

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 111 OF 2018

JACKSON MAROA MATIKOAPPLICANT

-VERSUS-

**SAMWEL GISIRE MATIKO (sued as the Legal Administrator
of the Estate of Boke Nyagisire - Deceased).....1st
RESPONDENT**

DAVID SABAI MWITA2nd RESPONDENT

JUDGMENT

A. INTRODUCTION

1. This Suit herein was instituted by **Jackson Maroa Matiko** (hereinafter referred to as "*the Applicant*") against **Samwel Gisire Matiko** (sued as the legal administrator of the estate of the late **Boke Nyagisire**) and **David Sabai Mwita** (hereinafter "*the 1st and 2nd Respondents*" respectively).
2. The matter was commenced by an **Amended Originating Summons** dated **17th November 2021**, which was **by consent of the parties and order of the court (27th February 2019)** treated as a **plaint**. The suit concerns ownership and occupation of the parcel of land known as **LR No. NYABASI/BOSONGA/1391**, a subdivision allegedly derived from the original parcel **LR No. NYABASI/BOSONGA/84** situated within

Nyabasi/Bosonga area in Migori County.

3. The Applicant claims to have been in **open, continuous, exclusive, and uninterrupted occupation** of a portion of the said land measuring approximately **two (2.0) acres** since **1985**. He asserts that through such occupation, he has **acquired title by way of adverse possession** under **Sections 7, 13, 17, and 38 of the Limitation of Actions Act (Cap 22 Laws of Kenya)**.
4. The Applicant further avers that the 1st Respondent, as administrator of the deceased's estate, **fraudulently subdivided** the original parcel **LR No. 84** into **LR Nos. 1390, 1391, and 1392**, and subsequently **transferred LR No. 1391** to the 2nd Respondent in an attempt to defeat the Applicant's long-standing interest and possession. He maintains that his occupation predates these subdivisions and that neither the deceased, the 1st Respondent, nor the 2nd Respondent has ever taken lawful steps to evict him.
5. Consequently, the Applicant seeks the following substantive **reliefs** from this Court:
 - a) That this Honourable Court do declare the Applicant to have acquired adverse possession of part LR. **No. NYABASI/BOSONGA/1391** measuring 0.15Ha.
 - b) That this Honourable Court be pleased to further order for excision of the portion measuring approximately 2.0 Acres from LR. **No. NYABASI/BOSONGA/1391** measuring 0.15Ha and the same be transferred to the Applicant by the 2nd Respondent.

- a) THAT this Honourable Court be pleased to issue an injunction restraining the Respondent from interfering with the Applicants enjoyment of the said portion of the suit land herein.
- b) THAT should the 2nd Respondent fail and/or refuse and/or neglect to transfer 2.0 acres of LR. **No. NYABASI/BOSONGA/1391** to the Applicant the Deputy Registrar to execute the subdivision and transfer documents in favour of the Applicant.
- c) **THAT** this Court do order that the Respondent pays Costs of this Application.
6. The **Respondents** opposed the claim through their respective **Replying Affidavits**, the **1st Respondent's** dated **30th October 2020** and the **2nd Respondent's** dated **17th February 2022**. Both respondents **categorically denied** the Applicant's assertions. They contended that the **Applicant is a grandson and beneficiary of the late Boke Nyagisire**, the original owner of the parent parcel LR No. NYABASI/BOSONGA/84. According to them, the Applicant's occupation of the land was **permissive and familial**, arising from his position as a member of the deceased's household, and therefore **not adverse** to the interests of the registered proprietor. They further explained that following **succession proceedings** relating to the estate of the deceased, the land was lawfully **subdivided** and a portion thereof, now known as **LR No. NYABASI/BOSONGA/1391**, was duly **transferred to the 2nd Respondent**, who remains the **registered proprietor**.
7. The Respondents additionally argued that the Applicant's claim is **inconsistent, exaggerated, and legally untenable**, noting that the

registered area of LR No. 1391 measures only 0.15 hectares (approximately 0.37 acres) far less than the two (2.0) acres claimed by the Applicant.

