



REPUBLIC OF KENYA



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**Wakwabubi v Mayusi & 6 others (Environment and Land Case
E011 of 2022) [2025] KEELC 7237 (KLR) (16 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 7237 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND CASE E011 OF 2022
EC CHERONO, J
OCTOBER 16, 2025**

BETWEEN

STEPHEN SIMIYU WAKWABUBI PLAINTIFF

AND

WAFULA MAYUSI 1ST DEFENDANT

MARTIN SIKUKU WAFULA 2ND DEFENDANT

FRED WEKESA WAFULA 3RD DEFENDANT

JOSEPH MARUTI WAFULA 4TH DEFENDANT

ROBERT FWAMBA WAFULA 5TH DEFENDANT

AUGUSTINE WANYONY 6TH DEFENDANT

JUMA WAFULA 7TH DEFENDANT

JUDGMENT

1. These proceedings were initiated vide Originating Summons (ELCOS) NO. E004 of 2022 dated 02/04/2022 and filed by Wafula Mayusi, the Applicant herein on 05/04/2022 against the Respondent Stephen Simiyu Wakwabubi. Subsequently on 31/10/2022, Stephen Simiyu Wakwabubi filed Bungoma ELC No. E011 of 2022 in relation to the same subject matter, leading to an application for consolidation of the two suits, which was allowed with ELC No. E011 of 2022 designated as the lead file and the Originating Summons taken as the defence and counterclaim.
2. In his plaint dated 26/10/2022, the Plaintiff averred that he was the registered owner of L.R No. West Bukusu/East Sboit/139(hereinafter referred to as “the suit land”) measuring approximately 23.5ha which he acquired from one Fwamba Chesoli (dcd). That the Defendants encroached into the suit



- property and he now wishes to have them vacate the same. He sought for eviction orders against the Defendants and their proxies plus costs of the suit.
3. The Defendants through the originating summons which is also their defence and counterclaim sought to be declared as owners of land measuring 29 acres forming part of the suit land. That they have become entitled to the said portion by virtue of section 7,17 and 38 of the Limitation of Actions Act. That the Plaintiff holds the title to the said land for them in trust. It was their case that the suit land belonged to the 1st Defendant's deceased father who put him (1st Defendant) and his brother namely Martin Okwabubi who is the Plaintiff's father in possession with each occupying an equal share. That the Plaintiff obtained title of the suit land in 1989 after the demise of the said Fwaba Chesoli (his grandfather) which occurred in 1985 to the exclusion of the other beneficiaries. That the Plaintiff's father died in the year 1983. It was contended that they have been in peaceful, continuous and notorious and uninterrupted occupation for 29 acres of the suit land since 1959.
 4. During pre-trial directions, the parties agreed to proceed with the hearing by way of viva voce evidence.
 5. PW1 Stephen Simiyu Wakwabubi testified that his father Wakwabubi Fwaba Chesoli was the registered owner of the suit land and that he filed succession proceeding in the year 1985 and he later obtained a grant in 1989. He adopted his witness statement dated 26/10/2020 and replying affidavit dated 23/04/2024 as his evidence-in-chief. He produced into evidence seven (7) items contained in his list of documents dated 26/10/2022 as P-Exhibit 1-7. He testified that he does not reside in the suit land and that his house had been demolished. That he left the suit land in 1984 and that the Defendants have been in occupation of the suit land. It was his further evidence that he has not taken any steps to remove the defendants from the suit land. That his grandfather namely Yusuf Mayusi has never been registered as the owner of the suit land. He testified that one of his brothers occupies part of the land.
 6. PW2 Geremendina Nakumicha Wanyama testified that the Plaintiff is her brother and that they resided in the suit land when they were young and that the Defendants moved into the suit land in 1960 after their family moved to Tongaren and have been in occupation to date.
 7. PW3 Gellas Kasisi Wakwabubi testified that the Plaintiff is her brother. He reiterated PW2's evidence and added that their father was buried in the suit land and that he resides in the suit land to date having established a homestead and utilizing it for planting crops. That the suit land is measuring 59.9acres(23.5Ha) and that the Defendants occupy part of the land.
 8. DW1 Wafula Fwamba Chesoli Mayusi adopted the supporting affidavit to the originating summons dated 21/03/2022 and his witness statement dated 12/07/2022 as his evidence-in-chief. He produced in evidence three items annexed to the Originating Summons dated 11/02/2023 as D-Exhibit 1-3. He testified that the original title in his father's name got lost and he registered a caution over the land. That he claims half of the suit land. He testified that he does not know the total acreage of the suit and the portion he occupies.
 9. DW2 Martin Sikuku Wafula testified that he is a village elder in Siboti. He adopted his witness statement dated 04/02/2023 as his evidence-in-chief. He testified that he has lived in the suit land since he was born and his current age is 65 years. That he registered a caution on the land in 1995 claiming beneficiary interest as the land belonged to his grandfather Yusuf Chesoli. He testified that their claim is for 29 acres out of the 68 acres.
 10. DW3 Joseph Simiyu Wafula adopted his witness statement dated 11/02/2023 as his evidence-in-chief. He reiterated the evidence of the other defence witnesses.
 11. DW4 Augustine Wanyonyi Wafula and Evans Juma Wafula (DW5) also associated themselves with the evidence of DW2 and DW3 above.



