



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT SIAYA**  
**ELC CASE NO. E004 OF 2023 (O.S.)**

**JANE ADHIAMBO AGOT.....1<sup>ST</sup>**  
**PLAINTIFF**  
**CHARLES AKONGO JURA.....2<sup>ND</sup>**  
**PLAINTIFF**

**VERSUS**

**LUCIA ADHIAMBO AWINO.....**  
**.....DEFENDANT**  
**THE LAND REGISTRAR, BONDO.....**  
**INTERESTED PARTY**

**JUDGMENT**

**Background**

1. This matter was concluded by this court on 15/05/2024, after the parties had closed their respective cases. However, due to the nature of the evidence before it, this court deemed it necessary for the interested party (IP) to file a report. Although the IP appeared through Mr Callen Masaka, Principal Litigation Counsel, they failed to submit any documents in the suit.

Consequently, the court directed the IP to visit **Land Parcel No. South Sakwa/Barkowino 186 (“the suit property”)** and, among other things, establish its occupancy.

2. It took a long time for the reports to be filed in court, but eventually, a detailed report which fully complied with the orders of this court was filed on 28/03/2025, which was long after this court had been transferred to a new court station. Having set the background as to why judgment was rendered over one year after parties had closed their respective cases, this court will now turn to the substance of the matter that is before it.
3. This suit was instituted by the plaintiffs against the defendant by an Originating Summons dated 9/02/2023, which was supported by the grounds on the face thereof and the affidavits of both plaintiffs, with that of the 1<sup>st</sup> plaintiff deposed on 9/02/2023 and that of the 2<sup>nd</sup> plaintiff undated. In a nutshell, the main ground in support of the OS was that they had, for a period in excess of 12 years, been in adverse possession of the suit property that was located in Bondo, Siaya County, measuring 1.82 ha or thereabouts.
4. They maintained that the defendant’s title over the suit property had been extinguished by dint of **Section 17** of the **Limitation of Actions Act, Cap 22** of the **Laws of Kenya** and sought the following reliefs from this court: -

- a. The plaintiffs be registered as the proprietors of the suit property in place of the defendant who presently claims title to the same.***
- b. The interested party to initiate the transfer of the entire suit property to the plaintiffs, with the defendant signing, executing or endorsing the necessary documents of transfer and in default, the Deputy Registrar of this honourable court does undertake signing, execution or endorsement of the necessary documents of transfer.***
- c. THAT the defendant be prohibited from evicting, or in any manner interfering with the suit property.***
- d. THAT the defendant pays the costs of this suit.***

5. In her affidavit in support of the OS, the 1<sup>st</sup> plaintiff stated she had been enjoying peaceful, quiet, and uninterrupted possession of the suit property since 1994, which was 34 years prior to the time she filed her case. She informed the court that she had built her home on the suit property, made a living out of it and had raised children therein for the entire period.
6. The 2<sup>nd</sup> plaintiff's affidavit (plaintiffs are relatives) averred that the suit property had been in the custody and possession of his family for generations past, which was traceable to his great-

grandfather Wauda K'chola. He asserted that, generationally, his entire family had known the suit property as their only home. He stated that adjudication was done in 1973; nonetheless, his family was surprised in 1975 when they discovered that the suit property was registered in the name of Marcel Ndege Kolo without their consultation. He maintained his home stood on the suit property.

7. The defendant strongly opposed the OS by filing her replying affidavit deposed on 10/07/2023 whereby she averred that; a) she was the legal administrator of the estate of James Mourice Kola (deceased) together with Erick Ochieng Obayi and the beneficiary of the estate of Lucia Akoth Kola (deceased), who was the registered proprietor of the suit property, b) the 1<sup>st</sup> plaintiff is the wife to the late Richard Agot Ohala (Richard) who is deceased and they were disputants against each other before the Land Control Board which decision was adopted as a judgment of the court in **SRM Bondo Land Misc. Case No. 13 of 2010.**
8. C) Neither the plaintiffs nor their relatives ever occupied the suit property or were buried therein, nor have they ever had a peaceful and/or uninterrupted occupation of the suit property to warrant their claim for adverse possession, and finally, d) her family had been in exclusive possession.
9. In quick rejoinder, the 1<sup>st</sup> plaintiff filed a further affidavit sworn on 30/08/2023, where in summary she deposed that: a) the

Land Control Board did not have jurisdiction to hear and determine land disputes as that was the preserve of this court, b) she and her family had been staying on the suit property from 1989 when she got married and had even built her matrimonial home on the suit property and the remains of her grandfather were interred on the suit property; and

10. C) It was only in the recent season that the defendant started farming on a portion of the suit property, d) Richard was tortured and detained several times by a police officer known as Maurice Otuka, who harassed them, and this was brought to the attention of the Office of the Attorney General.

