



REPUBLIC OF KENYA



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Kilonzo v Wakinyi & another; Mutungi & another (Interested Parties) (Environmental and Land Originating Summons 55 of 2020) [2025] KEELC 7541 (KLR) (27 October 2025) (Judgment)

Neutral citation: [2025] KEELC 7541 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 55 OF 2020
A NYUKURI, J
OCTOBER 27, 2025**

BETWEEN

FRANKLIN WAMBUA KILONZO PLAINTIFF

AND

PETER MUSYOKA WAKINYI 1ST RESPONDENT

PHILIP MUTISO NYENGE 2ND RESPONDENT

AND

PAUL KIOKO MUTUNGI INTERESTED PARTY

PETER NZEMA MUTUNGI INTERESTED PARTY

JUDGMENT

Introduction

1. In an Originating Summons dated 16th July 2020, the applicant sought against the respondents, the determination of the following issues;
 - a. Whether the applicant has acquired prescriptive rights over a portion measuring three quarter $\frac{3}{4}$ ($\frac{3}{4}$) acres from all that parcel of land known as Iveti/ Mungála/294 now registered in the name of the 1st respondent herein Peter Musyoka Wakinyi.



- b. Whether the applicant has acquired prescriptive rights over a portion measuring a quarter ($\frac{1}{4}$) acre from all that parcel of land known as Iveti/ Mungála/ 325 now registered in the name of the 2nd respondent herein Philip Mutiso Nyenge
 - c. Whether the respondents should provide costs of this application.
2. The applicant sought the following orders;
- a. That the applicant be and is hereby declared the owner by prescription over a portion measuring three quarter ($\frac{3}{4}$) acres from all that parcel of land known as Iveti/ Mungála/294.
 - b. That the applicant be and is hereby declared the owner by prescription over a portion measuring a quarter $\frac{1}{4}$ acre from all that parcel of land known as Iveti/ Mungála/325.
 - c. That the respondents do pay the costs of this application
3. The Originating Summons was supported by the affidavit sworn by the applicant on 16th July 2020. The applicant stated that land parcel No. Iveti/ Mungála/294 was registered in the name of Wakiyye Kiluu Mulwa and that his wife Kaveso Wakinye sold a portion thereof measuring $\frac{3}{4}$ acres to one Musyoki Musembi alias Nguka. That both the seller and purchaser died before the land was transferred to the purchaser. That on 17th April 1999, he entered into a land sale agreement with Maweu Nguka son of Musyoki Musembi, purchasing $\frac{1}{4}$ of an acre, whereof he paid in full the agreed purchase price of Kshs. 47, 000/= . That he immediately took possession, put up a permanent house on the purchased property, planted trees thereon and continued in occupation of $\frac{3}{4}$ acres for a period of 21 years.
4. That he again entered into a land sale agreement with Maweu Nguka purchasing $\frac{1}{4}$ of an acre in respect of parcel No. Iveti/ Mungála/325 at a consideration of Kshs. 80, 000/=, which land Musyoki Musembi had purchased from Nyenge Kiluu, the registered owner thereof. That he fenced and has been cultivating the said land and planted fruit trees for a period of 18 years. That the respondents are his neighbours and have been aware of his occupation. That he realized in June 2020 that the 1st respondent had filed succession in respect of his late father Wakinye Kiluu's estate and parcel No. Iveti/ Mungála/294 secretly registered in his name, and that the 2nd respondent had also filed succession in regard to the estate of Nyenge Kiluu and registered parcel No. Iveti/ Mungála/325 in his name.
5. That since 1999, the 1st respondent has never set foot on the $\frac{3}{4}$ acres occupied by the applicant, while the 2nd respondent has never set foot on the $\frac{1}{4}$ acre occupied by the applicant. That no one ever complained of his uninterrupted occupation of the suit properties until June 2020 when the 2nd respondent added a fence to the portion already fenced by the applicant. He attached sale agreements; photographs; grant and searches.
6. The suit was opposed. Peter Musyoka Wakinyi filed a replying affidavit dated 21st April 2021. He conceded that parcel No. Iveti/ Mungála/294 was initially registered in the name of Wakinya Kiluu Mulwa his father, who died in 1996. He stated that allegations that the applicant purchased part of that parcel were false. That Maweu Nguka had no capacity to sell the said property. That at the time of the alleged transaction, his father had already passed on, hence that transaction amounts to intermeddling with a deceased person's estate. He maintained that the applicant's occupation of parcel No. Iveti/ Mungála/294 is illegal and cannot create any rights in his favour. That the occupation was not open and peaceful as his family has always sought vacant possession from the applicant.