12. The 1st Defendant Wafula Mayusi died in the cause of the trial and was substituted by the 3rd Defendant who called the following witnesses.
13. DW5 Fred Wekesa Wafula adopted his witness statement dated 04/02/2022 as his evidence-in-chief. He stated that his co-defendants are his brothers while the Plaintiff is his cousin. He testified that the Defendants have been in occupation of the suit land since 1963 to date. He further stated that the Plaintiff does not live on the suit land but one of his brother does.
14. DW 6 Anastacia Nakumicha adopted her witness statement dated 10/02/2023 as her evidence-in-chief. She testified that the suit land belonged to her brother Yusuf Mayusi alias Fwaba Chesoli Mayusi. She testified that the suit land should be sub-divided into two portions.
15. DW7 Francis Waluywa Wangila, DW8 Mike Juma Wanyonyi and DW9 Moses Wangila adopted their witness statements dated 11/02/2023 as his evidence in chief and adopted the evidence off DW6 above.

Submissions by parties.

16. At the close of the case, the parties took directions and agreed to sum up their respective cases by filing submissions.
17. The Plaintiff filed submissions dated 21/07/2025 where he submitted that he is the registered proprietor of the suit land from 1989 through succession and hence the Defendants encroachment was unlawful as their occupation was continuously interrupted by the disputes including cautions which the plaintiff lifted in 2022. As such, he argued that he deserved the orders to evict the Defendants from the suit land as proprietor. It was further submitted that consolidating this suit with Originating Summons should be struck out as the same offends the relevant Rules in institution of suit and prosecution of the same. It was therefore his submission that there was no suit for adverse possession capable of being prosecuted. He further submitted that the claim of adverse possession as argued by the defendant does not meet the threshold for the defendants to be awarded 29 acres. That they entered through permission of the Plaintiff's father to use a portion of the suit land. Reference was made to *Kweyu v. Omutut* 1990 KLR 709-716.
18. In their submissions dated 05/07/2025, the Defendants argued that the Plaintiff's claim for eviction offends section 7 of the *Limitation of Actions Act*. They maintained that although the Plaintiff is the registered proprietor, his title is subject to section 28 of the *Land Registration Act* and is held in trust. They contended that the Plaintiff expressly pleaded that the Defendants are trespassers, and being bound by his pleadings, he cannot later allege licence even over half an acre. The Defendants further submitted that their possession has been open, continuous, notorious, and uninterrupted, with no evidence of judicial proceedings to the contrary. They added that the 1st Defendant and his family occupy about half of the suit land, a portion distinct on the ground, which was given to them by the 1st Defendant's father.

Analysis and determination.

19. The Plaintiff's claim is anchored on his status as the registered proprietor of the suit land. He relied on the principle of indefeasibility of title as provided for under the *Land Registration Act*, 2012. Section 24(a) of the said Act provides that the registration of a person as the proprietor of land vests in that person the absolute ownership of the land together with all rights and privileges appurtenant thereto.
20. Section 25(1) stipulates that the rights of a proprietor shall not be defeated except as provided in the Act and shall be held by the proprietor free from all other interests and claims whatsoever, save for encumbrances and overriding interests noted in the register.



