and his brother's children although he had not indicated as such in Originating summons. He also confirmed that he had his own land which was No. 257 for which he had secured a title deed.
26. He was then referred to annexures 16 to 19 of the Defendant's documents being letter of offer dated 16th August 2010 addressed to the Plaintiff, Letter of acceptance by the Plaintiff, Official receipt dated 25th May 2012 for Ksh. 3,000/= and the Plaintiff's copy of ID respectively as well as the documents No.1 - 4, herein marked as DMF1-4, wherein he confirmed that the said documents related to plot No. 257 which was his land. When he was referred to a letter of occupation dated 25th May 2012, he testified that he neither accepted plot No. 257 nor was he in possession of the said letter of acceptance. He however confirmed that he had paid a sum of Kshs. 3,000/= as per an official receipt dated 25th May, 2012.



27. He confirmed that Plot No. 253 had been registered to members and that Margaret Nyambura, who is his sister was alive although she was not a complainant in the instant case. He further confirmed that he was married with children and that they lived on Plot No. 257 and that whereas he had been cultivating and ploughing on the suit land, he had never lived on the same despite having built therein.
28. When paragraph 6 of the Supporting Affidavit was read to him, he stated that the contents therein were not true. In regard to the contents in Paragraph 7 of the Supporting Affidavit, he maintained that he had not lived on the suit land. That whilst the Defendant had showed him the title to the suit land in the year 2022, there had been no disturbance on the land from the year 2004 when he started ploughing, up to the year 2022.
29. He confirmed that the Defendant had been brought into the suit land for the first time in the year 2011 by the settlement office and the area chief. That it was in the said year 2011 that he had been asked why he was ploughing somebody else's land, meaning that the land was Defendant's. He admitted that from the year 2004 up to 2011 was about 7 years. He testified that from the year 2011 up to the year 2022 they had no dispute with the Defendant. That whereas he admitted that he had been arrested because of the suit land in the year 2022, it was in the said year that a dispute over the suit land had arisen.
30. He explained that he had been in occupation of the suit land for 12 peaceful years and although he had not been living on the land, he had been cultivating the same. That Pf exh 3 (a - e), had been taken on the land although he had nothing to prove the same.
31. In re-examination, he confirmed that whereas the Defendant was Ann Wanjiru Ndetso, he had come to court on behalf of James Maina. He also confirmed that one of the deceased brother's children was born in the year 1994. In reference to DMFI (1 – 4), he maintained that he did not accept the land. He confirmed that from the year 2003 – 2023, he had been ploughing peacefully on the suit land until the year 2024 and that even after the Defendant had emerged, he did not stop ploughing the suit land. He confirmed that he had been arrested in the year 2022.
32. Lepekai Legilip, adopted his witness statement dated 2nd September 2024 as his evidence in chief and testified as PW2 to the effect that he had met the the Plaintiff was his friend, on the land in the year 1993 wherein they had become neighbors from the year 1994 to date.
33. In cross-examination, he confirmed that his parcel of land was No. 1184 but he did not know the Number of the Plaintiff's parcel of land although the same was opposite his land. He explained that there were about 2 parcels of land between his land and the Plaintiff's land for which they did not boarder each other. He confirmed that he had a title deed to his land having been registered as its proprietor on 5th July 2018 although he had taken occupation of the same in the year 1993.
34. He explained that their titles had been issued at different times but that he did not know whether the Plaintiff had obtained his title since everybody hid their title. He also confirmed that the Plaintiff had two parcels of land in the area, his own land and the suit land which was his brother's land and which land he did not know if it had a title.
35. That he had just recently seen some ladies on the suit land although he had not witnessed any unrest on the land since the year 1993 although there had been a time when the Plaintiff had been charged in court. That he was just helping the Plaintiff because whereas the suit land had belonged to his brother, he had inherited the same and was now in charge. He testified that the house on the suit land was built in the year 1994. That whilst the Plaintiff was in court because somebody had cultivated on the land, he did not know who had done so.