7. That the applicant permanently lives in Mombasa and that between 2014 and 2017, with impunity, he put up a permanent house on the suit property without the 1st respondent's consent or approval. He stated that he filed succession proceedings in regard to the estate of his late father in Machakos HCC P&A No. 109 of 1999 and transferred parcel No. Iveti/ Mungála/294 into his name on 4th August 2018, hence the applicant cannot be entitled to the suit property by prescription. That the applicant should give him vacant possession of the suit property as he is a trespasser and should be evicted and compelled to demolish his illegal structures on the suit property. He stated that he procured registration of the suit property into his name lawfully and the applicant has no legal or equitable interest therein. He attached the death certificate of his late father, letters of grant of administration and title deed for parcel No. Iveti/ Mungála/294.
8. The 2nd respondent filed a replying affidavit dated 21st April 2021. He stated that his late father Nyenge Kiluu never entered into any land sale agreement with the applicant. That the sale agreement between the applicant and Maweu Nguka was fraudulent as the latter had no capacity to transact. That the suit property was registered in the name of his father in 1994 and that at the time of the transaction in 2002, his father was already dead, hence the applicant is an intermeddler. That neither his father nor his family allowed the applicant to enter the suit property. That the applicant permanently lives in Mombasa and has never lived on the suit property. That in 2013, the applicant with impunity began cultivating on the suit property without his consent. That having filed succession in respect of his father being Machakos HCC P& A No. 51 of 2003, he got himself registered as owner of the parcel No. Iveti/ Mungála/325. That he has been in occupation of the said parcel for more than 30 years and the same is still under his occupation. That the applicant should be compelled to destroy illegally constructed structures on the suit land at his cost. That he lawfully acquired the suit property and the applicant's remedy is to get a refund of his purchase price. That from 2003 when he had knowledge of the applicant's unlawful occupation of the suit property, he told the applicant's father to warn him to stay away hence his occupation has not been peaceful, or continuous. He attached his father's death certificate, grant of letters of administration and title deed.
9. The interested parties herein sought to be joined to this suit vide their application dated 4th June 2021, which was allowed. The 1st interested party on his own behalf and on behalf of the 2nd interested party swore the replying affidavit dated 27th September 2021 in response to the Originating Summons. He stated that he purchased parcel No. Iveti/ Mungála/ 325 from the 1st respondent on 9th June 2020, while his brother the 2nd interested party purchased parcel No. Iveti/ Mungála/ 294 from the 2nd respondent on 19th February 2020. That before the purchases, they conducted due diligence by obtaining copies of title and certificate of confirmation of grant for the estate of the late Nyenge Kiilu. That they lodged transfer documents with the lands office and that they were not aware of any encumbrance on the suit properties. That no objection was raised in regard to the grant and the transfer process.
10. The matter was heard by way of viva voce evidence. The applicant presented seven witnesses while the respondents presented four witnesses and the interested parties presented one witness.

