



Brek v Aroi (Suing in her Capacity as the Administrator of the Estate of Yusuf Avumau Aroi) (Environment and Land Case 13 of 2023) [2025] KEELC 7296 (KLR) (16 October 2025) (Judgment)

Neutral citation: [2025] KEELC 7296 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND CASE 13 OF 2023
EK MAKORI, J
OCTOBER 16, 2025**

BETWEEN

FARID ABDALA BREK PLAINTIFF

AND

FATIMA YUSUF AROI RESPONDENT

SUING IN HER CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF YUSUF AVUMAU AROI

JUDGMENT

1. The applicant initiated this legal action through an Originating Summons dated December 18, 2023, seeking a declaration that he has acquired ownership of Plot No. MN/III/539 through adverse possession and requesting an order for registration as its owner.
2. The respondent, in her replying affidavit, sworn on February 7, 2024, denies the applicant's claim.
3. At the conclusion of the case for both parties, the court instructed that counsel present their submissions in written form. Mr. Mwanzia, representing the applicant, and Mr. Hamza, representing the respondent, submitted their written arguments, which the court deeply appreciates as they significantly contributed to resolving the issues before the court.
4. Based on the materials and submissions presented before me, the issues I outline for the court's decision are: whether the applicant has proven entitlement to ownership of the suit property through adverse possession; whether the applicant is eligible for registration as the owner of the suit property; and who should be responsible for the costs of the case.
5. The applicant states that he moved into the property known as Plot Number MN/III/539R, Mtwapa, Kilifi County, without the consent and/or permission of the respondent in 2007.



6. In 2011, the applicant obtained permits from the County Government of Kilifi for the proposed construction of a new Multipurpose Hall and three flats on the suit property. The permits were granted, and the applicant proceeded to construct the said structures, including a hall for classes and rooms for teachers.
7. The applicant claims he has been using the suit property continuously and without interruption for over 12 years since 2007, when he moved in. He has properly developed the property by constructing permanent structures. The applicant provided photographic evidence to support his claim, showing the developments on the suit property as mentioned earlier. Additionally, he presented building permits confirming that the developments on the suit property occurred in 2011.
8. Conversely, the respondent denies that the applicant entered the suit property and built a house there as alleged. The respondent also affirms that the suit property has always belonged to her family, initially owned by her late father, Yusuf Avumai Aroi, who built a mosque and madrasa on the land for the community's benefit. After his death, the property became part of his estate, which the respondent has diligently managed as the lawful Administratrix since December 14, 2012.
9. The respondent clarifies that in 2010, a specific arrangement was made with the applicant's father, Abdalla Brek Said. The proposal was to build three flats and a multipurpose hall, not for private ownership, but to generate income for the mosque and madrasa teachers. This was a community trust (wakf), and the applicant's role was solely to oversee the construction, a fact he acknowledged under oath in his affidavit annexed as 'FYA-1'.
10. In her replying affidavit, the respondent asserts her authority over the property has never ceased. After her father's death, she defended it against teachers trying to take over by successfully filing Mombasa ELC Case No. 294 of 2012 and winning. She also states that the applicant failed to challenge that judgment and argues that ongoing litigation interrupted any adverse possession claim. She maintains the applicant has never been in open, exclusive occupation of the property as claimed.
11. In his submissions, Mr. Hamza argues that the law governing the initiation of adverse possession claims is outlined in Order 37 Rule 7 of the Civil Procedure Rules, which specifies the procedures and requirements for an adverse possession claim to succeed – an OS must initiate it. The extract of the certificate of title to be challenged must be disclosed.
12. Mr. Hamza argues that the applicant has entirely ignored this essential requirement. He has not provided any certified title extract for the land in question. This omission, he asserts, is not a minor error; it is a significant flaw that prevents the Court from making a proper decision on the claim. Additionally, the applicant did not include a Certificate of Search to verify that the land referenced actually exists.
13. In his view the applicant has attempted to create confusion by referring to the suit property as MN/III/539R, in an apparent effort to differentiate it from plot MN/III/539, which was mentioned in the Judgement of Mombasa ELC Case No. 294 of 2012 and relied upon by the respondent (annexed to the Supporting affidavit of the respondent sworn on 17th March 2025 as 'FYA-1').
14. Mr. Hamza considers this an intentionally deceptive move. Plot MN/III/539R and MN/III/539 are the same, known to the applicant. In his affidavit on December 18, 2023, supporting his Notice of Motion, the applicant admits in paragraph 7 that the respondent had 'differences' with teachers over the suit property. These 'differences' were resolved in favor of the respondent in Mombasa ELC Case No. 294 of 2012, and the applicant links his current claim to this earlier litigation, showing the property in question has always been Plot No. MN/III/539.



15. Mr. Hamza states that in his own Originating Summons, the applicant relies upon and attaches an agreement marked 'FAB 1', which unequivocally identifies the suit property as Plot No. MN/III/539. He cannot now retreat from the precise meaning of his own evidence; his submissions irrefutably confirm the identity of the land in question.
16. Mr. Hamza further asserts that the applicant has not provided any ownership documents linking the respondent to the alleged second Plot No. MN/III/539R. More fundamentally, the judgment in Mombasa ELC Case No. 294 of 2012 confirmed that the respondent's father owned land adjacent to MN/III/539, which was unadjudicated at that time.
17. Mr. Hamza concludes that it is well-established law that the doctrine of adverse possession cannot be invoked over unadjudicated land. The process for asserting a claim on such land is governed by statute, specifically the [Land Adjudication Act](#).
18. Mr. Mwanzia claims that plot No. MN/III/539R and MN/III/539 are separate parcels of land; therefore, the proceedings and judgment in Mombasa ELC Case No. 294 of 2012 do not apply in this case.
19. This court was moved under Order 37 Rule 7 of the Civil Procedure Rules, which outlines the procedure for filing suits under the doctrine of adverse possession. It states that it must be done through the Originating Summons.
20. Adverse possession is addressed in sections 7, 13, 17, 37, and 38 of the Limitations of Actions Act, Cap 22 Laws of Kenya. These sections cover adverse possession of land and also include provisions for revocation and registration of the new owner.
21. In the case of Mbira v Gachuhi [2002] IEALR 137, it was held that adverse possession must accrue under specific legal conditions:

