**Kabigo & 4 others v Gitau & another (Environment and Land Appeal E094 of 2022) [2025] KEELC 5842 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5842 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ENVIRONMENT AND LAND APPEAL E094 OF 2022**

**JA MOGENI, J**

**JULY 31, 2025**

**BETWEEN**

**FRANCIS KAMAU KABIGO ..... 1ST APPELLANT**

**GABRIEAL GACHIE KABIGO ..... 2ND APPELLANT**

**PETER NDUNGU KABIGO ..... 3RD APPELLANT**

**FRANCIS KANYA MWANGI ..... 4TH APPELLANT**

**JAMES MUREITHI MWANGI ..... 5TH APPELLANT**

**AND**

**MARGARET NJERI GITAU ..... 1ST RESPONDENT**

**NATIONAL LAND COMMISSION ..... 2ND RESPONDENT**

## JUDGMENT

1. This Appeal brought by the Appellants is about the suit property Chania/Mataara/654 [the "suit land:]. The appeal emanates from the Judgment delivered on 12/10/2022 where the Learned Magistrate [Hon H. M. Ng'ang'a, PM] held that the Appellants who were the Plaintiffs before the trial Court had not proved their case against the 1st Defendant who is the 1st Respondent herein to the required standard. Therefore, his finding was that;

> "From the above analysis, I find that the Plaintiffs' have failed to prove the claim for adverse possession by failing to prove the date of physical entry and actual possession. I accordingly find the claim not merited and dismiss the Originating Summons with costs to the 1st Defendant. I also find that the 1st Defendant, as the registered owner, entitled to compensation funds due from the 2nd Defendant, National Land Commission."

2. The Appellants were aggrieved thereby. So, through the firm of Waweru Nyambura and Company Advocates, they preferred the appeal by way of a Memorandum of Appeal dated 31/10/2022 and which is premised on the following grounds;

    a. That the learned Magistrate erred in law and facts in making a conclusive determination without fairly considering the Appellants' case.

    b. That the learned Magistrate erred in law and fact in dismissing the Appellants evidence and allowing the Respondents evidence.

    c. That the learned Magistrate erred in law and in fact in finding that the Appellants have not been in possession.

    d. That the learned Magistrate erred in law and in fact inferring evidence from unknown sources.

    e. The learned Magistrate erred in law and fact in inferring without evidence.

    f. That the learned Magistrate erred in law and in fact in dismissing the Originating Summons.

    g. That the learned Magistrate erred in law and fact in not considering that the Appellants have proved all aspects of adverse possession.

    h. That the learned Magistrate erred in law and fact in the interpretation of the principles of adverse possession.

    i. That the learned Magistrate erred in law and fact in not considering the evidence of the Appellants' witnesses.

    j. That the learned Magistrate erred in law and facts in awarding the Respondents costs.

3. Wherefore, the Appellant has sought the orders infra;

    1. That the appeal be allowed and the Judgment of the lower Court set aside and the Judgment entered in favour of the Appellants.

    2. The appeal be allowed with costs to the Appellant.

4. On 17/10/2024, the Court directed that the appeal be heard by way of written submissions.

5. Accordingly, the Appellant's Counsel filed submissions dated 16/12/2024 and identified five issues for determination namely:

    i. That the learned Magistrate erred in law and facts in making a conclusive determination without fairly considering the Appellants' case.

    ii. That the learned Magistrate erred in law and fact in dismissing the Appellants' evidence and allowing the Respondents' evidence.

    iii. That the learned Magistrate erred in law and in fact in finding that the Appellants have not been in possession of [Chania/Matara/624].

    iv. Whether the learned Magistrate misdirected herself by failing to consider that the Appellants had proven all aspects of adverse possession.

    v. Whether this Court should set aside orders issued by the lower Court.