Applicant's evidence

11. PW1 was Frankline Wambua Kilonzo who adopted contents of his affidavit in support of the Originating summons as his evidence in chief and produced documents attached thereon. He testified that parcel No. Iveti/ Mungála/294 was initially registered in the name of Wakiyye Kiluu Mulwa. That the land owner's wife one Kaveso Wakinye sold a portion thereof measuring $\frac{3}{4}$ acres to one Musyoki Musembi alias Nguka. That subsequently, on 17th April 1999, he purchased land measuring $\frac{1}{4}$ of



- an acre from Maweu Nguka son of Musyoki Musembi at a consideration of Kshs. 47, 000/= and immediately took possession, put up a permanent house, planted trees and continued in occupation of the purchased $\frac{3}{4}$ acres for a period of 21 years.
12. That he later purchased $\frac{1}{4}$ of an acre in respect of parcel No. Iveti/ Mungála/325 at a consideration of Kshs. 80, 000/= from Maweu Nguka which land Musyoki Musembi had purchased from Nyenge Kiluu, the registered owner thereof. That he has fenced that land, planted fruit trees thereon and has been cultivating the same for a period of 18 years. That the respondents are his neighbours and have been aware of his occupation. That he realized in June 2020 that the respondents had secretly been registered as owners of parcel Nos. Iveti/ Mungála/294 and 325 respectively after succeeding their late fathers' estates.
 13. That his occupation since 1999 and 2002 respectively, has been open and without interruption. He produced sale agreements; photographs; grants of letters of administration issued in 2004 and 2006, searches, receipts for payment of legal fees to the firm of Kisongoa advocates, demand letter, proposed subdivision of parcel No. 294 and mutation forms.
 14. On cross examination, he stated that he had not produced one agreement of sale of land. That at the time of purchase in 1999, there was an administrator to the estate of Wakinye. That when he purchased the suit property, the registered owner was already dead. That he had no agreement between Musyoki and Kaveso. That he placed a caution on the land later after being told that the interested parties had allegedly bought the land. That he did not produce a valuation report from the forest department to show the value of the trees on the land.
 15. PW2 was Joseph Mutua who adopted his witness statement as his evidence in chief. His testimony was that he was the applicant's cousin and that in 2003 he was the one who constructed the applicant's house on parcel No. Iveti/ Mungála/294, which property also had rental houses. That he had been the one collecting rent for the applicant between 2012 to 2018. That the respondents have been aware of the applicant's occupation.
 16. In cross examination, he stated that parcel No. 294 was purchased in 1997 and parcel No. 325 was purchased when he was young, although he did not witness the sales. That the applicant was using the suit property. That he lived with the applicant until 2018.
 17. PW3 was Timothy Mutuku Kiamba. He adopted his witness statement as his evidence in chief. His testimony was that he was a retired Assistant Chief, Mungála sublocation. That he grew up in that village since 1950. That he was aware that the applicant purchased the suit properties in 1999 and 2002 respectively and that his occupation has not been objected to by anyone. That the applicant's occupation of the two properties has been for a period of over 12 years.
 18. On cross examination, he stated that he did not witness the applicant's sale agreement in 1999 and that Maweu was not the registered owner of the land he sold. That he witnessed the agreement in regard to parcel No. 325. That he stays 200 meters from the plaintiff. That he had been Assistant Chief since 1988 to 2003. That he stamped the agreement of 1999. That he wrote that agreement.
 19. PW4 was Francis Nzau Kaunange, a Chaplain at Mumbuni Boys High School. He adopted his witness statement as his evidence in chief. His testimony being that he was the applicant's neighbour for over 20 years. That in 1999, the applicant purchased land and settled there. In cross examination, he stated that he did not know the registration number of the land occupied by the applicant and did not know the person who sold land to the plaintiff. That the applicant has built on the suit property. That he moved away to Kasinga 13 years ago. That there was no dispute over the applicant's land.



