



REPUBLIC OF KENYA



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Kibiku (Suing as the Administrator and Legal Representative of the Estate of Gibson Kibiku - Deceased) v Deacons Enterprises Limited & another; Nyawira & 31 others (Interested Parties) (Environment and Land Case 139B of 2021) [2025] KEELC 5742 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5742 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND CASE 139B OF 2021

JG KEMEI, J

JULY 31, 2025

(FORMERLY ELC NO 735 NAIROBI)

BETWEEN

SERAH WAMBUI KIBIKU (SUING AS THE ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF GIBSON KIBIKU - DECEASED) PLAINTIFF

AND

DEACONS ENTERPRISES LIMITED 1ST DEFENDANT

NYOKABI KAMOTHO (GUARDIAN AD LITEM OF J KAMOTHO) 2ND DEFENDANT

AND

ANNE ZIPPORAH NYAWIRA INTERESTED PARTY

MARGARET WAMUYU MUTHEE INTERESTED PARTY

CHARLES GITHUI KIGOTHO INTERESTED PARTY

BLUE VENTURES LIMITED INTERESTED PARTY

JANE WAMBUI MUNGAI INTERESTED PARTY

STEPHEN MUCHIRI MUNGAI INTERESTED PARTY

JAMES NJAGI WAHOME INTERESTED PARTY

JALIWA INVESTMENTS LTD INTERESTED PARTY

MILKAH WANGUI KIMANI INTERESTED PARTY

CECILIA WANGUI MUNGAI INTERESTED PARTY



DAVID MAINA KAHANDO	INTERESTED PARTY
JACINTA NDUTA MWAURA	INTERESTED PARTY
JOHN MACHARIA MAINA	INTERESTED PARTY
ANTHONY KIMANI MURAGAMI	INTERESTED PARTY
CATHERINE NJERI WANGOMBE	INTERESTED PARTY
JOSPHAT NDIRANGU THUO	INTERESTED PARTY
DOMINIC MBURU GACHERU	INTERESTED PARTY
JAMES KIMANI KIMANI	INTERESTED PARTY
ALUBRETA NYANGENDO GATHUMBI	INTERESTED PARTY
AGATHA MUTHONI MUNGAI	INTERESTED PARTY
STEPHEN MUCHAI KIMANI	INTERESTED PARTY
MACHARIA KARIUKI	INTERESTED PARTY
NILIPHER EVA WANJIRU MWANGI	INTERESTED PARTY
MOSES KAMAU GATONYE	INTERESTED PARTY
LUCY WANJIRU GATONYE	INTERESTED PARTY
GATEKE HOLDINGS LIMITED	INTERESTED PARTY
JOHN NJOROGE IKONYA	INTERESTED PARTY
FRANCIS GICHUKI WAHOME	INTERESTED PARTY
ANN KIBUNJA	INTERESTED PARTY
GEOFFREY WACHIRA KIMANI	INTERESTED PARTY
MARGARET GICHUKI	INTERESTED PARTY
SAMUEL NJONGORO NJIHIA	INTERESTED PARTY

JUDGMENT

1. Vide the originating summons filed on the 22/10/2012 the Plaintiff filed suit against the defendants seeking the following orders;
 - a. A declaration that the plaintiff is entitled by adverse possession to all that 25 acres portion of Land Reference LR No 20695 Thika Municipality subdivided out of plot No 4670.
 - b. That this court do issue an order for the registration of the Plaintiff as the owner of all that 25 acres of land LR 20695 Thika Municipality (a subdivision of plot No 4670 Thika Municipality)
2. The summons are premised on the grounds on the face of it and the supporting affidavit of Gibson Kibiku sworn on the 22/10/2012.
3. The deponent stated that the suit land originally measured 30 acres being LR 4670. From 1/6/1963 he occupied the land and utilised it to graze cows as well as quarry building stones for sale. He buried