B. HEARING

8. The hearing of this matter proceeded through **viva voce evidence** following the Court's earlier direction that the **Amended Originating Summons** be treated as a **plaint**, with the accompanying responses serving as statements of defence. Both the Applicant and the Respondents testified before the Court, and documentary evidence was produced in support of their respective positions.

a) The Applicant's Case

9. The Applicant, **Mr. Jackson Maroa Matiko**, testified as **PW1**. He relied on his **witness statement dated 10th August 2018**, his **further affidavit and statement dated 17th November 2021**, and his **lists of documents dated 10th September 2018 and 17th November 2021**, which were produced and marked as **P. Exhibits 1-5**.

10. The Applicant testified that he is a **farmer residing in Komotibo Location, Kuria East Sub-County**, and that he has been in **continuous, open, and uninterrupted occupation** of approximately **two (2) acres** of land that originally formed part of **LR No. Nyabasi/Busonga/84**, which belonged to his late grandfather, **Boke Nyagisire**. He stated that following the subdivision of that land, the portion he occupies became **LR No. Nyabasi/Busonga/1391**, which is currently registered in the name of the **2nd Respondent, Mr. David Sabai Mwita**. He told the court that he has lived on the land since

1985, cultivating and developing it, and that despite attempts to evict him in **2014**, he has remained in occupation for **over 38 years**. He prayed that the court declare him the lawful owner of the said parcel by virtue of **adverse possession**.

11. Upon **cross-examination by counsel for the Respondents**, the Applicant admitted that the land was originally registered in the name of **his grandfather, Boke Nyagisire**, and that **succession proceedings** had been filed by the **1st Respondent, Samwel Gisire Matiko**, without his involvement. He confirmed that the **Chief had prepared a list of family beneficiaries** but maintained that he was not allocated any portion. He further testified that he lives on **two acres** together with his family and that although he had not filed a **surveyor's report**, he produced **photographs** to demonstrate his occupation. In **re-examination**, he reiterated that the portion he occupies is part of the family land forming his inheritance and urged the court to recognize his long occupation by declaring him the **owner of LR No. 1391**.

b) **The Respondents' Case**

12. The defence hearing took place on **29th November 2023** before me the **1st Respondent, Mr. Samwel Gisire Matiko**, testified as **DW1**. He relied on his **witness statement filed earlier** and adopted it as his evidence-in-chief. He stated that he is a **businessman and resident of Kuria Sub-County**, and that the **Applicant is his stepbrother**. He told the court that the **suit land, LR No. Nyabasi/Busonga/84**, belonged to their **grandfather, Boke Nyagisire**, and that after his death, **succession proceedings** were conducted through which the land was lawfully **subdivided and distributed** among the rightful

heirs. He explained that **LR No. 1391**, the subject of the dispute, was one of the resultant parcels and was transferred to the **2ns Respondent**, who has **developed it**. He denied that the Applicant had ever occupied the land adversely, maintaining that his occupation, if any, was **permissive** as a family member.

13. During **cross-examination**, DW1 confirmed that the Applicant, being a grandson of the deceased, was entitled to a **share of the family land**, and produced a **chief's letter** showing the Applicant's entitlement. However, he conceded that he had not produced the **list of beneficiaries** as directed by the court during the succession process. He testified that the Applicant currently resides on **parcel No. Nyabasi/Busonga/1145**, which was registered in his own name and which he holds **in trust for the family**. He further explained that **thirteen family members** had originally resided on **parcel No. 84** before it was subdivided, and that the **2nd Respondent** had lawfully purchased his portion from their **mother**, in **1995**, although the written sale agreement could not be traced.
14. The **2nd Respondent, Mr. David Sabai Mwita**, testified as **DW2**. He relied on his **witness statement dated 17th February 2023** and the **documents filed in support of his defence**, which were produced and marked as **Defence Exhibits 1 and 2**. He told the court that he is a **farmer and resident of Kuria West**, and that he purchased land from **Damaris Matiko Boke** in **1995**, when the original parcel was still **LR No. 84** registered in the name of **Boke Nyagisire**. He testified that he initially bought **half an acre** and later **another half acre** from her children, and the land was later registered as **LR Nos. 1390 and 1391**. He stated that he took possession immediately after purchase and

constructed a **gate and a house in 2014**, During **cross-examination**, he confirmed that his purchase was legitimate and that the Applicant's claim concerned **parcel No. 1341**, He denied any adverse occupation by the Applicant and maintained that his **title was valid and lawfully acquired**.