20. PW5 was Francis Wambua. He adopted his witness statement as his evidence in Chief. He stated that the applicant had been his landlord since January 2012 up to mid 2015. That he lived on the applicant's premises with his wife and the building appeared to have been put up several years before his occupation.
21. In cross examination, he stated that he did not know the registration number of the applicant's land and did not know how the applicant acquired the suit property. That the applicant used to issue them with receipts for rent payment but none had been filed in court. That he had no document to show he lived in the applicant's premises.
22. PW6 was Rose Mutinda who adopted his witness statement as his evidence in chief. She stated that the applicant had been his landlord from 2012 to 2015 at his houses in Kisooni. That the houses appeared to have been build several years before her occupation. In cross examination, she stated that they had an oral tenacy agreement and that she had no evidence to show she was the applicant's tenant.
23. PW7 was Syokau Kabilu. She adopted her witness statement as her evidence in chief. She stated that the applicant was her neighbour for over 30 years. That the applicant bought land from Maweu Nguka in 1999. That since then he constructed a house on the land. That there was no dispute on the land since then until 2020 when the respondents wanted to take the land from the applicant.
24. In cross examination, she stated that he did not know the registration number of the land purchased by the applicant and was not present when the agreement was made in 1999. That her house was 800 meters from the applicant's house. That marked the close of the applicant's case.

Respondents' evidence

25. DW1 was Peter Musyoka Wakinyi. He adopted his witness statement dated 21st October 2021. His testimony was that parcel No. 294 was initially registered in the name of his late father Wakinye Kiilu Mulwa who died in 1996. He denied the applicant's allegation that Musyoka Musembi purchased $\frac{3}{4}$ acres of the said property from Kaveso Wakinye. He stated that the alleged sale by Maweu to the applicant was fraudulent as Maweu had no capacity to transact. That the applicant's occupation of the suit property is illegal and that the same was neither peaceful nor open since on many occasions, he demanded vacant possession. That having obtained grant of representation, he got registered as owner of the suit property lawfully and that he sold parcel No. 294 to Peter Nzema Mutungi at a consideration of Kshs. 1, 200, 000/= on 19th February 2020. He produced documents he filed as exhibits. He produced death certificate, grant of letters of administration, title deed for parcel No. 294 and sale agreement.
26. On cross examination, he stated that currently the suit property is registered in his name, and it was previously in his father's name. That he filed succession in 1999. That there is one person on the land who has refused to vacate the land. That the person has built on the land, dug a well on the land and lives in Mombasa, but his brother lives on the land. That he has put up a gate and a fence on the land. He denied allegation that his mother Kavesa was issued with grant in 2006. That he was aware his mother had an advocate called Paul Kisongoa and that the said advocate represented his mother in a succession cause. That he did not know if there was an agreement on payment of the advocates legal fees with the applicant. That the plaintiff took his mother to the advocate before consulting him. That he did not know if the applicant entered the land in 1999, but knew he was on the land in 2014. That when the applicant entered the suit property, he constructed thereon but that the witness did not sue him to stop the construction. He stated that the applicant had put up a rental house and that he lives in Mombasa where he is a teacher. That during succession, he did not inform court that the applicant was on the land and that he did not tell the applicant that he was the administrator. That he also did



not tell the people he sold the land to that there was someone else in occupation of the land. That he never informed the applicant when he sold the land to interested parties and never wrote a letter asking the applicant to vacate. That the person who purchased the land from him had not moved into the land. That he knew some of the applicant's tenants, one of whom was a police officer. That he has never known how the applicant got the suit property.

