



**Kariuki v Mwangi (Sued as the legal representative of the Estate of the Late Simon Mwangi Kamau) (Environmental and Land Originating Summons E009 of 2023) [2025] KEELC 7744 (KLR) (14 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 7744 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT EMBU**  
**ENVIROMENTAL AND LAND ORIGINATING SUMMONS E009 OF 2023**  
**AK BOR, J**  
**OCTOBER 14, 2025**

**BETWEEN**

**MARGARET WAMBUI KARIUKI ..... PLAINTIFF**

**AND**

**FELIX MAINA MWANGI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE SIMON MWANGI KAMAU) ..... DEFENDANT**

**JUDGMENT**

1. Through the Amended Originating Summons dated 13/10/2024, the Plaintiff seeks a declaration that she has become entitled to ownership of a portion of land measuring 0.49 ha out of Nthawa/Riandu/735 (the suit land) against the Defendant by virtue of Section 7 of the *Limitation of Actions Act* and in the alternative, a declaration to be issued that the Defendant is registered as proprietor of the land on behalf of and in trust for her and the trust must be dissolved in her favour. She seeks a declaration that she is entitled to be registered as proprietor of the suit land pursuant to a constructive trust and for Deputy Registrar of this court to execute the necessary transfer documents in her favour as well as costs of the suit.
2. The suit land is registered in the name of the late Simon Mwangi Kamau and the Defendant is his legal representative. The Plaintiff's case is that since 2000, she has been in occupation of the suit land with her family openly, peacefully and as of right without interruption. She averred that over the years she and her family had extensively developed the suit land by constructing residential houses, planting indigenous trees and cultivating various food crops on the land. She contended that the Defendant has never occupied the suit land from the time she took possession in 2000, nor had he taken any steps to evict her. She added that the Defendant's title to the suit land was therefore encumbered by a constructive trust and that the trust should be dissolved in her favour.



3. The Defendant filed a replying affidavit in opposition to the claim and averred that the late Simon Mwangi Kamau was his father and the registered proprietor of the suit land while the Plaintiff is the registered owner of Nthawa/Riandu/3325, which neighbors the suit land. He averred that his father died on 29/11/1987 and that at the time of his death, he was very young and his family briefly occupied the suit land but later moved to Nyeri to be near their maternal family. Sometime in May 2021, his family moved back to take possession of the suit land but found that the boundary of the land had been interfered with and was missing. He took up the issue of re-establishing the boundary between the suit land and that of the Plaintiff by engaging various authorities including the District Land Surveyor, Land Registrar and even filed a case in the Magistrates court for re-establishment of the boundaries but the suit was struck out.
4. He averred that the Plaintiff had been uncooperative and the boundary issue could not be resolved. He averred that the Plaintiff filed this suit in a bid to avoid the re-establishment of the boundary. He claimed that as at 22/7/2021, there were no crops on the disputed portion of the suit land nor was the land tilled. He added that there were only a few trees on the land that were recently cut down and he learnt from the Plaintiff's son served as the boundary identifiers between the two parcels of land. When he visited the suit land on 23/11/2023, he found that the Plaintiff had erected temporary boundaries with tree branches and attempted to cultivate the disputed land, in an effort to establish occupation of the suit land.
5. He denied that the Plaintiff had been in uninterrupted occupation of the suit land for over 12 years based on the averment that the registered owner died in 1987, which was more than 13 years before the Plaintiff took possession. He contended that one of the ingredients of adverse possession is that the registered owner has to have the knowledge of the unauthorized occupation and takes no action to end the occupation, which is not the case here. He added that the Plaintiff had not met the requirements for adverse possession and this suit is a bid to avoid dealing with the boundary dispute.
6. During the hearing, the Plaintiff adopted her written statement and reiterated her claim that she has occupied the suit land since 2000 and had become entitled to it by way of adverse possession. She stated that together with her brother, David Kabuga, they purchased 5 acres of land from Simon Gichuhi and divided it into two portions. She stated that she did not know that she got a big share of the land after subdivision.
7. On cross-examination, she clarified that she was not in court over the land that belongs to the late Simon but that the land is hers. She stated that she entered the land in 2000 and that the late Simon came to the land in 2001 to deliver a letter to her. She was told that Simon died in 1987 but someone delivered the letter and that is when she learnt that Simon owned the land. On re-examination, she stated that the land she owned measures 2 ½ acres and that she was shown the land by the seller, Gichuhi. She denied that her land extended into her neighbour's land.
8. The Plaintiff tendered in evidence copies of a limited grant of letters of administration ad litem dated 2/6/2022, official search for land parcel 735 and the mutation form dated 2/8/2020.
9. The Plaintiff called her brother, David Kabuga Kanyiri, her brother as a witness. He stated that that he was the registered owner of Nthawa/Riandu/3324, which is in the same locality as the suit land. He calimed that the Plaintiff had been in occupation of a portion of 0.49 ha out of the suit land herein openly, peacefully and continuously since 2000 without interruption. That over the years, the Plaintiff had extensively developed the suit land by constructing residential houses, planting indigenous trees and cultivating various food crops.