- his kin on the suit land among them being his mother, Wambui Warioko in 1977, two sons namely Dickson Kamande in 1972 and Hiram Ngugi in 1989 respectively
4. That from 1/6/1965 he entered into an agreement by way of a temporary licence occupation (TOL) from the Commissioner of Lands where he was licensed to occupy the land for a period of 9 months subject to the payment of annual rent of Kshs 200/- with either party giving three months' notice. This arrangement was later firmed vide a letter from the Commissioner of Lands dated the 6/2/1987 to continue to occupy the land until further notice.
 5. That in 1992 J J Kamotho who was then a minister of Government frequently visited the suit land during which periods he and his family would be forced to stay indoors. Later he learnt that the J J Kamotho had caused the land (LR No 4670) to be subdivided into two portions measuring 25 (LR No 20695) and 5 acres (LR 20868) respectively. That 25 acres was alienated to his company being the 1st Defendant herein. Despite his protestations the sub divisions went on unabated. That he has endeavoured to get a copy of the title created in favour of the 1st Defendant to no avail.
 6. He retained the 5-acre piece of land until 1995 when it was allocated to one Wilson Wambugu Nderitu but he successfully recovered it vide the judgment of the court issued on 23/11/2011.
 7. That since acquiring the title to the suit land in 1992, the defendants have never taken possession of the suit land which he continues to occupy peacefully uninterrupted and exclusively to date.
 8. In addition, he averred that the title for 25 acres was acquired through fraud by the Defendants. Particulars of fraud were pleaded under para 13 of the Supporting affidavit to include failure to adhere to the procedure for acquisition of the suit land; failure to develop and or take possession within two years of the grant; acquiring the land without regard to and bypassing and or disregarding and or before the determination of the subsisting agreement between the commissioner of land and himself.
 9. The 1st Defendant failed to file any response to the originating summons.
 10. The 2nd Defendant in her Replying affidavit sworn on 21/8/2014 deponed that she is the guardian ad litem of her father Hon J J Kamotho. She deposed that the 1st Defendant was allocated 25 acres in 1991 and thereafter the suit land was subdivided into 1/8 of an acre plots and each sold and titles processed between the years 1996 -2002 through the offices of the 1st Defendant. Thereafter the 1st Defendant does not own the suit land and there being no cause of action against it, the suit ought to be dismissed. She added that during the subdivision and visits to the site there was no encounter with the plaintiff on the suit land. That the Plaintiff has never been in occupation nor practised any animal husbandry nor quarrying of building materials on the suit land. That the Plaintiff held a licence to occupy the suit land which expired within 9 months. The 1st Defendant was allocated LR No 20695 (suit land) in 1991 at a stand premium of Kshs 2, 111,690/- which was duly paid. A copy of the letter of allotment dated the 24/7/1991 marked as NK3 was annexed.
 11. Save for witness statements, the 1st – 32 Interested parties did not file any pleadings in opposition the Plaintiffs case.

The Evidence of the Parties

12. PW1 – Sarah Wambui Kibiko testified and relied on her witness statement dated 10/3/21 and produced documents marked as PEX1-10 in support of her case.
13. She stated that she is the wife of the late Gibson Kibiku who died on 26/6/2014. Her husband occupied 30 acres of land under licence from the Government of Kenya over land measuring 30 acres L R No 4670 in 1960. He complied with the terms of the said licence including payment of rents. They used



the land for grazing of cows sheep and farming as well as quarrying of murram which Kibiku sold to construction firms. Later the land was subdivided into two portions of 5 and 25 acres each and Kamotho through the 1st Defendant and Nderitu were allocated 25 acres and 5 acres respectively. Nderitu sued them for eviction but the court entered judgement in their favour and reverted the land to them in 2011.