15. At the close of DW2's evidence, the **Respondents' case was closed**, and the matter was reserved for **filing of written submissions**.

C. SUBMISSIONS OF THE PARTIES

a) Submissions by the Applicant

16. The **Applicant's submissions** were filed through **M/s Abisai & Company Advocates** dated **19th January 2024**. Counsel submitted that the Applicant had met all the legal ingredients required to prove **adverse possession**. It was argued that he had been in **open, exclusive, peaceful, and uninterrupted occupation** of the suit land since **1985**, a period well beyond the statutory twelve years prescribed under the **Limitation of Actions Act**.

17. Counsel submitted that the Applicant's possession was **adverse to the true owner's interest**, having neither sought nor obtained permission to occupy the land. It was further contended that the **subdivision and transfer** of the land could not extinguish rights that had already accrued through adverse possession.

18. Reliance was placed on the decision in **Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR**, where the Court of Appeal held that adverse possession is established when one takes possession of land belonging

to another and asserts rights inconsistent with those of the true owner. Counsel also cited **Kasuve v Mwaani Investments Ltd & 4 Others [2004] 1 KLR 184** and **Wilson Kazungu Katana & 101 Others v Salim Abdalla Balohein [2015] eKLR**, emphasizing that the title of the registered owner is extinguished by operation of law once the statutory period lapses.

19. The Applicant therefore urged the Court to declare that he had acquired ownership by adverse possession and to order that **two acres** be excised from **LR No. 1391** and registered in his name, with the **Deputy Registrar** authorized to execute all relevant transfer instruments.

b) **Submissions by the Respondents**

20. The **Respondents' submissions**, filed through **M/s Apondi & Company Advocates and** dated **22nd January 2024**, opposed the claim. Counsel argued that the Applicant's occupation of the suit land was **familial and permissive**, and therefore incapable of maturing into adverse possession. They contended that as a **grandson and beneficiary** of the deceased, the Applicant's stay on the land was not adverse but in recognition of family ties.

21. Counsel further submitted that the Applicant's claim was **factually untenable**, as he sought **two acres** out of a parcel measuring only **0.15 hectares (approximately 0.37 acres)**. It was also their position that time for adverse possession could only start running from **2017**, when the 1st Respondent became registered as proprietor of the land, and thus the Applicant had not satisfied the twelve-year statutory period.

22. The Respondents relied on the principle that **parties are bound by their pleadings**, as restated in **IEBC & Another v Stephen Mutinda Mule [2014] eKLR**, to argue that the Court could not grant reliefs outside the pleadings. They also invoked **Sections 24, 25, and 26 of the Land Registration Act**, which accord the registered proprietor absolute ownership unless fraud or illegality is proved. Counsel therefore urged the Court to dismiss the suit with costs.

Issues for Determination

23. Having considered the pleadings, the evidence adduced by both parties, and the submissions filed, the Court finds that the following issues arise for determination:

- a) **Whether the Applicant has proved ownership of the suit property LR No. NYABASI/BOSONGA/1391 by way of adverse possession.**
- b) **Whether the Applicant is entitled to be registered as proprietor of LR No. NYABASI/BOSONGA/1391**
- c) **Who should bear the costs of this suit.**

Analysis and Determination

Issue 1: Whether the Applicant has proved acquisition of title to LR No. NYABASI/BOSONGA/1391 by way of adverse possession

24. **Section 38(1) of the Limitation of Actions Act** allows a person to move to this Court for an order that he be registered as the proprietor of land or a lease in place of the person registered as proprietor thereof. In **KASUVE.V. MWAANI INVESTMENTS LTD & OTHERS 2004 1 KLR**

184, the Court of Appeal set out what a person claiming to be entitled to land by way of adverse possession must prove and said: -

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.”