21. Further, section 26(1) provides that the certificate of title issued to a registered proprietor shall be taken by the courts as prima facie evidence that the person named as proprietor is the absolute and indefeasible owner, subject only to allegations of fraud, misrepresentation, illegality, or acquisition through a corrupt scheme.
22. On the strength of the above provisions of the law, the Plaintiff contended that the Defendants are trespassers on his land, having entered thereon without his consent, license, or any colour of right. He contended that being the absolute proprietor, he is entitled to protection of his title under Article 40 of *the Constitution*, and that the Defendants, having no legitimate claim, should be evicted.
23. The law on trespass is now settled. The 10th Edition of Black's Law Dictionary defines trespass as follows;

“an unlawful act committed against the person or property of another; especially wrongful entry on another's real property. Clark & Lindsell on Torts, 18th Edition on page 923 defines trespass as any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to proof that the Defendant invaded his land without any justifiable reason”.

The *Trespass Act* defines trespass under section 3 (1) of the Act as follows:

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership.

24. The case of John K Koech v Peter Chepkwony [2019] eKLR cited with approval Clerk & Lindsell on Torts 18th Edition at paragraph 18-01 which deemed trespass as follows:

“Any unjustifiable intrusion by one person upon land in possession of another...Trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession.”

25. Eviction orders, being drastic in nature, are granted where a registered proprietor has proved unlawful occupation by another and where no valid defence in law is available to the occupier. It is trite that, a proprietor may seek eviction of persons unlawfully on his land, but such relief is subject to established statutory exceptions, including adverse possession.
26. As earlier stated, the Defendants mounted a counter-claim of adverse possession. It is noteworthy that the Plaintiff challenged the consolidation of the two suits which saw the originating summons become the defence and counter-claim. However, this court notes that these directions were taken by consent of the parties and secondly and in the spirit of the overriding objective set out in the *Civil Procedure Act* Cap 21 Laws of Kenya, suits are ideally consolidated if there is a common question of law or fact in the suits, the reliefs or rights sought arise from the same or a series of transactions, or for any other reason such as convenience, avoiding multiplicity of suits and expedition to resolve suits. I find no procedural irregularity in the consolidation of the suits as directed by the Court.
27. Back to discussing the Defendants defence and counter-claim, they invoked sections 7, 17 and 38 of the *Limitation of Actions Act* (Cap 22, Laws of Kenya), arguing that their possession of 29 acres forming part of the suit land has been open, notorious, continuous, peaceful, and uninterrupted since 1959. Under section 7 of the *Limitation of Actions Act*, no action to recover land may be brought after the



expiry of 12 years from the date the cause of action accrued. Section 17 of the same Act extinguishes the title of a proprietor whose land has been in adverse possession beyond the limitation period, while section 38 empowers the court to make vesting orders in favour of a claimant who has proved adverse possession.

28. For one to be entitled to a claim of land by the doctrine of adverse possession, he/she must prove that he has been in exclusive possession of the said land openly and as of right, 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. See the case of *Kasuve v Mwaani Investments Ltd & 4 Others* (2004) eKLR 184, where it was held:

“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 without interruption for a period of 12 years after dispossession the owner or by discontinuation by the owner of his own violation.”

29. For a claim of adverse possession to crystalize, dispossession of the owner of land must be apparent. This aspect is found in the Latin maxim of *nec vi, nec clam, nec precario*: that is without secrecy, without force and without permission. See the case of *Munyaka Kuna Company Limited v Bernardo Vicezo De Masi (The Administrator of the Estate of Domenico De Masi (Deceased))* (2018) eKLR, where the Court declared as follows:

“To establish adverse possession, a litigant must prove that he has both the factual possession of the land and the requisite intention to possess the land (*animus possidendi*). Secondly, one must prove that he has used the suit land without force, without secrecy, and without persuasion (*nec vi nec clam nec precario*), for the prescribed limitation period of twelve years. Third, he must demonstrate that the registered owner had knowledge (or the actual knowing) that the adverse possessor was in possession of the suit property. Fourth, the possession must be continuous; it must not be broken or interrupted.”