14. She added that she and her family have settled on the suit land and have buried her husband, sons and mother in law.
15. In cross she stated that Kibiku was given the land for grazing livestock and to run one beer hall only. That she was aware that Kamotho subdivided the land and sold to third parties. That Kamotho was a powerful Government Minister and therefore they could not challenge him.
16. The Defendants failed to attend the hearing and offer their testimonies in defence of the Plaintiff's case.
17. Jane Wambui Mungai testified on her own behalf and that of the 1st-10th Interested parties and relied on her witness statement dated 15/9/2020. She stated that she purchased the land from the 1st Defendant and produced the sale agreement dated the 11/11/2008, title issued on 19/11/2008 for parcel No 71 and a transfer of lease by the 1st Defendant. She stated that they are innocent purchasers for value. She did not carry out any due diligence on the land of the 1st Defendant. She has no evidence to show that the 1st Defendant held title over the land. Though she stated that she paid for the land she did not produce any evidence in support.
18. John Macharia Maina relied on his witness statement on his and on behalf of the 11th-32nd Interested parties and produced documents in form of receipts, sale agreement application for search, transfer of lease and payment of land rates in support of his evidence that he purchased parcel No 32/89 from the 1st Defendant through a land agent called Metrocosmo Limited and got title from the 2nd Defendant. He is not aware of any third-party claims, including that of the Plaintiff. He is yet to construct on the suit land though he attempted to put up a house but was demolished by the unknown persons at night.

Site Visit Report

19. At the close of the hearing the parties carried out a site visit which report has been filed in court.

The Written Submissions

20. I have read and considered the written submissions filed by the plaintiff, and the interested parties and I thank counsel for their insights.

Analysis and Determination

21. Having read and considered the pleadings, the evidence adduced during the hearing, the written submissions and all the material placed before the court, the following issues are fall for determination;
 - a. Whether the Plaintiff has proven a claim by way of adverse possession.
 - b. Who meets the cost of the suit?
22. The claim of the Plaintiff is that her husband was licenced to occupy the suit land then measuring 30 acres in 1965 by the Government of Kenya. They lived thereon with their family, practising animal husbandry, quarrying building materials for sale and at some point, buried their kin and kindred on the land. He was also allowed to run one beer hall thereon. That in 1987 the Commissioner of Lands confirmed to Kibiku in a letter that he could occupy the land until further notice. It was her evidence



- that they paid the land rent for the duration of their stay and met all the required conditions to the licence, which evidence was not controverted at all.
23. That in 1991 or thereabouts, while still residing on the property, the land was subdivided into two portions measuring 25 and 5 acres and allotted to the 1st Defendant and one Wambugu Nderitu respectively. Upon obtaining title Nderitu sued them for eviction but judgement was entered in their favour on their counterclaim in 2011 hence recovering the 5 acres. That though the 1st Defendant was allocated the land in 1991, neither the 1st Defendant nor the interested parties have taken any steps to remove him.
24. The interested parties state that they are bonafide purchasers of the portions of the land having purchased the lands from the 1st Defendant. They concede that they have never occupied any part of the land despite obtaining titles in 2002 onwards.
25. It is not in dispute that the Plaintiffs claim against the Defendants has not been rebutted. That said the Plaintiff continues to bear the burden of proof even in such an instance where the case is uncontested. The Court is persuaded by the decision in *Gichinga Kibutha Vs. Caroline Nduku* (2018) eKLR where the Court stated: -
- “It is not automatic that instances where the evidence is not controverted the Claimant shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”
26. The above situation obtains under Section 107 of the *Evidence Act* which states 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.”
27. Equally the burden of proof in a suit or proceeding lies on the person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies on the person who wishes the Court to belief on its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.
28. In the case of *Richard Wefwafwa Songoi Vs. Ben Munyifwa Songoi* (2020) eKLR in which the Court stated as follows: -
- “A person claiming adverse possession must establish the following: on what date he came into possession; what was the nature of his possession; whether the fact of his possession was known to the other party; for how long his possession has continued and that the possession was open and undisturbed for the requisite 12 years.”
29. Section 7 of the Limitations of Actions Act states as follows;
- “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”