25. It is now well settled that the combined effect of the relevant provisions of **Section 6, 13 and 17 of the Limitation of Actions Act** is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of the adverse possession - **BENJAMIN KAMAU & OTHERS .V. GLADYS NJERI C.A CIVIL APPEAL NO 2136 OF 1996.**

26. Similarly, the new land laws promulgated after the 2010 Constitution recognize the doctrine of adverse possession. **Section 28 (h) of the Land Registration Act 2012** identifies some of the overriding interests in land as:

“rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.”

27. **Section 7 of the Land Act 2012** provides that: -

“Title to land may be acquired through -

(a) -(c)

(d) prescription"

28. A person claiming land by way of adverse possession must prove that his occupation of the land in dispute is not by force, secrecy or persuasion - (nec vi nec clam nec precario) - **KIMANI RUCHINE & ANOTHER .V. SWIFT RUTHERFORD & CO LTD 1980 KLR 10.** It must be open, peaceful continuous, un - interrupted and with the knowledge of the owner.
29. In a recent exposition of the doctrine of adverse possession, the Court of Appeal in **MTANA LEWA .V. KAHINDI NGALA MWAGANDI C.A CIVIL APPEAL NO 56 OF 2014 [2015 eKLR]**, described it as follows:
-"Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period. In Kenya, it is twelve (12) years. The process springs into action essentially by default or in - action of the owner. The essential pre - requisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner."
30. Applying the above principles to the facts before this Court, it is evident from the record that the **Applicant, Mr. Jackson Maroa Matiko**, claims to have been in open, exclusive, and uninterrupted occupation of approximately **two (2) acres** of land forming part of **LR No. NYABASI/BOSONGA/84**, since **1985**. His evidence was that through long possession and continuous use, his occupation ripened into ownership by way of **adverse possession**, and that the 1st Respondent

later caused the land to be subdivided and transferred to the 2nd Respondent, thereby infringing on his rights.

31. The Court has considered the Applicant's testimony alongside the evidence of the **1st and 2nd Respondents**. It is not in dispute that the original parcel **LR No. 84** belonged to the late **Boke Nyagisire**, who was the Applicant's grandfather. It is further uncontested that the 1st Respondent, as administrator of the estate, conducted succession proceedings and distributed the land among family members, including the subdivision that resulted in **LR Nos. 1390, 1391, and 1392**. The 2nd Respondent's evidence, which was unshaken in cross-examination, shows that he **lawfully purchased** his portion from **Damaris Matiko Boke** in **1995**, and that his resultant title, **LR No. 1391**, measures **0.15 hectares (approximately 0.37 acres)**.

32. The central question is therefore whether the Applicant's occupation of the land was **adverse** to the interests of the registered owner, and whether such possession met the statutory threshold of being **open, continuous, exclusive, and hostile** for the prescribed period of **twelve (12) years**. The evidence shows that the Applicant is a **grandson and family member** of the late Boke Nyagisire and that his occupation arose by virtue of **family arrangements** on ancestral land. The 1st Respondent testified that several family members, including the Applicant, resided on the original parcel, and that their presence was **permissive**. The Applicant himself admitted that he considered the land as part of his inheritance and not as property belonging to a stranger.

33. The Court of Appeal in **Kasuve v Mwaani Investments Ltd & 4 Others [2004] 1 KLR 184** was clear that possession can only be

adverse where it is **exclusive, as of right, and without permission** of the owner. From the evidence, the Applicant's occupation was with the **knowledge and tolerance** of his grandfather and later his family members. There was no demonstration of any overt act or conduct showing that he **asserted exclusive ownership** or **dispossessed** the lawful owner. Accordingly, the Court finds that his occupation, being **permissive and familial**, cannot be converted into adverse possession. Time for purposes of limitation **did not begin to run** against the registered owner under such circumstances.