30. It is noteworthy that the parties herein are close relatives. The Plaintiff pleaded in his plaint that the Defendants had encroached upon his land without his permission or licence, and on that basis labelled them trespassers. However, the Defendants adduced evidence that their occupation dates back several decades, having been placed into possession by their father and grandfather, Yusuf Chesoli Mayusi and that their occupation has been open, notorious and uninterrupted. The court must therefore interrogate whether the Plaintiff's assertions of encroachment without permission displace the Defendants' claim of long and continuous occupation without interruption or licence, which, if proved, would meet the legal threshold for adverse possession notwithstanding the Plaintiff's registered proprietorship.

31. This Court has considered the fact that the parties herein are close relatives. however, it is imperative to note that the doctrine of adverse possession is not negated merely because the parties are members of the same family. What is crucial is whether the person claiming adverse possession has demonstrated occupation of the suit land that is open, continuous, exclusive and adverse to the rights of the registered owner for the statutory period of twelve years as provided under Sections 7, 13, 17 and 38 of the [*Limitation of Actions Act*](#). In family arrangements, occupation is often presumed to be permissive, and the claimant must therefore go further to establish that such possession was inconsistent with and in denial of the owner's rights. See *Kweyu v Omutu* [1990] KLR 709; *Mbira v Gachuhi* [2002] 1 EALR 137. Accordingly, the mere fact of kinship does not of itself defeat a claim for adverse possession, but it



does impose a heavier evidentiary burden upon the claimant to show that the occupation was indeed hostile to the title of the registered owner.

32. The Defendants testified that they entered and took possession of 29 acres of the suit land in 1959 upon being placed there by their grandfather, whom they alleged was the registered owner of the land. While such occupation may, on the face of it, appear to have been permissive, the Plaintiff categorically denied that the grandfather was ever the owner and instead asserted that the land belonged to his own father. The Defendants, despite making this claim, failed to tender any documentary or credible evidence to establish their grandfather's ownership or authority over the suit land. In those circumstances, it would be speculative for this Court to presume that their entry and occupation was permissive. The principle of nec precario that possession must be without permission is therefore satisfied, since no licence or leave has been proved to have been granted by the true owner.
33. The Defendants were also obligated to prove that their occupation has been open, continuous, exclusive, and without interruption. Significantly, the Plaintiff and his witnesses admitted to the Defendants' long occupation extending well over six decades. In particular, PW3 testified that the Defendants moved onto the land in 1960 while the Plaintiff himself testified that he vacated the land in 1984, leaving the Defendants in exclusive possession of 29 acres as confirmed by PW3. These admissions corroborate the Defendants' evidence that their possession was not recent or secret but notorious and longstanding. The law requires that possession be nec vi (without force) and nec clam (without secrecy). In this case, the Defendants' occupation was not obtained through violence, nor was it hidden from the Plaintiff who was fully aware of their presence. It was equally not permissive, since the Plaintiff expressly pleaded that the Defendants were trespassers and never claimed to have licensed their occupation. Their possession thus meets all the three elements — nec vi, nec clam, nec precario.
34. In the case of *Githu v Ndeete* [1984] KLR 776, the Plaintiff's registration in 1989 did not interrupt time already running in favour of the Defendants, and no judicial proceedings were shown to have interrupted their possession. Accordingly, by operation of law (the *Limitation of Actions Act*), the Plaintiff's title has been extinguished to the extent of the portion occupied, and in line with *Mtana Lewa v Kahindi Ngala Mwagandi* [2015] eKLR, the Defendants' long, open, and notorious occupation has crystallized into ownership by adverse possession.
35. Consequently, the Plaintiff's suit seeking eviction of the Defendants from land parcel L.R. No. West Bukusu/East Sboit/139 is hereby dismissed with costs. The Defendants' counter-claim of adverse possession is allowed in its entirety with costs.
36. It is so ordered.

DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 16TH DAY OF OCTOBER, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Kituyi for the Plaintiff.
2. Mr. Were for the Defendants.
3. Bett C/A.