36. In re-examination he confirmed that the suit land belonged to the Plaintiff's deceased brother who had died in the year 1995.
- That Plaintiff thus closed his case.
37. The Defence opened her case with the testimony of DW1, Ann Wanjiru Ndatho, the Defendant herein who adopted her witness statement dated 24th September 2024 and relied on her filed documents as her evidence before proceeding to testify that she was allotted the suit land in the year 2011 vide a letter of offer dated 29th August 2011 for Plot No. Oljorai 253, which letter of offer she produced as Df exh 5. That they had been given a period of about 1 year to pay for the land wherein she had paid a sum of Ksh. 7,750/= on the 20th September 2011 vide the receipt she produced as Df exh 6. She explained that after making the said payment, they had returned the receipt to the lands officer wherein she had been asked to pay stamp duty of Kshs. 500/= to the Kenya Commercial Bank (KCB) which stamp duty she had paid on 12th June 2013.
38. That she had made another payment of Kshs. 2,800/= in the office on 12th June 2013 for purposes of processing the title. That she had been issued with a receipt to that effect, herein produced as Df exh 7 (a - b). That she had taken the receipts to the land Registry wherein they had been told to await the issuance of the title and thereafter, she was given a discharge of charge on 13th December 2012 which discharge of charge she produced as Df exh 8. That before then, she had accepted the offer of allotment for land parcel No. 253 Oljorai Phase II on 20th September 2011 which acceptance letter she produced as Df exh 9.
39. That it was after a year, that is, on 8th October 2013 that she had received her title deed for land parcel No. Naivasha/Oljorai Phase II/253 which title she produced as Pf exh 10. That thereafter, she had conducted a search at the lands office and confirmed that the land was hers as evidenced by a certificate of official search dated 26th May, 2023 which she produced as Df exh 11.
40. That because she wanted to sub-divide the land for her personal reasons, she had obtained a letter of consent dated 16th March 2023 by the Land Control Board Gilgil which she produced as Df exh 12. That thereafter she had proceeded to carry out the mutation process wherein the surveyor had gone onto the suit land. That she subdivided the land into two resulting in land parcel numbers 16609 and 16610 registered in her name, as per the titles dated 12th July 2023 and the searched therein, herein produced as Df exh 13 (a-b) and 14 (a-b) respectively.
41. That she had subsequently sold parcel No. 16609 to her cousin through a sale agreement of 13th March 2023, but had not transferred the land because the said cousin resides in the United States of America (USA).
42. That whereas the Plaintiff had stated that he had lived on the land for more than 12 years, she did not know how because it had been when she had gone to work in Sudan for 2 years that the Plaintiff had entered onto the land in the year 2018 and started cultivating it and therefore, she would not know how the Plaintiff alleged to have entered into the suit land in the year 2003. That she and other people had been given and shown their respective parcels of land in the year 2011 in the presence of the lands officer, the Surveyor, area chief and Assistant chief.
43. That she saw the Plaintiff for the first time in the year 2011 tilling on another parcel of land. She admitted that when she was being shown her parcel of land, there had been maize growing therein but after the land had been measured, she had asked the Assistant Chief to plough the land. That the Plaintiff had been summoned and informed that the land belonged to somebody and that he