34. Even assuming time could run, the **2nd Respondent** became the registered proprietor of **LR No. 1391** only after **2017** following lawful succession and transfer. The present suit was filed in **2018**, barely one year later. As the Court of Appeal held in **Benjamin Kamau & Others v Gladys Njeri (Civil Appeal No. 2136 of 1996)**, the right of action in adverse possession can only accrue after twelve (12) years of uninterrupted adverse possession. On this record, there is clearly **no twelve-year period** capable of supporting a claim against the **2nd Respondent**.
35. Additionally, the Applicant's assertion that he occupies **two (2) acres** contradicts the undisputed size of **LR No. 1391**, which was averred to measure **only 0.15 hectares**. The Applicant produced no survey report or credible evidence identifying or demarcating the alleged portion he occupies within the registered boundaries. This inconsistency renders his claim **uncertain and unprovable** within the meaning of adverse possession, which demands clarity of the portion claimed and proof of exclusive control.

36. In the result, this Court finds that the **Applicant has failed to discharge the burden of proof** required under **Section 38(1)** of the **Limitation of Actions Act**. His possession was **permissive, indeterminate, and inconsistent** with the statutory requirements for adverse possession.

Issue 2: Whether the Applicant is entitled to be registered as proprietor of LR No. NYABASI/BOSONGA/1391

37. Having found that the Applicant has **not established ownership by way of adverse possession**, the next question is whether, in the alternative, he is otherwise entitled to be **registered as proprietor** of the portion he claims within **LR No. NYABASI/BOSONGA/1391**. The Applicant's prayer seeks a declaration vesting title in him and an order directing the excision and transfer of approximately **two (2) acres** from the said parcel to his name.

38. The Applicant's claim for registration is wholly **anchored on the doctrine of adverse possession**, as set out under **Sections 7, 13, 17 and 38** of the **Limitation of Actions Act**. That is the sole legal foundation upon which this Court can lawfully order registration of land in the name of a claimant who is not the current registered proprietor. Having determined that the Applicant's possession did not satisfy the essential elements of adverse possession, it follows that no legal or equitable interest has accrued in his favour capable of displacing the title held by the 2nd Respondent.

39. The Court takes note of the Applicant's argument that his occupation dates back to 1985 and that he has developed the land over time. However, as was emphasized in **Mtana Lewa v Kahindi Ngala**

Mwagandi [2015] eKLR, the doctrine of adverse possession does not reward mere long occupation. It must be shown that such occupation was **hostile to the title of the true owner** and persisted for the statutory period **without permission or recognition** of the registered owner's title. The evidence before this Court, including the Applicant's own testimony, demonstrates that his occupation was **familial and permissive**, arising from the understanding that the land formed part of the ancestral estate. Such occupation does not confer ownership rights against the registered proprietor.

40. Accordingly, in the absence of any established right under adverse possession or other lawful basis, the Applicant has **no entitlement in law or equity** to be registered as proprietor of **LR No. NYABASI/BOSONGA/1391** or any portion thereof. The 2nd Respondent's title remains valid and indefeasible, and the Applicant's claim for registration must therefore **fail**.

Issue 3: Costs

41. On the question of costs, the general rule under **Section 27 of the Civil Procedure Act** is that costs follow the event. However, considering that the parties are close relatives and the dispute concerns family land, it is just and equitable that **each party shall bear their own costs**.

Disposition

42. Having carefully considered the pleadings, the oral and documentary evidence presented, the written submissions of the parties, and the

applicable law, the Court finds that the Applicant has **failed to establish ownership by way of adverse possession** in respect of **LR No. NYABASI/BOSONGA/1391** or any portion thereof. His occupation was permissive and rooted in family relations rather than hostile possession.

43. Consequently, the Court makes the following final orders:

- a) The Applicant's claim by way of adverse possession is **hereby dismissed**.
- b) **Each party shall bear their own costs** of the suit, given the familial relationship between them.

DATED, SIGNED and DELIVERED virtually at **NAIROBI** on this **31st** day of **October, 2025**.

MOHAMMED N. KULLOW
JUDGE

Judgment delivered in the presence of: -

N/A for the Applicant

N/A for the Respondent

Philomena W. Court Assistant

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