6. The Counsel for the Appellants submitted that they were in open, notorious, continuous occupation of the land since 1974 as opposed to the 1st Respondent who since the alleged purchase in 1984 has

never been on the suit property. The Appellants also submitted that the fact that the compensation money was paid to the Appellants, it is testimony that they are the ones who were in actual occupation of the suit property.

7. That despite the valuers report showing that there were no structures on the suit property that there was tea and coffee bushes that the Appellants had planted. They relied on the cases of Wambugu v Njuguna, [1983] KLR 173, Mweu v Kiu Ranching & Farming Co-operative Society Ltd. [1Q.,85] KLR 430, Celina Muthoni Kithinji v Safiya Binti Swaleh & 8 Others [2018] eKLR and the case of Mbira v Gachuhi [2002] IEALR 137. It was their case that the Appellants have proved to the required standard as is provided by law that they have been in possession, the suit land was in a non-consensual, open and exclusive manner.

8. That they had proven that their possession was to the exclusion of the owner, their possession of the piece of land was open and notorious and without interruptions. They submitted that their occupation started in 1974 and has continued till the filing of this suit and finally the Appellants use and possession of the land was open and undisturbed for more than 12 years as provided under the Limitations of Actions Act.

9. In the result, Counsel termed the appeal meritorious and implored the Court to allow it with costs. To buttress the submissions, Counsel relied upon Sections 7 and 13 of the *Limitation of Actions Act*.

10. The 1st Respondent through Kithu Mbuthia Advocates filed submissions dated 14/01/2025stating brief facts of the suit before the trial Court and the Grounds of Appeal. Counsel submitted that none of the Appellants disputed the fact that the suit property is properly registered in the name of the 1st Respondent and the 1st Respondent had a title that could not be impeached since 1984.

11. They further stated that during trial PW3 adduced evidence of Valuation Data Collection Forms dated 8/4/2019 in his favour. He confirmed that he signed this form which indicated him to be a Lessee of the suit property. Thus since they signed forms identifying their occupation of the suit property as lessees the legal Principle of Estoppel estops the Appellants from making a claim for adverse possession. Following this representation made to the 2ndRespondent by virtue of the Valuation Data Collection Forms which listed them as Lessees, the 2nd Respondent paid the Appellants compensation of Kshs. 2,000,000/- each in the year 2021.

12. He also submitted that the 1st Respondent established that the suit property is not inhabited by any person that can claim continuous uninterrupted possession and occupation through the Valuation Report which gives status of the suit premises and the report is unchallenged.

13. At the same time, it was the submission of the 1st Respondent that she has unfettered access to the suit property and no one has ever prevented her access to the suit property.

14. In his submissions it was his case that the Appellants admitted in evidence that they did not know the 1st Respondent so if this be the case, he stated that the Appellants cannot claim to have had utilized the property nec vi, nec clam, nec precario [neither by force, nor secretly and without permission]?

15. Therefore, that this admitted fact negates the fundamental legal basis of a claim for adverse possession which is set off by Section 7 of the *Limitation of Actions Act*. This Section bars the Appellants from laying any claim in adverse possession, as any claim if any would have first accrued to Kabigo Mukiundi.

16. The 1st Respondent's Counsel relied in his submissions on Section 7 and 38 of the Limitations of Actions Act [Cap 22] and cases decided such as Gabriel Mbui v Mukindia Manyara [1993] eKLR, Wanjuki Njiru v David Njeru Nthiga ELC49 of 2014, and Joseph Gahumi Kiritu v Lawrence Munyambu Kabura Civil Appeal No. 20 of 1993.

17. At the same time, it was Counsel's submission that the Appellants are not squatters and that they have their ancestral homes in the Gituamba area. Their claim is only for unjust enrichment to deny the 1st Respondent her rightfully owned property.