- should not plough the land again after harvesting the maize he had planted thereon. That she had then requested a boy called Nicholas Langat to look after the land.
44. She explained that after the Plaintiff had harvested his maize, he did not till the land again until the year 2018 when Langat had told her that the Plaintiff had brought a tractor on the land to plough the same. She confirmed that she had only planted trees therein and dug a pit latrine for her workers wherein there had been no homestead on the suit land that to date.
 45. She testified that they had been having disputes with the Plaintiff over the suit land from the year 2018 wherein they had gone to the Chief when he started claiming the suit land. That she had even called him on phone to ask him to leave the land. That they had also been before the District Commissioner whom the Plaintiff had claimed had given him the land, wherein the District Commissioner denied those allegations. That when an enquiry was made at the Settlement office, the Plaintiff had been summoned but he did not appear.
 46. She confirmed that that Plaintiff had filed the instant suit on 5th March 2024 and that it was not true that he had been in peaceful possession of the suit land because they had been having a dispute form the year 2018 to date. She thus referred to a ruling dated 27th February 2024 in Nakuru Criminal Case No. E0852/2023 Republic vs Simeon Kibaki Mwangi and testified that they had even gone for mediation before the Officer Commanding Station (OCS) wherein the Plaintiff had been warned not to go to the land but he did not comply. That subsequently, she had called the OCS who had arrested the Plaintiff for being stubborn wherein he had been charged with forceful detainer of her piece of land.
 47. That the Plaintiff had even been called by the Surveyor and shown the map. That whereas she had attended the said Criminal Case, they were able to prove that the Plaintiff did not disturb her hence he had been acquitted. She produced the ruling in the said criminal case as Df exh 16.
 48. She testified that she had found out that the Plaintiff had land No. 257 in Morop in the same scheme, which land was far from her land.
 49. That in his letter of acceptance, he had stated that he had land and had paid Kshs. 3,000/=. She produced the Plaintiff's letter of offer dated 16th August 2010 and the acceptance letter as Df exh 1 and 2 respectively as well as the official receipt dated 25th May 2012 for Ksh. 3,000/= and a copy of the Plaintiff's Identity Card as Df exh 3 and 4 respectively.
 50. She sought for the dismissal of the Plaintiff's suit with costs stating that he had disturbed her for long thus making her make many trips from Nairobi to Naivasha. That the Plaintiff had informed her that court orders were nothing before proceeding to uproot her beacons, fence and trees. That every time there was an activity on her land, the Plaintiff would go round the same on a motorbike, taking photographs.
 51. When she was referred to Pf exh 3 (a-e), she testified that she did not know if the photographs were in relation to her land because many people were cultivating land around that area. That the trees could not have been present from the year 2003 because she had planted and was still planting trees on her land.
 52. When she was cross-examined by the Plaintiff, because his Counsel was absent, she confirmed that the first time she went to her land, she did not find the Plaintiff inside her land. She also confirmed that he had been asked to remove his maize. She admitted no having seen him being questioned by the officers from the settlement and that she had never been summoned by chief. She maintained that she had planted trees around her land and that it was true that they had been having a dispute with the Plaintiff.



53. That whereas they had gone to the OCS three times, she did not remember what the Plaintiff had told the OCS when he was called. That she had planted trees and kept on checking the land. She confirmed that the dispute had started in the year 2018 when the Plaintiff had brought the tractor onto the suit land.
54. She confirmed that pursuant to obtaining title, she became proprietor of the suit land. That on her visit to the land, she found that the Plaintiff had planted maize thereon and on the neighbor's land. That the Plaintiff got into the suit land after she got her title and upon contacting him by phone, he told her that the suit land belonged to his brother.
55. She clarified that once the settlement took over, the committee had been dissolved. She confirmed that the "Ardhi Sasa" had also showed that the land was hers and that they had been there during public participation wherein she had checked the register.
56. In re-examination she confirmed that there had been no documents produced by the Plaintiff to confirm that the suit land was either his or his brother's. That indeed the Plaintiff had even failed to produce the documents with regards to the case in Nakuru. That she had only come to know of the existence of the Plaintiff's brother after the Plaintiff had been arrested.
57. Upon the closure of the Defendant's case, parties were directed to file their submissions wherein only the Defendant complied and filed her submissions dated 18th June, 2025. She first summarized the factual background of the matter before founding her submissions in the decided case of *Mtana Lewa v Kahindi Ngala Mwangadi* [2015] eKLR to submit that Adverse Possession could only arise out of non-permissive possession wherein in order to succeed in a claim for adverse possession, one must prove and demonstrate that he had occupied the land openly without force, secrecy and permission of the land owner with intention to have the land. Thereafter, she framed her issues for determination as follows:
- i. Whether the Plaintiff has locus standi to institute the suit.
 - ii. On what date did the Plaintiff come into possession?
 - iii. What was the nature of his possession?
 - iv. Whether the fact of his possession was known to the other party.
 - v. For how long his possession had continued.
 - vi. Was the possession open and undisturbed for the requisite 12 years?
58. On the first issue for determination as to whether the Plaintiff has locus standi to institute the suit, she submitted that whereas the Plaintiff had confirmed that the suit property belonged to his deceased brother, he did not produce any document to show that he had the capacity to institute the suit on behalf of his deceased brother. She placed reliance on the decided case of *Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased)* [2016] KEHC 4186 (KLR) to submit that a party lacking the proper locus standi could not initiate or maintain a suit on behalf of a deceased's estate and that a suit brought without the necessary locus standi was considered incompetent.
59. On the second issue for determination as to what date the Plaintiff had come into possession of the suit property, she reiterated the contents of her Replying Affidavit to submit that the period from the time that the Plaintiff had allegedly taken possession of the suit land in the year 2003 to the time that she had acquired the same in the year 2013 added up to 10 years thus falling short of the mandatory threshold for a claim of Adverse possession.



