

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELC NO. E20 OF 2024 (OS)

1. KAHINDI DUNDU alias KAHINDI KAZUNGU KATANA

2. KENGA KHAMIS
APPLICANTS

VERSUS

KAZUNGU FONDO KALAMA
RESPONDENT

JUDGMENT

1. The Applicants filed this suit by way of an Originating Summons dated **22/10/2024** claiming to have acquired title over Land Parcel No. **Chonyi/Galanema/176 (the suit property)** by way of adverse possession. They sought for determination of the following issues: -

1) That the Applicants are entitled to be declared as the owners and/or proprietors of original land parcel no. Chonyi/Galanema/176 which they have acquired by way of adverse possession having lived, developed and/or worked thereon for over twenty-two years since 2002 well beyond the statutory 12 years and used it peacefully and uninterrupted without any interference from the Respondent, his agents, servants and/or predecessors;

2) That the Applicants are each entitled to be registered in equal...

2. The Applicants are represented by the firm of **Messrs. Obaga Muriuki & Company Advocates.**

3. The Applicants' claim is anchored on the 1st Applicant's supporting affidavit sworn on an even date and the annexed documents marked as "**KKK-1, 2, 3 and 4** which include; a copy of his identity card (KKK-1), a copy of letter dated 21/10/2024 by the area assistant chief (KKK-2), a copy of the title and search certificate of the suit property (KKK-3) and photographs allegedly showing activities carried out by the Applicants on the suit property (KKK-4).
4. Particularly, the Applicants' case is that that they have been in open, continuous, and uninterrupted occupation of the suit property for over **22** years. The 1st Applicant avers that the land was previously occupied by his late grandfather, **Katana Yoyo**, who cultivated perennial and seasonal crops thereon, and that after his demise, the Applicants continued with cultivation, harvesting, and planting of mangoes, coconuts, cashew nuts, maize, and beans. The deponent avers that the Respondent secretly caused the suit property to be registered in his name, has not interfered with the Applicants' possession (for a period exceeding 12 years) and therefore knew or ought to have known of their occupation and that by reason, the Applicants have acquired title to the suit land by way of adverse possession.
5. The Respondent was served by way of advertisement in the press but did not enter appearance or file any response, and consequently the hearing proceeded *ex parte*.

6. The 1st Applicant testified as **PW1**. He adopted his written statement dated 24/3/2025 and produced the documents in the list of documents dated 22/10/2024 as PEXH 1-3 and a copy of the title annexed to the affidavit as PEXH 4. He told the court that he has lived on the suit property for more than 22 years and urged the court to grant him the title thereto.
7. **Paul Majimbo Ngumbao (PW2)** adopted his written statement dated 24/3/2025 and testified that he owns land adjacent to the suit property. He confirmed that he has known the 1st Applicant to be in occupation of the suit property for a period of over **22** years.
8. **Chivatsi Mrinzi Juaje (PW3)** adopted his written statement dated 24/3/2025 and testified that his land, parcel No. 249, borders the suit property. He stated that the 1st Applicant has built on the suit property and has lived there with his family for many years.

ANALYSIS AND DETERMINATION

9. The legal basis for the doctrine of adverse possession in Kenya is embodied in **Section 7** of the **Limitation of Actions Act, (Cap 22)** which is set out 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 or, if it first accrued to some person through whom he claims, to that person.”

10. **Section 13** of the Limitation of Actions Act further provides:

“13. Right of action not to accrue or continue unless adverse possession

(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.

11. The procedure for seeking relief on a claim based on adverse is provided for in **Section 38** of the Limitation of Actions Act and **Order 37** of the Civil Procedure Rules, 2010. **Section 38 (1)** provides: -

(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

(2) An order made under sub-section (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

12. **Order 37** Civil Procedure Rules provides: -

(1) An Application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons

(2) The summons shall be supported by an Affidavit to which a certified extract of the title to the land in question has been annexed.

13. The Applicants claim that they acquired title to the suit property by operation of the doctrine of adverse possession. It was therefore upon them to adduce evidence that convinces the court that on a balance of probabilities. This is envisaged under **section 107, 108 and 109** of the **Evidence Act** which read: -

Section 107(1):

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Section 108:

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

Section 109:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided for by law that the proof of that fact shall lie on any particular person.”

14. In the present case, the burden lay upon the Applicants to adduce credible evidence demonstrating, on a balance of probabilities, that they had acquired prescriptive rights over the suit property. They were required to prove that their possession was as of right and inconsistent with the title of the registered owner; that such occupation was open, actual, continuous, uninterrupted, peaceful, and exclusive; and that it was with the knowledge, but without the consent or permission, of the registered owner for the prescribed statutory period of twelve years.
15. From the 1st Applicant’s testimony, it is not in dispute that they have been in occupation of the suit property since **2002**, a period spanning over twenty-two (**22**) years. His evidence, corroborated by PW2 and PW3, was that they have engaged in cultivation, planting of perennial crops such as mangoes, coconuts, and cashew nuts, as well as seasonal crops

like maize. Further evidence was adduced that the 1st Applicant has constructed a homestead on the property and has resided there with his family. The Respondent neither entered appearance nor tendered any evidence to controvert these claims.

16. The court of appeal in **Mtana Lewa v Kahindi Ngala Mwangandi [2015] KECA 532 (KLR)** explained: -

“Reverting to the question I have posed above-whether the doctrine of adverse possession is arbitrary it must be borne in mind that before one can claim title to land by adverse possession and apart from proving 12 years of uninterrupted, open and peaceful possession, certain strictures must be satisfied. Those strictures are summarized in the Latin maxim, *nec vi, nec clam, nec precario*, that, one’s possession has not been through use of force, not in secrecy and without the authority or permission of the true owner.”

17. Guided by the above provisions and authority, and applying them to the facts before me, I am satisfied that the Applicants’ possession of the suit property meets the legal threshold of adverse possession; that they have been in actual, open, and continuous possession of the land for a period exceeding twelve years without interruption and without consent of the Respondent. The Respondent’s inaction throughout this period, including failure to defend these proceedings, fortifies the Applicants’ claim.

18. The Applicants have also demonstrated that they have extensively developed the land by cultivating perennial and seasonal crops and

constructing residential structures. Their evidence has been consistent, credible and unchallenged. Therefore, I find that they have proved their case on a balance of probabilities.

19. In the result, judgment is entered in favour of the Applicants in the following terms:

- a) **It is hereby declared that the Applicants have acquired title to the land known as Chonyi/Galanema/176 by way of adverse possession.**
- b) **An order is hereby issued vesting title of the said portion of land in the names of the Applicants in equal shares;**
- c) **The Respondent is directed to execute all documents necessary to effect the transfer and registration of the said portion of land to the Applicants within 60 days, failing which, the Deputy Registrar of this Honourable Court shall execute the same on his behalf;**
- d) **The Land Registrar, Kilifi County, is directed to effect the transfer and issue a title in favour of the Applicants;**
- e) **There shall be no orders as to costs.**

Dated, signed and delivered at Malindi on this 15th day of October, 2025.

A rectangular box containing a handwritten signature in blue ink, which appears to be 'Mwangi Njoroge'.

**MWANGI NJOROGE
JUDGE, ELC, MALINDI.**