“..... 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....”
22. Significantly, as submitted by Mr. Hamza, with whom I agree, Order 37 Rule 7 of the Civil Procedure Rules provides:

“7. Adverse possession [Order 37, rule 7]

 - (1) An application under section 38 of the [Limitation of Actions Act](#) (Cap. 22) 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.
 - (3) The court shall direct on whom and in what manner the summons shall be served.”
23. Munyao J. emphasized this rule in the ELC Practice Guidelines titled: “Guidelines towards best practices in resolution of disputes within the coast region, especially concerning suits for adverse possession and/or suits with multiple plaintiffs/defendants.” The aforementioned is dated September



20, 2022, in which the judge clarified that Order 37 Rule 7(2) must be strictly followed to effectively adjudicate matters related to adverse possession, as outlined in paragraph 4 of the guidelines:

“Suits for adverse possession must strictly comply with the requirements of Order 37 Rule 7 (2) on the provision of the certified extract of the title. Such must be current at the time of filing suit because land does change ownership. Note that the law requires that the Originating Summons be supported by an affidavit to which a certified extract of the title is annexed.”

24. The applicant entirely overlooked this crucial requirement. No certified title extract for the land in question has been provided. This omission is not a minor oversight; it is a substantial flaw that hinders the Court from making an informed decision. Additionally, the applicant did not include a Certificate of Search to confirm the existence of the land in question.
25. I agree with Mr. Hamza that the applicant has tried to create confusion by referring to the suit property as MN/III/539R, apparently to distinguish it from plot MN/III/539, which was mentioned in the judgment of Mombasa ELC Case No. 294 of 2012 and relied upon by the respondent in the supporting affidavit sworn on March 17, 2025.
26. The applicant provides no evidence to differentiate these two plots since no extract of Plot MN/III/539R and MN/III/539 was submitted, leading to the conclusion that they are identical. In his supporting affidavit sworn on December 18, 2023, in support of his Notice of Motion filed the same day, the applicant admits in paragraph 7 that the respondent had ‘differences’ with teachers regarding the property. The key point of this statement is that these ‘differences’ were the very issue conclusively decided in favor of the respondent in Mombasa ELC Case No. 294 of 2012. I agree with the respondent that by acknowledging this, the applicant links his current claim directly to the earlier case, clearly showing that the property he now claims is, and has always been, Plot No. MN/III/539.
27. Furthermore, providing the title extract could have clarified that there was an adjacent plot belonging to the respondent and that the same land was fully registered and not under adjudication; if so, adverse possession would apply.
28. Regarding the applicant's presence on the suit property, the record shows it was permissive, not adverse. His own replying affidavit confirms that his father built the flats and hall in 2010 with the respondent's father's consent, for the communal purpose of supporting the madrasa. I am persuaded by the reasoning in *Samuel Miki Waweru v Jane Njeri Richu* [2007] KECA 465 (KLR), where on a similar point the court held:

“... It is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise. Further, as the High Court correctly held in *Jandu v Kilpal* [1975] EA 225, possession does not become adverse before the end of the period for which permission to occupy has been given. The principle to be extracted from the case of *Sisto Wambugu v Kamau Njuguna* (1982 – 88) 1 KAR 217 relied on by Mr. Gitonga, learned counsel for the appellant, seems to be that a purchaser of land under a contract of sale who is in possession of the land with the permission of the vendor pending completion cannot lay a claim of adverse possession of such land at any time during the period of validity of the contract unless and until the contract of sale has first been repudiated or rescinded by parties in which case adverse possession starts from date of the termination of the contract.”



29. According to the record, the respondent's father granted permission to the applicant's father to build the flats and hall for community benefit, not for private ownership. The applicant's later role as an "overseer" of the construction, as admitted in Paragraph 5 of the supporting affidavit sworn on July 30, 2020, further clarifies that his involvement was non-possessory.
30. The applicant relies on construction permits, but they are not attached. The claim of 12 years' continuous possession is unproven; after building the flats and hall, the applicant never resided in or had exclusive control of the premises. The mosque and madrasa, which are central to the property, were built and maintained by the respondent's family.
31. The applicant failed to meet the evidentiary burden under Sections 107, 109, and 112 of the *Evidence Act*. The multipurpose hall was for the madrasa, not personal use. After the respondent's father's death, madrasa teachers attempted to take control, leading to Mombasa ELC Case No. 294 of 2012, where the court upheld the respondent's ownership. The judgment has not been challenged. The applicant's review application was dismissed on November 15, 2023.
32. Arising from the foregoing, the current OS must fail and is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED ELECTRONICALLY IN MALINDI ON THIS 16TH DAY OF OCTOBER, 2025.

E. K. MAKORI

JUDGE.

In the Presence of:

Ms. Gatimu for the Applicant

Mr. Shehe for the Respondent

Happy: Court Assistant

