



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

IN THE ENVIRONMENT AND LAND COURT DIVISION

ELC NO. 54 OF 2020 (O.S)

IN THE MATTER OF: - PLOT NO. 102- MALINDI, LT: 37,

FOLIO: 501, FILE: 3420 (INCLUDING:

- SUBDIVISION NO. 11020 - MALINDI,
LT: 41, FOLIO: 253, FILE: 11407,**
- SUBDIVISION NO. 102/1-MALINDI, LT:
45, FOLIO: 57, FILE: 13087 &**
- SUBDIVISION NO. 11021- MALINDI, LT:
45, FOLIO: 58, FILE: 13088 AND ANY
OTHER SUBDIVISION THEREFROM).**

AND

**IN THE MATTER OF: - AN APPLICATION FOR
DECLARATION THAT THE PLAINTIFFS/APPLICANTS HAVE
OBTAINED OWNERSHIP OF TWO THIRTY-FOUR DECIMAL
FIVE (234.5) ACRES OR NINE FOUR DECIMAL NINE FOUR**

ONE EIGHT (94.9418) HECTARES OR THEREABOUT OF THE ABOVE SAID PARCELS OF LAND BY WAY OF ADVERSE POSSESSION.

BETWEEN

ASAA TABU ASAA & 113 OTHERS.....

APPLICANTSS

AND

1. MOHAMED SAID RAJAB

2. NAIMA ABDALLA ISSA

3. SAID SULEIMAN SAID

4. JAMAL H. MOHAMED

5. KULTHUM BINTI ABDALLA & 7 OTHERS.....

.....RESPONDENTS

RULING

1. The 1st and 2nd defendants' notice of preliminary objection (PO), dated June 25, 2025, seeks to strike out the plaintiffs' claim against them on the grounds that the 1st and 2nd defendants purchased the suit premises from the 3rd to 5th defendants in 2013. Therefore, by the time the suit was filed against the 1st and 2nd defendants, the 12-year statutory period for adverse possession had not yet expired. They also

argue that their portion of land is unoccupied. The applicants also seek costs.

2. This serves as the foundation of the PO.
3. The PO was canvassed through written submissions. I acknowledge receipt of submissions by Ms. Monah for the 1st and 2nd defendants/applicants and Mr. Kenga for the plaintiffs/respondents with gratitude, as they went a long way in resolving the issues raised in the PO.
4. In the well-known case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696**, the Court of Appeal for Eastern Africa held:

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”

5. Further, Sir **Charles Newbold, JA** stated that:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is

argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

6. The 1st and 2nd defendants argue they purchased portion number 11020 (Org. No. 102/2) in Malindi on August 31, 2013, after portion number 102 had been extinguished. They acquired their portion four years following the subdivision. The 1st and 2nd respondents bought their portion when it was vacant, fenced it, and took possession. However, the applicants filed this suit claiming adverse possession in 2020, after Portion Number 11020 (Org. No. 102/2) in Malindi came into existence.
7. In their view, the applicants/plaintiffs have not established standing and the case is invalid from the outset; proceeding to a full hearing would be a waste of the Court's valuable time. They submit that the applicants have no claim against the 1st and 2nd respondents, and their suit should be dismissed with costs.

8. Plaintiffs /respondents argue that the PO primarily involves issues of fact and thus does not qualify as raising a jurisdictional issue.
9. I agree that the issues raised by the 1st and 2nd respondents are questions of fact, and a hearing will need to be held to determine when the clock started ticking for adverse possession. It has been established in various judicial authorities that the rights of an adverse possessor are not shakable or defeated by a change of ownership. This was the position taken in the case of **Gachuma Gacheru v Maina Kabuchwa [2016] eKLR**, where the Court of Appeal, citing **Maweu v Liu Ranching & Farming Cooperative Society [1985] eKLR**, held that:

“Lastly, on argument by the respondent that time in adverse possession can only begin to run once title is issued, we disagree and set out the sentiments of this Court in MAWEU V LIU RANCHING & FARMING COOPERATIVE SOCIETY, [1985] eKLR:

“What logic is there in saying that this concept of the absolute and infeasible title may only be lost, after twelve years of suffering adverse possession from the time of registration, but not for shorter periods because the adverse possession commenced during

the time of the owner's predecessor. How is it lost at all?

Adverse possession is a fact to be observed upon the land. It is not to be seen in a title, even under cap 300. Any man who buys land without knowing who is in possession of it risks his title, just as he does, if he fails to inspect his land for twelve years after he had acquired it. If such title can be lost at all, its absolute and indefeasible nature obviously refers to other matters than adverse possession.

The plaintiff Society of course relies upon the decision of the earlier court, but no argument on the point of principle was pressed that I could see, with great respect to learned counsel. Certainly, he was unable to advance any cogent argument from the reasoning in Alibhai's case, or otherwise, why absolute and indefeasible title interfered with the operation of the Limitation of Actions Act (cap 22).

There is nothing in the concept of an overriding interest which is new to the law; it is merely an acknowledgement of existing common law. No title which passed to a new owner before registration was provided for, curtailed the period of limitation. The reason lies in the public policy which underlies

the Limitation of Actions Act (cap 22): namely, that a long period of possession should not be disturbed by the negligent owner or owners in succession.” Emphasis added.

10. Therefore, the PO dated June 25, 2025, is unmeritorious and is hereby dismissed with costs.

Dated, signed, and delivered electronically in Malindi on 5th November, 2025.

E. K. MAKORI

JUDGE

In the presence of:

Ms. Monah for the 1st and 2nd Respondents

Ms. Oloo for the 3rd Respondent

Happy: Court Assistant