27. DW2 was Philip Mutiso Nyenge, the 2nd respondent. He adopted his witness statement dated 21st October 2021. He produced documents he filed as exhibits. His testimony was that parcel No. 325 was initially registered in the name of his late father Nyenge Kiilu Vele who died in 1994. He denied the applicant's allegation that Musyoka Musembi purchased ¼ acres of the said property from Nguka. He stated that the alleged sale by Maweu Nguka to the applicant was fraudulent as Maweu had no capacity to transact. That the transaction amounted to intermeddling with a deceased person's property. That the applicant was not allowed by this witness' family to occupy the said property and that having obtained grant of representation, he got registered as owner of the suit property lawfully and that he sold parcel No. 325 to Paul Kioko Mutungi at a consideration of Kshs. 1, 200, 000/= on 9th June 2020. He produced documents he filed as exhibits. He produced death certificate, grant of letters of administration, title deed and sale agreement.
28. In cross examination, he stated that parcel No. 325 was in his name. That the applicant had claimed the said land before he commenced succession. That the applicant informed him that he bought the land from Maweu. He stated that Maweu has never bought land from his father. That nothing was constructed on parcel No. 325. That he has planted guava and Mango trees on that land. That the plaintiff entered the land in 1995 and barred them from using the land. That he has never sued the plaintiff for eviction. That the plaintiff has never cultivated the suit property and that it is not the plaintiff who planted the trees seen in his photographs. That DW1 was his cousin and he had asked him to take care of his land parce No. 294. That DW1 moved to Lukenya from the suit land many years ago and had not been using the land. That he was aware that the plaintiff constructed on parcel No. 294. That he built on the land before the witness was asked to be a care taker of that land. That he did not tell the applicant that he was selling his land.
29. DW3 was Teresia Muloko Mutiso, the wife of the 2nd respondent. She adopted her witness statement dated 21st October 2021 as her evidence in chief. She reiterated the testimony of the 2nd respondent. On cross examination, she stated that they sold parcel No. 325 although it is in her husband's name. That they had been planting maize and beans on the land and they had planted guava and avocado trees before they sold it. That when they sold the land, no one was on the land. That the applicant had built a house on part of parcel No. 294 and that they have had a dispute for over 20 years as he came on the land claiming to have bought it from Maweu. That he built on the land in february 2021 and dug a borehole thereon the same year.
30. DW4 was Serah Ndulu Musyoka, the wife of the 1st respondent. She adopted her witness statement as her evidence in chief. She reiterated DW1'S evidence. In cross examination, she stated that parcel No. 294 is in her husband's name and that they sold it to the 1st interested party. That the applicant built on that land by force. That she cannot remember when the applicant entered parcel No. 294. That the applicant has put up two houses and a gate on the said property. That as at 2002, the applicant had already built a house on parcel No. 294. That the 2nd interested party asked about who had constructed on the land at the time of purchase of the land and was informed that it was the applicant. That marked the close of the respondents' case.



Interested parties' evidence

31. IP 1 was Paul Kioko Mutungi, the 1st interested party. He adopted his witness statement dated 4th October 2023 as his evidence in chief and produced documents filed. His testimony was that together with the 2nd interested party they each purchased the two parcels of land from the respondents respectively. He produced sale agreements and transfer forms. In cross examination, he stated that he inspected the land before purchase and that other than the seller of the land, no other person was in possession. That he conducted due diligence before purchase but had not produced copies of title or confirmation of grant. That marked the close of the interested parties' case.
32. Parties filed written submissions in support of their respective cases. On record are submissions filed by the applicant dated 18th February 2025 and the interested parties' submissions dated 8th May 2025.

Applicant's submissions.

33. Counsel for the applicant submitted that the applicant had proved having acquired the suit properties by adverse possession. Counsel relied on sections 7 and 38 of the *Limitation of Actions Act* as well as sections 28 (h) of the *Land Registration Act* and argued that rights acquired by prescription are overriding interests. The court was also referred to the cases of Gabriel Mbui v Mukindia Maranya [1993] KLR; Oketch (Suing as the administrator and legal representative of the estate of Henry Oketch Odhiambo0 v Ogwang & 2 Others (Environment and Land Appeal E009 of 2023) [2024] KEELC 6944 (24 October 2024) (Judgment) and Public Trustee v Wanduru [1984] e KLR on what constitutes adverse possession.
34. Regarding whether the applicant had met the threshold for a claim for adverse possession, counsel referred to the case of Gatimu Kinguru v Muya Gathangi (1976) KLR 253 and submitted that land sought on adverse possession must be definitely identified, defined and with clear boundaries. Counsel argued that the applicant had identified the suit properties accordingly and demonstrated that he had adversely occupied the suit properties for the statutory period continuously. Counsel also argued that the applicant was entitled to costs.