18. 1st Respondent's Counsel submitted that the Courts have over the years developed basic principles to be fulfilled in order to establish a claim for adverse possession;

    i. A user as of right, in order to found a title must establish that the use shall not be by violence, stealth or permission. The possession must not be clandestine. If in its inception it is vitiated by its clandestine, violent or permissive nature, it must lose that character and become open, peaceable and as or right before it can cause time to run.

    ii. A person claiming a right by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period of 12 years. The time does not run merely because the land is vacant.

    iii. The entry and occupation of the land must be with, or maintained under some 'claim or colour of right to title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.

    iv. The occupation of the land by the intruder who pleads adverse possession must be non-permissive use i.e. without permission from the true owner of the land occupied. Permissive occupation of land is inconsistent with adverse possession. The intruder must show when his possession ceased to be permissive and became adverse. The non-permissive occupation or use must also be hostile to the use by the owner of the land.

    v. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive and with an evinced unmistakable animus possidendi, that is to say, occupation with the clear intention of excluding the owner as well as other people. The exclusive possession means that the exercise of dominion over the land must not be shared with the disseised owner, the land being in actual possession with the intent to hold solely for the possessor to the exclusion of others. The owner must cease to be in occupation of the land by reason of dispossession or discontinuance of possession. The fact that nothing is done to improve or work a piece of land is not evidence that a person has abandoned the possession or that he has otherwise been eliminated from the land.

    vi. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community, of the exercise of dominion over the land. So notorious must be the overt acts of ouster that there must be nothing that would lead the owner to suppose that his rights remain intact. Surreptitious possessory acts do not found a claim of adverse possession.

    vii. The possession must be continuous, uninterrupted, unbroken, for the necessary statutory period.

    viii. The rightful owner or paper title holder against whom adverse possession is raised, must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period.

    ix. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession. The owner who

had not intended to part with possession or is unconsciously dispossessed, cannot be said to have been evicted or to have quit the land.

19. The Counsel submit that all the Appellants failed to individually and collectively prove all the essential elements required to sustain a claim for adverse possession of the suit property. Thus, he submitted that the impugned Judgment is without any error and urged this Court to uphold it. That the appeal be dismissed with costs.

20. As this is a first Appellate Court, it is my duty to subject the entire evidence on record to a fresh and exhaustive re-evaluation and re-appraisal targeted at reaching my own inferences in the instant dispute. That in doing so, I bear in mind that the trial Court had the added advantage of having seen and heard the witnesses as they testified while I am limited thereto but entitled to depart from the trial Court's findings if they are based on no evidence or there has been a misapprehension of the evidence; see Selle v Associated Motor Boat Company Ltd [1968] EA 123 and PIL Kenya Ltd v Oppong [2009] KLR 442.

21. Notably, on 2/09/2020, the Plaintiffs filed the original suit by way of an Originating Summons under Order 37 Rules 7 and Section 38 of the Limitation of Action Act seeking the determination of the following issues;

    a. A declaration that the title of Margaret Njeri Gitau to the land parcel number Chania/Mataara/654 [suit land] has been extinguished by the Plaintiffs Adverse Possession thereof for a period of more than 12 years in terms of the Limitations of Actions Act

    b. That the Plaintiffs have become entitled to Adverse Possession to the suit land and registered under the *Land Act* in the name of the 1st Defendant

    c. An order that the Land Registrar Gatundu registered the Plaintiffs as the absolute proprietors of the land parcel Number Chania/Mataara/654 in place of the Defendant

    d. That the Land Registrar Gatundu be directed that the order herein shall be an instrument of transfer of ownership of the whole suit land from the 1st Defendant to the Plaintiffs.

    e. Costs

22. Alongside the Originating Summons they also filed a Notice of Motion Application of even date.

23. The 1st Respondent opposed the Originating Summons by her Replying Affidavit of twelve [12] paragraphs sworn on 24/11/2020. She deposed, inter alia, that she is the absolute registered owner of the entire suit land as revealed in a Land Certificate marked "MNG-1" annexed to the Affidavit [D Exhibit 1]. Having purchased the suit property by way of sale by public auction in 1984 after the then registered owner could not redeem a mortgage.