60. As to the nature of the Plaintiff's possession, she submitted that she had demonstrated that ever since she took possession of the suit property, there had been numerous antagonisms between the Plaintiff, herself and her workers. That the Plaintiff had not been enjoying peaceful and continuous occupation of the suit property as had been alleged since she had known of his occupation of the suit property and had been protecting the same from unlawful entry by reporting the same to the chief culminating into the arrest and arraignment of the Plaintiff in court. She placed reliance in the decided case of Samuel Kihamba v Mary Mbaisi [2015] KECA 853 (KLR) to submit that the Plaintiff's use of the land must be visible and apparent such that the true owner was on notice of the adverse claim.
61. On the fourth issue for determination as to whether the fact of the Plaintiff's possession had been known to the other party, she reiterated the contents of her Replying Affidavit to submit in the affirmative. That the Plaintiff had been encroaching into the suit land several times wherein the Defendant had protected the same from unlawful entry. That further, the Plaintiff had failed to provide sufficient evidence to prove that he had been in actual, open, continuous and exclusive possession of the suit property for the requisite 12 years period. Reliance was placed in the decided case of Kathoka v Kasyula & another (Environment & Land Case E001 of 2022) [2023] KEELC 18961 (KLR) (18 July 2023) (Judgment).
62. As to whether the Plaintiff's possession had been continuous, the Defendant's submission had been that the Plaintiff had never taken possession of land parcel No. Naivasha/Olgorai Phase II/253 neither had he demonstrated that the true owner had been dispossessed or discontinued their possession of the land. She placed reliance in the decided case of Sangale v Shibiro (Civil Appeal E082 of 2021) [2022] KECA 1221 (KLR) (4 November 2022) (Judgment) to submit that the Plaintiff ought to have shown that he had physically been on the land using it as an owner would.
63. As to whether the Plaintiff's possession had been open and undisputed for a requisite period of 12 years, she placed reliance on the provisions of Sections 107, 109 and 112 of the *Evidence Act* as well as the decided case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 others [2014] eKLR to submit that the Plaintiff had not discharged his burden of proof since he had not produced any document to support his claim for adverse possession. That on the other hand, she had demonstrated that she had legally acquired the suit land and had been in possession of the same and that the Plaintiff had never enjoyed peaceful, quiet and uninterrupted possession of the suit land as had been alleged.
64. In conclusion, she submitted that the Plaintiff had failed to establish the necessary elements for a claim of adverse possession and prayed that the Plaintiff's claim be dismissed with costs.

Determination.

65. This is a matter where the Plaintiff/Applicant herein seeks for declaratory orders that the Defendants' title in parcel of land referred to as Naivasha/Olgorai Phase II/16610 and Naivasha/Olgorai Phase II/16609 each measuring approximately 0.86 Hectares had been extinguished by virtue of his adverse possession thereof for a period of more than 12 years in terms of Sections 17 and 38 of the *Limitation of Actions Act* and that he be registered as its proprietor wherein after, there be orders of injunction issued against the Defendant restraining her whether by herself or through their employees, servants, agents or otherwise however from interfering with the said parcel of land.
66. In response the Defendant opposed the Plaintiff's suit stating that she was the registered proprietor of the suit lands having been allotted plot No. 253 measuring approximately 1.20 Ha at Olgorai Phase II Settlement Scheme in Naivasha District by the Settlement Fund Trustees (SFT) wherein after accepting and complying with the allotment letter, she had been issued with a Title Deed for Naivasha/Olgorai Phase II/253 in her name on 8th October 2013. That she had then taken possession of the land