10. On cross-examination, he stated that his land, parcel no. 3324 was next to the Plaintiff's parcel no. 3325. He explained that he and his sister subdivided Nthawa/Riandu/2010 measuring 1.59 hectares into two portions. His portion no. 3324 measures 1.03 ha just as his sister's land according to the mutation form. He stated that they bought land measuring 1.59 hectares and were shown the beacons. On engaging a surveyor, they discovered that the land was bigger on the ground based on the beacons. He conceded that the land they occupy is bigger than the land they bought and that all through, the Plaintiff believed that the suit land was hers and that she was ploughing it as hers without knowing it belonged to someone else. On re-examination, he stated that they had been on the two parcels of land since 2000 and have developed them. That no steps have been taken to remove them from the land.
11. Peter Kiragu Kanyiri, the Plaintiff's brother also testified and that the Plaintiff learnt in 2022 that she was staying on the late Simons land.
12. The Defendant also gave evidence and stated that after his family left for Nyeri, they did not return to the suit land until 2021. From 1987 when his father died to 2021, he did not know what was happening on the suit land. He stated that the boundaries on the suit lands had not been established and his family had not occupied a portion of parcel no. 735 until now. Further, that since the boundary issue had not been resolved, they did not know if the Plaintiff was on their land. On re-examination, he stated that there are no developments on the suit land.
13. The Defendant produced a certificate of official search for parcel no. 3325, bundles of photographs and correspondence, pleadings filed in Siakago PM ELC Case no. E060 of 2022 and a copy of a ruling delivered on 29/6/2023. He also produced copies of the affidavit of service dated 26/7/2023, official search for parcel no. 2010, mutation form dated 7/8/2000 in respect of parcel no. 2010 and the official search for land parcel 3324.
14. The Defendant relied on the testimony of his brother one Francis Thuita Mwangi who corroborated his averments. On cross-examination, he stated that the houses on the Defendant's photographs were not on their land. He stated that the Plaintiff's son lived on the suit land but there is no activity on the land. He stated that the trees that are on the land are natural trees and some bushes. His family had neither occupied the suit land nor developed it.
15. John Gitonga Kiura, a community policing officer, also testified on behalf of the Defendant. He stated that he was engaged as a witness in the failed boundary marking exercise by the area Assistant Chief. He accompanied the Defendant's brother to the suit land on 23/11/2023 where they found the Plaintiff's son and his brother Paul Kanyiri digging holes in the grass and planting maize without first digging the land. They had cut down tree branches and put them up in an attempt to create a boundary. He stated that the Plaintiff and her family were not cultivating the suit land until November 2023 and that they only utilised the upper and middle parts of the land. He clarified that the only houses on land parcel 3325 are temporary structures, which are located on the upper part of the land.
16. On cross-examination, he stated that the Plaintiff's and the Defendant's parcels of land are adjacent to each other. The Defendants were on the suit land from 1987 until 1990 then they left. He did not know whether the Plaintiff is on the Defendant's land. That the Plaintiff's sons are on the land while the Plaintiff lives in Nyeri. He stated that the Plaintiff's sons have built and farm on the Plaintiff's land. On re-examination, he explained that the Plaintiff's sons plough the upper part of the land where they have built and do not plough the lower side, which has a dispute.
17. On conclusion of the hearing, the court directed parties to file and exchange written submissions, which it has considered. The Plaintiff submitted that she has acquired rights over 0.49 ha out of parcel number no. 735 through adverse possession, having been in exclusive, open, and uninterrupted