Interested parties' submissions

35. Counsel for the interested parties submitted that the transactions between the applicant and Maweu Nguka were invalid as at the time of the transactions, the registered proprietors of the suit properties were already dead. Counsel argued that the applicant failed to provide evidence to show that Kaveso Wakinye sold land to Musyoki Musembi. They referred the court to provisions of section 3 of the *Law of Contract Act* regarding the elements of a valid contract, and submitted that the contract relied upon by the applicant was not valid.
36. On whether the applicant had met the threshold for adverse possession, counsel relied on the case of Wilson Kazungu Katana & 101 Other v Salim Abdala Bakshwein & Another (2015) KECA 728 KLR, and submitted that the applicant failed to demonstrate having had exclusive and open possession of the suit properties. Reliance was further placed on the case of Samuel Miki Waweru v Jane Njeri Ruchu Civil Appeal No. 122 of 2001 (UR) for the proposition that to prove adverse possession, a claimant must demonstrate that his occupation of the land claimed was without the owner's permission. Counsel relied on section 107 of the *Evidence Act* and argued that the burden of proof in the case was upon the applicant.
37. Regarding the question as to whether the transactions between the respondents and the interested parties were valid, counsel contended that at the time of sale, the suit properties had been registered



in the vendors' respective names who had lawfully obtained registration upon undertaking succession proceedings. Counsel relied on section 26 of the *Land Registration Act* and argued that the respondents titles were indefeasible. They submitted that the interested parties were bona fide purchasers for value and hence their acquisition of the suit properties was lawful. On costs, counsel submitted that the interested parties should be awarded costs as costs follow the events.

Analysis and determination.

38. The court has carefully considered the pleadings, evidence and submissions filed. The only issue that arise for the court's determination is whether the applicant has proved that he acquired the suit properties by way of adverse possession.

39. The *Limitation of Actions Act* is the basis for adverse possession claims. Section 7 of the *Limitation of Actions Act* bars a person from bringing a suit for claim of land after twelve years, and states that;

“An action may not be brought by any person to recover land after the end of 12 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 provides as follows;

1. A right of action to recover land does not accrue unless the land is in 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, whereunder Section 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.”

Section 17 states as follows;

Subject to Section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.

Section 38 (1) and (2) provides 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 the 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.

40. Thus, where an owner of land fails to assert his or her rights, when he or she has been dispossessed of his or her land by a trespasser who came on the land without force, secrecy and the owner's permission, and who has openly and exclusively occupied the same continuously for 12 years, the owner's rights in that land become extinguished under the doctrine of adverse possession. In such a case, the trespasser may apply to this court to be registered as owner of such land in the place of the owner.



41. In the case of *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR where the Court of Appeal cited with approval the case of *Adnam v Earl of Sandwich* (1877) 2 QB 485, the rationale for adverse possession was stated as follows;

“The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties.”

42. To prove adverse possession, a claimant ought to show that he or she has dispossessed the rightful registered owner of their land for a continuous period of 12 years. In the case of *Maweu v Liu Ranching and Farming Cooperative Society* 1985 KLR 430, the court held as follows;

“Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession have been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances.”

43. In the instant case, the applicant alleged that he had adversely, openly and as of right occupied $\frac{3}{4}$ acres of parcel No. 294 since 1999 and $\frac{1}{4}$ acres of parcel No. 325 since 2002 for uninterrupted period of over 12 years. This assertion was denied by the respondents who stated that the occupation was from 2014 and 2013 respectively and that the same was not peaceful as they both had been asking the applicant to vacate the land.