24. Further, the 1st Respondent averred that she purchased the suit property free from all encumberances as an innocent purchaser for value. That since purchase she has never acquiesced on her claim to her right title of ownership and possession of the suit property.

25. Thus, she avers that the Plaintiffs [Appellants] were strangers to her and that they were not in occupation of the suit property since they have built their permanent residences on another piece of land within the Sub-County.

26. She avers that the Plaintiffs' application is intended for unjust enrichment.

27. I have carefully considered the Grounds of Appeal, the rival submissions including the cases cited therein and the pleadings in the original suit. The issues for determination herein appear in the parties' respective pleadings alongside the Grounds of Appeal which boil down to whether;

1. The Appellants' claim for adverse possession over the suit land, is tenable,

2. The orders sought in the Memorandum of Appeal are merited.

28. In their evidence, the Appellants called three witnesses. PW3 stated that he was representing the rest of the Plaintiffs [Appellants] and he relied on his Statement and List of Documents dated 02/09/2020. He testified that he had brought the claim on his own behalf and he had authority to sue on behalf of the other Plaintiffs and this was presented through Exhibit 3.

29. It was his testimony that he had been on the suit premises since birth and so have the other Appellants although he did not provide the evidence regarding the others. He also stated that he had never seen or met the 1st Defendant/Respondent.

30. He produced the Data Valuation Forms which supported their testimony that they had been compensated by the 2nd Respondent in 2019.

31. PW1 and PW2 were Chief and Assistant Chief respectively. PW1 testified to have written a letter on behest of the Plaintiffs Exhibit 1, though he confirmed the land was owned by the 1st Respondent. It was his advise that the parties should resolve the issue at hand through Mediation. On his part PW2, testified that he knew the Appellants although he also stated to have written a letter, Exhibit 2. He testified that he knew the land belonged to the 1st Defendant/Respondent.

32. The 1st Respondent [DW2] relied on her statement on record as well as DExhibits 1 and 2 which include; Certificate of Land and the Valuation Report. She testified that she is the registered owner of the suit premises and that she is the legal owner of the suit property and has title to it. She produced her original title to the property as Defence Exhibit 2.

33. She testified that she bought the suit premises from Barclays Bank by way of public auction and immediately took possession when it had tea bushes and other vegetation. It was her testimony that she never licensed anyone to cultivate her property and neither did she lease it and that the Plaintiffs [Appellants] are strangers to her.

34. According to her, she only learned of the claim to her property when this present suit was filed and that the Appellants are residents of Gituamba area and they have permanent residences. It was her prayer that the suit be dismissed.

35. She called one witness who was the Valuer, PW2 who presented a Valuation Report and 1st Defendant's Supplementary List of Documents as Defence Exhibit 1.

36. He testified that the suit property had tea bushes among other vegetation but it was devoid of any residential homes/homesteads only temporary structures. That the property was easily accessible as it was not fenced and that when he visited the suit property to prepare his report, he did not meet anyone.

37. The trial Court's finding was that the 1st Respondent proved ownership of the suit land. Further, that the Appellants failed to provide proof that they have occupied the suit land since 1974.

38. It is quite instructive that in the case of Wilson Kazungu Katana and 101 others v Salim Abdalla Bakshwein and another [2015] eKLR, the Court of Appeal stated that adverse possession dictates that;

a. The parcel of land in question must be registered in the name of a person other than the Applicant,

b. The Applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner,

c. The Applicant must be in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.

39. In the instant case it is clear that the Appellants and 1st Respondent had never met. This being the case, the issue of dispossessing the owner of the suit property who is the 1st Respondent does not arise. Further the Valuation Forms that the Appellants produced in Court identified them as lessees and so they cannot now turn and claim ownership through adverse possession.