- occupation of that portion since 2001. She submitted that according to the mutation form she produced, the registered area for parcel no.735 is 1.59 ha while the ground area is 2.08 ha, the difference being 0.49 ha which is what she occupies. She emphasised that her occupation was not challenged in cross-examination, and that the Defendant and his witnesses admitted that she was in possession of a portion of parcel no. 735. She further contended that the death of a registered owner does not defeat a claim for adverse possession and relied on *Karuntimi Raiji v M'makinya M'itunga* (2013) eKLR.
18. She submitted that by virtue of Section 28(b) of the *Land Registration Act*, trusts are recognized as overriding interest against a registered owner's title. She submitted that her actual possession and occupation of the suit land for more than 20 years, is recognized as an overriding interest against the title to the suit land and equity demands that the Estate of the late Simon be treated as a trustee of the Plaintiff over the subject portion of land. She urged the court to allow her claim.
  19. The Defendant submitted that the Plaintiff's occupation of the suit of land is denied and added that from the evidence he tendered, it was clear that the boundary between land parcel 735 and 3325 is not identifiable and therefore one cannot know the extent of the Plaintiff's encroachment on land parcel 735. He submitted that the Plaintiff and her witnesses admitted during cross-examination that they were unaware until 2022 that the portion she occupied might belong to another person. Further, there was no evidence that the defendant or the estate of the late Simon Mwangi Kamau, who died in 1987, knew of the alleged occupation before 2022.
  20. It was urged that since the Plaintiff only became aware of the encroachment in 2022, time began to run from that date meaning that the right to claim under adverse possession had not accrued. He contended that possession of land belonging to a deceased person before the grant of letters of administration constituted intermeddling and cannot give rise to adverse possession and cited *Njoki v Pussy* (ELCA 100 of 2022) [2023] KEELC 945 (KLR) to support that position. He submitted that the Plaintiff's claim could not survive the demise of the registered owner of parcel 735 as the Plaintiff claims to have come into possession in 2001, 14 years after the death of the registered owner. That prior to 2022, the Plaintiff and her witnesses were not aware that they were in occupation of a portion of parcel 735.
  21. On the alternative claim for constructive trust, the Defendant argued that no trust could arise as there were no dealings between the Plaintiff and the late Simon to establish any trust relationship, and that no evidence was tendered to show that the late Simon held the land for the Plaintiff's benefit. He contended that the Plaintiff's reliance on constructive trust was an afterthought after she failed to establish adverse possession. He submitted the suit lacks merit and should be dismissed with costs.
  22. The issue for determination is whether the Plaintiff has established, on a balance of probabilities that she has acquired title over a portion of land measuring 0.49 ha out of Nthawa/Riandu/735 through adverse possession or through a constructive trust.
  23. It is not in dispute that Nthawa/Riandu/735 is registered in the name of the late Simon Mwangi Kamau, whose estate is represented by the Defendant. It is also not in contention that the Plaintiff is the registered owner of a neighbouring land being Nthawa/Riandu/3325, and that the two parcels of land share a common boundary. What is in dispute is whether the Plaintiff's occupation of 0.49 hectares out of the late Simon Mwangi's parcel no. 735, satisfies the legal elements necessary to ground a claim for adverse possession. The Plaintiff claims that she took possession of the suit land in 2000 believing it was hers after purchasing her land from Simon Gichuhi.
  24. The principles governing claims for adverse possession are well settled. In *Wambugu v Njuguna* (1983) KLR 172, the Court of Appeal held that in order to acquire title to land which has a known owner by the statute of limitations, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Further, that the proper way of assessing proof of



adverse possession is whether the titleholder 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 of the requisite number of years.

25. Further, in *Samuel Kihamba v Mary Mbaisi*(2015) eKLR, the court held that for one to succeed in a claim for adverse possession, they must prove and demonstrate that they have occupied the land openly, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. That there must be an apparent dispossession of the land from the landowner. These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land.
26. In the present case, the Plaintiff's claim of occupation of the disputed portion was expressly denied by the Defendant. The evidence tendered by the Defendant and his witnesses points to an unresolved boundary dispute between parcel numbers 735 and the Plaintiff's parcel 3325. It is apparent from the Defendant's evidence that the Land Registrar was to visit the disputed parcels of land on 23/11/2023 to resolve the dispute but the process was halted when the Plaintiff filed this suit on 22/11/2023. The Plaintiff did not tender evidence to demonstrate that the portion measuring 0.49 ha which she claims to occupy falls within the Defendant's parcel no. 735. She did not produce any evidence that the developments she claims to have made on the land fall within the disputed portion.
27. In addition to that, the Plaintiff's brother, David Kabuga, who testified that he purchased parcel no. 3325 with the Plaintiff confirmed that the Plaintiff only became aware in 2022 that the portion she occupied might in fact belong to another person. Prior to that discovery, her occupation was based on the mistaken belief that she was lawfully within the boundaries of her own property. Such possession cannot be deemed hostile to the registered proprietor's title as it lacks the essential element of *animus possidendi*, that is, the intention to possess and exclude the true owner. In the absence of this crucial element, the claim for adverse possession cannot be sustained.
28. Regarding the alternative claim for a constructive trust, the Plaintiff argued that her long occupation of the suit land for over 20 years creates such a trust in her favour by virtue of Section 28(b) of the [\*Land Registration Act\*](#). However, that is not enough to establish a constructive trust. For there to be a constructive trust, there must be proof of some unfair or unconscionable conduct by the registered owner that would make it unjust for him to keep the land. In this case, no such evidence was provided, as the Plaintiff did not establish any relationship or prior dealings between her and the registered proprietor of the suit land before 2000. The Supreme Court stated in *Shah & 7 others v Mombasa Bricks & Tiles Limited & 5 others* (2023) KESC 106 (KLR) that a constructive trust only arises from clear acts or circumstances showing that it would be inequitable for the registered owner to deny another person's interest or to prevent unjust enrichment.
29. The Plaintiff's claim fails and is dismissed with costs to the Defendant.

**DELIVERED VIRTUALLY AT EMBU THIS 14<sup>TH</sup> DAY OF OCTOBER 2025.**

**K. BOR**

**JUDGE**

In the presence of: -

Ms. Mukami Boore for the Plaintiff

Ms. Jackline Kiragu for the Defendant

Diana Kemboi- Court Assistant