30. In the case of *Kasuve Vs. Mwaani Investment Ltd & 4 Others* (2004) KLR 184 the Court stated as follows: -
- “In order to be entitled to the land by adverse possession the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition.”
31. In the case of *Bejoy Chundra Vs KallyProsonno* (1878) 4 cal 1327 the late Mr Justice Markby, as he then was, defined adverse possession as follows;
- “by adverse possession I understand to be meant possession by a person holding the land on his own behalf (or on behalf) of some person other than the true owner, the true owner having a right to immediate possession.”
32. Further in the case of *Wambugu v Njuguna* (1983) KLR 172 the Court of Appeal stated that the general principle is that until the contrary is proved, possession in law follows the right to possess. It stated;
- a. In order to acquire by the statute of Limitations title to land which has a known owner, that owner must have lost his right to, the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.
 - b. The *Limitation of Actions Act*, on adverse possession, contemplates two concepts; dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”
33. In the case of *Kweyu v Omuto*, Court of Appeal, Civil Appeal No. 8 of 1990 the court stated;
- ‘...In deciding the issue of adverse possession, the primary function of a court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is matter of legal conclusion to be drawn from the findings of facts.’
34. It is not disputed that the Plaintiff and her family occupied the land under a temporary licence as early as 1963. However, it was her unchallenged evidence that the land was alienated by the Commissioner of Lands in 1991 to the 1st Defendant while they were in possession.
35. Possession of land with the permission of the owner does not support a claim in adverse possession. In the case of *Malcom Bell v Daniel Toroitich Arap Moi & Another* [2012] eKLR the Court of Appeal held that a claim in adverse possession could not be sustained as the Respondents had come into possession of the property through the permission of the deceased father of the appellant.
36. In this case no evidence was led to suggest that the Plaintiff occupied the land with the permission and or consent of the Defendants.
37. It is the law as founded under section 42 of the Limitations of Actions Act that in Kenya a claim of adverse possession cannot be founded on Government Land. It therefore follows that whilst the licence



was in force no adverse possession accrued to the Plaintiff on account of the licence and or permission from 1965-1991.

38. Has the Plaintiff proven uninterrupted exclusive possession of the land as of right uninterrupted for the duration of 12 years? The starting point are the provisions of Order 37 Rule 7 (1) and (2) which states that an application under section 38 of the *Limitation of Actions Act* shall be made by originating summons. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.
39. With respect to the extract of the 1st defendant's title, Sarah Wambui Kibiku led evidence and stated that; we have endeavoured to get a copy of the title created in favour of the 1st Defendant to no avail apart from a copy of the annual returns showing J J Kamotho as a director of the 1st Defendant.
40. Evidently, the extract of title was in possession of the rival party and the Plaintiff cannot be faulted for not accessing the same. In any event the existence of the said title has not been disputed by any of the parties, least of all the Interested Parties who allege to derive title from the mother title held by the 1st Defendant.
41. However, the court has perused the letter of allotment dated the 24/7/1991 issued to the 1st Defendant for a period of 99 years from the 1/8/1991. The 2nd Respondent in her Replying affidavit deponed on 21/5/2014 stated that the 1st Defendant was allocated the land after which it sub divided into small plots of 1/8 of an acre each. I have seen some of the titles of the resultant subdivisions registered in the name of the 1st Defendant dating back to 2000.
42. The Interested parties led evidence that they purchased the portions from the 1st Defendant and acquired titles, some of the titles have been adduced in evidence.
43. Section 38 of the Limitations of Actions Act states as follows;

“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”
44. It is not in dispute that the 1st Defendant and the interested parties held titles to the land variously and therefore are persons whom time can run against for purposes of adverse possession.
45. When does time begin to run? From the unchallenged evidence on record time started running from 1991 when the land was alienated to the 1st Defendant. There is no evidence in support any steps that the 1st Defendant nor the interested parties took to dislodge the Plaintiff from the suit land. By the year 2003, adverse possession had crystalized in favour of the Plaintiff. Even if the year 2000 when the 1st Defendant became formally registered as title holder is to be taken adversity accrued and crystalized in favour of the Plaintiff by 2012. Whichever way it is looked I find that the plaintiff has proven her claim by way of adverse possession.
46. The site report of 30/1/25 states as follows;