### **Hearing and evidence**

11. The matter proceeded by *viva voce* evidence, and during the hearing, the plaintiffs respectively testified as **PW1** and **PW2** and their evidence was led by **Patricia Ayoo Ogola (PW3)** and **Mary Alice Misungu (PW4)**, and reliance was placed on their witness statements and oral testimonies. Additionally, the 1<sup>st</sup> plaintiff produced several documents marked as **Pex1-5**, which were respectively composed of photographs, a certificate of confirmation of grant, a letter to the Office of the Attorney General, a green card for the suit property, and a certificate of official search thereof.

12. In chief, the plaintiffs' evidence was a reiteration of the averments contained in their affidavits, which were also repeated in their witness statements, which are summarised in the preceding paragraphs; hence, it is unnecessary to reiterate them.
13. In addition, the 1<sup>st</sup> plaintiff testified that a similar case had previously been filed, and she was never given an opportunity to be heard. She testified that the 2<sup>nd</sup> plaintiff was her brother-in-law and they were not related to the defendant in any way.
14. She informed the court that the suit property was ancestral land and her father-in-law was buried therein. She only utilised the suit property for farming activities, and it was registered in the name of Lucia Akoth. Upon the court seeking clarification from her, she informed it that Lucia Akoth was the defendant's mother-in-law and that she started utilising the suit property after filing the suit herein. Lastly, she lived in land parcel no. 185.
15. In his testimony, the 2<sup>nd</sup> plaintiff informed the court that since he was born, his family had always made use of the suit property. **PW3**, who was the plaintiffs' relative, testified that when she got married in 1968, she left her parents and sister, who were residing on the suit property, and that they also farmed there. According to her, many relatives were interred in the suit property, including her grandfather, stepmothers and father. When **PW4**, the wife of the 2<sup>nd</sup> plaintiff, testified,

she informed the court that when she married him in 1980, she found him residing on the suit property. On cross-examination, she stated she got married in 1982.

16. Upon closure of the plaintiffs' case, the defendant, who was a sole witness, testified, and she relied on her replying affidavit that was referenced earlier, her witness statement, oral testimony and documents produced as **Dex. 1-8**. The plaintiffs produced some of these documents, and the additional ones included a title deed for the suit property, a letter addressed to Morris Kola Ndege dated 8/07/2006, a statutory notice dated 12/11/2008, and a letter addressed to Lucia Okoth Kola dated 10/02/ 2009, among others.
17. She maintained that when she got married in 1985, she found out that her father-in-law's family (Marcel Ndege's family) had always made use of the suit property with several family members being interred thereat and that Lucia Okoth Kola, who is deceased, was still the registered owner of the suit property. She informed the court that she lived approximately 4 km away from the suit property and that she, along with the 1<sup>st</sup> plaintiff, were cultivating it.
18. Accordingly, and parties having preferred not to file any written submissions, the matter was reserved for judgment today. Thus, having given careful thought to the pleadings, evidence, law, jurisprudence, the record from **Bondo SRM 13 of 2010 between Richard and Lusi Akoth Kola** and the

land registrar's and surveyor's reports, the singular issue that commends this court's determination is **whether the plaintiffs' claim met the threshold of adverse possession.**

19. Nevertheless, before we proceed with the analysis and determination, it is pertinent to address the issue of **Bondo SRM 13 of 2010 between Richard and Lusi Akoth Kola.** About this, **Section 7** of the **Civil Procedure Act** comes to this court's mind as it prohibits the court from trying any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

20. With respect to this previous decision, it is observed by this court that both the lower court and the Land Dispute Tribunal (LDT) whose decision was the subject of adoption did not have jurisdiction to entertain claims of adverse possession as that was and still is the preserve of this court as provided for in **Section 38 (1)** of the **Limitation of Actions Act.** It therefore finds that this suit is not *res judicata*.

21. Reverting to the substantive issue for determination, the legal framework on adverse possession is statutorily

underpinned in our **Limitation of Actions Act**, and the relevant provisions are found in **Sections 7, 13 and 38** thereof: -

**Section 7** 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.”***

**Section 13** states that: -

***“(1)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 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.***

***(2)Where a right of action to recover land has accrued and thereafter, before the right is***

***barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.***

***(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.”***

Lastly, **Section 38 (1)** elucidates that: -

***“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”***

22. The principles of law on adverse possession are settled in Kenya, and the burden is usually on the adverse possessor to strictly prove all the elements of adverse possession to the required standards. Pointedly, it must be borne in mind that claims of adverse possession are matters of fact that are

observed on the land. The decision of **Maliamu Ncurubi M'ibiri v Francis M'imanyara M'ringera [2011] eKLR** quoted with approval the well-cited decision of **Mbira v. Gachuhi [2002] 1 EA**, which summarised the principles thus:

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***“a) That there had been absence of possession by the true owner through abandonment.***

***b) That the adverse possessor had been in actual possession of the piece of land;***

***c) That the adverse possessor had no colour of right to be there other than his entry and occupation;***

***d) That the adverse possessor had openly and without the consent of the true owner done acts which were inconsistent with the enjoyment by the true owner of land for purposes for which he intended to use it;***

***e) That there was a sufficient animus to dispossess and an animus (sic) possidendi;***

***f) That the statutory period, in this case twelve years, had elapsed.***

***g) That there had been no interruption to the adverse possession throughout the aforesaid statutory period; and***

***h) That the nature of the property was such that, in the light of the foregoing, adverse possession would result.”***

23. Bearing in mind the law and jurisprudence, under **Sections 17 and 37** of the **Limitation of Action Act**, adverse possession operates against title and therefore, such claims must be filed against the registered owner or her legal representatives. Following this, the plaintiffs needed to meet this threshold. However, this was not so, as they sued the defendant in her personal capacity, yet she is not the registered owner of the suit property; rather, it is her mother-in-law, Lucia Okoth Kola. The plaintiffs never amended their OS and, on this test alone, their claim cannot succeed. Nevertheless, it is incumbent to consider the other principles.
24. Concerning occupancy for over 12 years, the 2<sup>nd</sup> plaintiff claimed to have lived on the entire suit property from birth, which was allegedly from 1958. The 1<sup>st</sup> plaintiff alluded that her occupancy commenced either in 1989 or 1994, which was allegedly the year she married Richard. They maintained that they had interred the remains of their relatives there and had built homes on the suit properties. To substantiate this, they presented photos which showed crops on a farm and a structure.
25. On being interrogated on this, it emerged that the 1<sup>st</sup> plaintiff did not live on the suit property but instead merely cultivated

it, and commencement of cultivation took place after 9/02/2023, which was when she filed suit. It suffices that her claim had not even accrued by the time she was filing suit.

26. In her testimony, the defendant was consistent in her evidence that, though she did not live on the suit property, she and the 1<sup>st</sup> plaintiff tilled it. The comprehensive ground report by the Land Registrar Bondo/Rarieda/Usigu Sub-Counties, dated 13/05/2025, affirmed, substantiated, and corroborated the defendant's evidence when it concluded verbatim as follows: -

*"It was noted that both the Plaintiffs and the Defendant were claiming the suit parcel of land as a whole which is currently registered in the name of Lucia Okoth Kola, one of the Defendant's herein. The said parcel was previously registered in the name of MARCEL NDEGE KOLA as the 1st registered proprietor measuring 11. HA.. Jane Adhiambo Agot is ploughing a portion of the said parcel measuring 0.50 HA while Lucia Adhiambo Owino is ploughing a portion measuring 1.80 HA as illustrated in the surveyor's report. There was no physical evidence of occupation on the remaining portion as there were no developments thereon or proof of farming activities."*

27. This conclusion was arrived at after conducting *in situ* engagements that involved 27 participants, including the

plaintiffs and defendants. In the engagements, it emerged that the 2<sup>nd</sup> plaintiff's evidence during the exercise was a total departure from his testimony before the court, and this is what he told the land registrar: -

*"I am not occupying this land however myself together with COLLINS SANGWA and Jane Agot have been ploughing the said parcel. I stay on parcel no. SOUTH SAKWA/BARKOWINO/180 which is registered in my name."*

28. Without much ado, these pieces of evidence reveal that the plaintiffs' testimonies were inconsistent, unreliable, full of falsehoods, and not credible, as it emerges they have never occupied the suit property. The only parties found to have made use of the suit property were the 1<sup>st</sup> plaintiff, who, based on the evidence, did so only after the suit had been filed. In any case, it was only a small portion of it. It also arises that the defence evidence was consistent with the land registrar's report, and this court finds her evidence consistent, believable, and corroborated. Consequently, this court finds that the plaintiffs' claim fails.

29. As this court concludes, it acknowledges Diana Wanyama and Shadrack Ochieng, respectively land registrar and subcounty surveyor, for, on being directed by the court, tendered a detailed report which shed light on the ground

situation. Moreover, this court appreciates the litigants for being patient as they waited for this report to be filed.

30. In the end, this court finds the plaintiffs did not prove their claim of adverse possession to the required standards and the OS is hereby dismissed. Since it is trite law that costs follow the event, costs are awarded to the defendant.

Judgment accordingly.

**Delivered and Dated at Machakos this 21<sup>st</sup> day of October, 2025.**

**HON. A. Y. KOROSS  
JUDGE  
21.10.2025**

**Judgment delivered virtually through Microsoft Teams  
Video Conferencing Platform**

In the presence of;

Ms Kanja Court Assistant.

Defendant.

N/A for plaintiff.