40. Moreover, this Court subscribes to the Court of Appeal decision in Wambugu v Njuguna [1983] KLR 173 where Chesoni Ag JA [as he then was] stated in part:

> " ... I now turn to consider whether the Respondent acquired title to the suit land by adverse possession. The following passage appears at p 490 of Megarry's Manual of the Law of Real Property [5th Edn]: "... Before 1833 the word 'adverse' was used in a highly technical sense; but today it merely means that there must be possession inconsistent with the title of the true owner and not, for example, possession by a trustee on his behalf. Time does not begin to run merely because the owner abandons possession, for until some other person has taken possession of the land there is nobody against whom the owner is failing to assert his rights. If the owner has little present use for the land, much may be done on it by others without demonstrating a possession inconsistent with the owner's title ..." [Emphasis laid]

41. It is therefore, my considered view that although the first limb as stated in Wilson Kazungu Katana case [supra] was proven, no sufficient evidence was adduced by the Appellants to prove open and exclusive possession of the suit land in an adverse manner to the title of the 1st Respondent. No other evidence such as photographs were produced in evidence in the suit. Further, the Appellants failed to show that they were being paid for the tea they were harvesting and that the land upon which the tea is growing has been identified with them.

42. The law and requirements for adverse possession was reiterated in the case of Mbira v Gachuhi, [2002] IEALR 137 where it was held that:

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

43. The Appellant's contention that the Magistrate erred by relying on the evidence of the valuer yet the Chief who is at the grassroot and closer with the people had testified that he knew that the Appellants were the ones in occupation of the suit property. Thus, the learned Magistrate erred by relying on the valuer's report yet the Valuer was paid by the 1st Respondent to write the report.

44. However, it is crystal clear that the trial Magistrate identified issues for determination touching on the onus of the Plaintiffs to prove ownership by adverse possession and for the Defendant has proved her claim of the suit land. The trial Magistrate proceeded to make a determination thereof and indicated the reasons for such determination. In light of the foregoing, I find that this Ground of Appeal is untenable. From the Judgment of the trial Court, the learned Magistrate determined that the Appellants failed to prove even when they entered the suit property.

45. This Court is guided by Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya which provides as follows:

> " 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."

46. I, thus, endorse the learned trial Magistrate's considered finding that neither the Appellant nor the Respondent herein, proved their respective cases before the trial Court to the requisite standard.

47. Bearing in mind the entire evidence on record in this case, and applying the facts of the case as well as legal principles stated above, it is clear that the Appellants who were the Plaintiffs before the trial Court failed to prove adverse possession.

48. In the case of Gabriel Mbui v Mukindia Maranya [1993], eKLR adverse possession was defined as:

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

49. And in Mtana Lewa v Kahindi Ngala Mwagandi [2015] eKLR, the Court of Appeal defined adverse possession as:

> " Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve [12] years. The process springs into action essentially by default or in action of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity, and in extent to show that possession is adverse to the title owner."

50. The standard of proof in civil matters including the instant case, is on a balance of probabilities. In that regard, having taken into account the entire evidence on record in this appeal, the facts of the case as well as the legal principles stated above, the 1st Respondent who was the 1st Defendant before the trial Court proved that she is the lawful owner of land parcel number Chania/Mataara/654. I therefore, would endorse the learned trial Magistrate's finding.

51. In conclusion, it is the finding of this Court that the learned trial Magistrate's Judgment is faultless at law. I proceed to uphold the same.

52. Wherefore, the instant appeal lodged by way of a Memorandum of Appeal dated 31/10/2022 is hereby dismissed with costs to the 1st Respondent.

53. It is so ordered.

**DATED, SIGNED AND DELIVERED AT THIKA THROUGH MICROSOFT TEAMS ON THIS 31ST DAY OF JULY 2025.**

**MOGENI J**

**JUDGE**

In the presence of: -

Ms. Mueni holding brief for Mr. Waweru for the Appellants

Mr. Maina for the 1st Respondent

2nd Respondent - Absent

Melita – Court Assistant