“The suit premises measures approx. 25 acres. On the North Eastern part of the suit property there is a godown under construction. The said building is 75% complete. The suit property has marked roads access and or within it. the suit property borders former castle breweries on the southern with and African Wines and Spirits on the Eastern side is the murrum



road. The plaintiffs residential home borders the suit property from the northern wing. On the western wing the suit property borders with a church and some residential houses. Generally, the whole block of 25 acres is unoccupied and empty save for the godown which is still under construction.

47. It was the case of the plaintiff that she has occupied the property since the 1st Defendant acquired title in from 1965 to date. The Interested parties led evidence that they tried to fence the portions of their acquisition but the fences would be removed. The Plaintiff led evidence that she has been using the land to graze animals and it being an expansive land cannot be said to be unoccupied. The Plaintiff informed the court that she and her husband have all along tried to assert title by seeking the allocation of the land from the authorities to no avail as well as wading off intruders. The report agrees with the Plaintiffs evidence that the 5-acre plot that they hold title borders the suit land. None of the Defendants and or the Interested parties have claimed that they have ever entered the suit property and or developed the same. I find that the site report does little to cloud the claim of the Plaintiff. The defendants and the Interested parties had knowledge of the exclusive uninterrupted and peaceful occupation of the land by the Plaintiff for over 12 years and are now barred by section 7 of the Limitations of Actions Act from wresting the land from the Plaintiff.
48. In the case of *Mwangi & Another –v – Mwangi*, (1986) KLR 328, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights....”
49. As regards the question whether the interested parties are bonafide purchasers for value without notice, the case of the definition of a bonafide purchaser for value without notice is necessary. In the case of *Lawrence Mukiri v. Attorney General & 4 Others* [2013] eKLR thus:
- ... a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:
- a. He holds a certificate of Title.
 - b. He purchased the Property in good faith;
 - c. He had no knowledge of the fraud;
 - d. The vendors had apparent valid title;
 - e. He purchased without notice of any fraud;
 - f. He was not party to any fraud.
50. A bonafide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.
51. In this case the Interested parties claim a purchaser’s interest from the Defendants. The Interested Parties have not shown any diligence that they deployed before purchasing the property. If they had inquired about the status of the land they would have discovered that the Plaintiff holds possessory rights that had accrued in her favour since 2003. The Interested Parties acquired land that had been encumbered with an equitable interest in favour of the Plaintiff hence acquired nothing. Luckily there are without a remedy. I say no more.
52. Final Orders for Disposal



All in all, I find that the Plaintiff has proven her claim of adverse possession and I proceed to enter judgement as follows;

- a. It is hereby declared that the Plaintiff is entitled by way of adverse possession to all that parcel of land known as LR No 20695 Thika Municipality (a subdivision of the original plot being LR No 4670.) measuring 25 acres or thereabouts.
- b. It is hereby ordered that ALL the subdivisions of the mother title being LR No 20695 be and are hereby cancelled and the land do revert to LR 20695 Thika.
- c. The Land Registrar be and is hereby ordered to cancel all the titles arising from the subdivisions of the mother title for LR No 20695 and effect registration of the Plaintiff as the owner all that parcel of land known as LR No 20695 Thika Municipality (subdivided out of the original plot being No 4670.) measuring 25 acres or thereabouts forthwith.
- d. Costs of the suit shall be in favour of the Plaintiff.

53. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF JULY 2025
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered Online in the Presence of:-

1. Mr Omondi HB for Mr Gachie for the Plaintiff
2. N/A for the Defendants
3. Mr Chahilu HB Kibathi for the 1st -10th Interested Parties
4. NA for the 11th -32nd Interested Parties.