- and embarked on planting trees and farming and had since been enjoying peaceful and uninterrupted possession to the exclusion of the Plaintiff herein. That subsequently she subdivided the said property giving rise to Title Nos. Naivasha/Olgorai Phase II/16609 and 16610 (the suit lands herein).
67. The Plaintiff's case was that he filed suit on behalf of his deceased brother, James Maina Mwangi. That in the year 2009, the Agricultural Development Corporation (ADC) had given the land to Settlement Fund Trustees (SFT) after which they had a public participation and chose a committee which had then identified the occupiers of the land and registered them. That the land in question, originally plot No. 253, was given to James by the late president Moi in 1994 and after James' death in 2003, he took over the land as his brother's children were young.
 68. The dispute began when the land was re-registered, and James' name was listed alongside Jennifer Metiny. That he had raised a claim, which was resolved in his favor by the the District Commissioner (DC), in the year 2013 wherein land had been eventually registered to Jennifer and him. That he had then sought for the land to be given to his sister, Margaret Nyambura Wamboi.
 69. He had admitted that although he had his own land (No. 257) and had never lived on the disputed land, yet he had been cultivating the same since the year 2004 up to the year 2022, when a dispute arose between him and the Defendant, whom he claimed had destroyed his crops and trees and even had him arrested in 2022 wherein he had placed a caution on the land in October of that year. The land was later subdivided in the year 2022, when the Defendant, took surveyors to the land, thus giving rise to plots No. 16610 and 16609.
 70. During cross-examination, he confirmed that he had not initiated succession proceedings for his brother's estate and therefore did not have the legal authority to represent his brother's children, who were now adults. He also contradicted his earlier statements, admitting that the Defendant had first come to the land in 2011 and that a dispute had existed since then, despite his previous claim of peaceful occupation. He maintained that he was suing to be compensated for the destruction of his crops.
 71. The Defendant's case on the other hand had been that she was allocated the disputed land, Plot No. Olgorai 253, in 2011. She produced a letter of offer dated 29th August 2011, and a receipt for her first payment of Ksh. 7,750 on 20th September 2011. She paid stamp duty on 12th June 2013, and another fee for title processing on the same day. She received her title deed on 8th October 2013 wherein she took possession of the land and planted trees.
 72. That the Plaintiff, only began cultivating the land in the year 2018, when she was working in Sudan. She recalled first seeing him in 2011 on a different plot of land. At that time, she found maize on her land wherein the local chief has asked the Plaintiff to harvest his maize and not cultivate the land again which orders had been disobeyed.
 73. That their dispute started in the year 2018 wherein she had to report the Plaintiff to authorities, including the District Commissioner and the police. She confirmed that the Plaintiff was arrested in the year 2022 for forceful detainer of her land but was later acquitted in the criminal case on 27th February 2024 wherein he then filed the current lawsuit on 5th March 2024. That in the year 2023, she had subdivided the land into plots 16609 and 16610 wherein she had sold plot No. 16609 to her cousin on 13th March 2023 which plot was yet to be transferred as her cousin lived out of the country.
 74. She denied claims that the Plaintiff had been in peaceful possession of the land and stated that he had continuously disturbed her, uprooting her beacons, fences, and trees. She requested the court to dismiss the Plaintiff's suit.
 75. It is against this background, that the issues that arises for my determination being as follows;



- i. Whether the Plaintiff filed suit on behalf of his deceased brother.
 - ii. Whether or not the Plaintiff has acquired the suit property by way of adverse possession.
76. On the first issue for determination, it is trite law that the issue of lack of locus standi is fatal where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties. In this case however, no evidence at all had been adduced that the suit land herein was part of the estate of the Plaintiff's deceased brother, James Maina Mwangi apart from the Plaintiff's verbal testimony that the suit land No. 253 belonged to his brother having been given the same, as a squatter in the year 1994 by the late president Moi.
77. The Court of Appeal sitting in Nyeri in *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi* [2013] eKLR, had observed as follows:
- “...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.”
78. The Plaintiff did not discharge the burden placed on him as provided for by the law and therefore his attempt to claim the suit land on behalf of his deceased brother, is herein rejected.
79. I have looked at the title deed and official search certificate to No. Naivasha/Oljorai Phase II/253, herein produced as Df exh 10 and 11 respectively, and the same confirms that indeed the Defendant herein had been registered as proprietor of the suit land on the 24th June 2013 and title issued on the 8th October 2013.
80. The court is mindful of the legal attribution to the doctrine of Adverse Possession which is embodied in Section 7 of the *Limitation of Actions Act*, in these terms:
- “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...”
81. Section 13 of the *Limitation of Actions Act* aforesaid further provides that:
- A right of action to recover land does not accrue unless the land is in the possession of some person in whose favor the period of limitation can run (which possession is in this Act referred to as Adverse Possession) and, where under sections 9, 10, 11 and 12 (of the 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.
82. Sections 37 and 38 of the *Limitation of Actions Act* stipulate that if the land is registered under one of the registration Acts, then the title is not extinguished but held in trust for the person in Adverse Possession until he shall have obtained and registered a High Court (Read Environment and Land) Order vesting the land in him/her
83. Section 37 of the *Limitation of Actions Act* 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, to land or easement 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.”