44. From the evidence, the applicant provided evidence of photographs showing a permanent house on parcel No. 294. The respondents' witnesses confirmed that the applicant had built on the land parcel No. 294 and had been on the land for over 20 years. DW4 stated that as of 2002, the applicant had been on parcel No. 294 but no suit has been filed to evict him. While the respondents confirmed that his presence on the suit property was unlawful, he conceded that no suit for eviction was filed against the applicant. It is therefore clear that the applicant's occupation of parcel No. 294 was adverse, open as of right, with no permission of the registered owner and continuous for a period of over 12 years. The 1st interested party claimed to have entered into a land sale agreement with the 1st respondent in 2020. He alleged to have purchased the suit property when there was no one thereon save the registered proprietor. This evidence is not credible as several defence witnesses confirmed that the applicant had been on the property for several years having put up houses thereon and therefore the interested parties could not have failed to see the applicant's houses on the said property. No transfer was effected in favour of the interested party before the 12 year period. The statutory period ran from when the administrator of the estate of wakinye Kiluu Mulwa one Susana Kaveso Wakinye obtained grant of letters of administration in 2006, which grant was issued in Machakos HCC P&A Cause No. 109 of 1999. Therefore, the 1st respondent's title over the portion occupied by the applicant had been extinguished, even before the alleged sale to the 1st interested party in 2020 since it was conceded by the respondents that the applicant had put up his houses on the suit property before 2002. For the above reasons, I therefore find and hold that the applicant has proved having acquired $\frac{3}{4}$ acres of parcel No. 294 by adverse possession.

45. Regarding parcel No. 325, the search and title presented in evidence show that the said parcel measures 0.08 hectares which is 0.2 of an acre. The applicant claims $\frac{1}{4}$ of an acre which is 0.1 hectares or 0.25 of



an acre. I do not see how the applicant could occupy more land than the entire parcel No. 325 and still claim that he had occupied only a portion and not the entire parcel. To be in adverse possession of land, the occupied portion must be identifiable with clear boundaries, area and or size (See Gatimu Kinguru v Muya Gathangi (1976) KLR 253). However, in the instant case, it is clear that the size stated and claimed by the applicant cannot be in reference to parcel No. 325 which is apparently smaller than the portion occupied by the applicant. The court cannot make illogical orders that cannot be enforceable. Besides, the nature of the applicant's occupation of parcel No. 325 which is alleged to be a fence and cultivation, was contested and the 2nd respondent denied the allegation that the applicant had been cultivating the said parcel. No evidence was presented by the applicant to show that for over 12 years, he had exclusively been in occupation of the said parcel and dispossessed the registered owner thereof. In my view, cultivating and fencing another person's land, although it may amount to trespass, is not sufficient demonstration of adverse possession. In addition, when the applicant's period of occupation was challenged, the applicant failed to provide clear evidence to show that he had occupied the said property for over 12 years. I therefore find and hold that the applicant has not proved his claim of ¼ acres over parcel No. 325. I therefore dismiss the applicant's claim in regard to parcel No. Iveti/ Mungála/ 325 against the 2nd respondent, with costs.

46. In the premises, I find and hold that the applicant has proved his case on the required standard against the 1st respondent in regard to parcel No. Iveti/ Mungála/ 294 and I allow his claim as follows;
- a. That the applicant is hereby declared the owner by prescription over a portion of land measuring three quarters ($\frac{3}{4}$) acres from all that parcel of land known as Iveti/ Mungála/294.
 - b. The 1st respondent shall transfer $\frac{3}{4}$ acres from parcel No. Iveti/ Mungála/ 294 to the applicant within 60 days of this judgment and in default, the Deputy Registrar of this court shall execute all the necessary transfer documents to vest the said portion in the applicant's name.
 - c. The 1st respondent shall bear the costs of the suit.

47. It is so ordered.

DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 27TH DAY OF OCTOBER, 2025

A. NYUKURI

JUDGE

In the presence of;

Mr. Kivui holding brief for Mr. Mutava for the applicant

Mr. Mutunga holding brief for Mr. Musyimi for the respondents

Mr. Mburu for interested parties.

Court Assistant- Delphine