84. In terms of Section 38 of the *Limitation of Actions Act*, where a person claims to have become entitled by Adverse Possession to land, (s)he must apply to the High (Read Environment and Land Court) for an order that (s)he be registered as the new proprietor of the land in place of the registered owner. The elaborate procedure of moving the Court is provided for in Order 37 Rule 7 of the Civil Procedure Rules as follows:
- i. An application under Section 38 of the *Limitation of Actions Act* shall be made by Originating Summons.
 - ii. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.
85. From the evidence herein submitted, is clear that the Defendant had been registered to the parcel of land on the 24th August 2013.
86. Section 26(1) of the *Land Registration Act* is very clear on the importance of a title deed as follows;
- “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—
87. It is therefore not in contention that once the Defendant had been registered as proprietor of the suit land, then time for the purpose of adverse possession, started running, and as per the statute, unless and until the true owner is not in possession of his land.
88. No Green card/title was produced by the Plaintiff to show who the proprietor of the land prior to the registration of the Defendant was. It is trite and or mandatory that the extract of the register, or green card, be annexed to the Originating Summons and for a good reason because the same shows the history of the land in question as there could be entities against whom time cannot run for purposes of acquiring land by Adverse Possession which entries need to be excluded from the computation of time for example where land that is still registered under the Settlement Fund Trustee, it cannot be computed for purposes of an accumulating time for a claim of adverse possession.
89. In our case, the Plaintiff’s claim was that he took possession of the land in the year 2003, after his brother’s demise, because his deceased brother’s children were young, and had been cultivating on the same up until the year 2011 when the Defendant was introduced as the owner of the land. That the period between 2011 up to the year 2022, there had been no dispute with the Defendant until the year 2022 when he was arrested and charged over the suit land. The calculation for Adverse possession against the Defendant thus started running from the 24th August 2013, it is also not disputed that after obtaining title to the suit land, the Plaintiff was ejected from the suit land wherein he made a re-entry in the year 2018 thus breaking his continuous possession and the calculation of the adverse possession then started running again in the year 2018 up until the 5th March 2024 when this suit was filed which then gives us a period of 6 years approximately. His re-entry into the suit land was marred with disputes that had been lodged with the area Chief, the Settlement office, and the Police thereby culminating



into his arrest and criminal charge of forceful detainer wherein he had been acquitted in the year 2024 and filed the current lawsuit on 5th March 2024.

90. In *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR 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 or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is averse to the title owner.”

91. In *Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others* [2018] eKLR, the Court of Appeal had observed as follows;

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

92. The main elements of adverse possession that a claimant has to prove include:

- i. actual,
- ii. open,
- iii. exclusive
- iv. and hostile possession of the land claimed.

93. As I have indicated herein, the rule in adverse possession is that the party claiming must have been in possession for over 12 years. To prove a claim under adverse possession, all that the Plaintiff had to do was to establish that he came into occupation and took possession of the suit land exclusively and has lived on the said property continuously without interruption for a period of over 12 years. In the present case, the Plaintiff failed to do adduce evidence that he had had been in possession of the suit land for 12 years, or that he had been in exclusive and peaceful occupation of the same.

94. I thus find that the Plaintiff’s case lacking merit for which it is dismissed with costs to the Defendant.
It is ordered.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 25TH DAY OF SEPTEMBER 2025.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

