



Kitayi v Chesiriken (Suing as Personal Representative of Enock M. Psenjen - Deceased) & 2 others (Environment and Land Case E005 of 2022) [2025] KEELC 7671 (KLR) (5 November 2025) (Judgment)

Neutral citation: [2025] KEELC 7671 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND CASE E005 OF 2022**

CK NZILI, J

NOVEMBER 5, 2025

BETWEEN

ROSE NALIKA KITAYI APPLICANT

AND

LOIS CHESIRIKEN (SUING AS PERSONAL REPRESENTATIVE OF ENOCK M. PSENJEN - DECEASED) 1ST RESPONDENT

STEPHEN KIPLANGAT PJENJEN (SUING AS PERSONAL REPRESENTATIVE OF ENOCK M. PSENJEN - DECEASED) 2ND RESPONDENT

VICTORIA KAMULE MASINDE 3RD RESPONDENT

JUDGMENT

1. Before the court is an originating summons dated 7/11/2022, in which the applicant seeks to be declared entitled to a portion of land measuring one-half (½) of an acre on the parcel of land known as L.R. No. 2116/571 in Kitale Municipality, by virtue of adverse possession.
2. The applicant contends that she entered into a sale agreement dated 4/6/2005, with the 3rd respondent, to purchase ½ an acre out of Title No. Kitale Municipality Block 10/3 for Kshs. 800,000/=, which she paid for, took vacant possession and has been on the portion continuously, openly and uninterruptedly with effect from 2005, to the filing of the suit.
3. At the trial, the applicant testified as PW1, adopted the affidavit in support of the originating summons, sworn on 7/11/2022, as her evidence-in-chief. Equally, the applicant relied on several exhibits among them a sale agreement dated 4/6/2005 between her and the 3rd respondent, a copy of the grant No. 30280, in the name of Enock Mokoit Psenjen Benjamin issued in September 1972, certificate of grant dated 23/7/2015 in favour of the 1st and 2nd respondents as the legal representatives of the estate of the registered owner, grant of letters of administration and lastly, a decree in Kitale ELC No. 136 of 2006



in which the 3rd respondent was decreed to have been entitled to an order of specific performance of the agreements dated 10/6/2003 and 30/9/2003 for the suit land.

4. The applicant told the court that she has been on the land as per Clause No. 4 of the sale agreement dated 4/6/2005 and has never been evicted, notified to vacate, or proceedings taken against her for eviction, which is now close to 20 years.
5. The applicant contended that she has developed the portion by putting up a Kei Apple fence, semi-permanent structures, and a permanent toilet.
6. The 1st and 2nd respondents opposed the originating summons through a replying affidavit sworn on 25/10/2023, which DW1 adopted in court as his evidence-in-chief.
7. The contention by the 1st and 2nd respondents is that there is an ongoing case at the Court of Appeal against the decree in ELC No. 136 of 2006, where the 3rd respondent was claiming a portion of the suit land measuring one (1) acre.
8. The 1st and 2nd respondents produced copies of the pleadings in the former suit, judgment, and an authority to plead as Exhibits No. 1, 2, and 3. The 1st and 2nd respondents deny that the applicant is entitled to the reliefs sought.
9. On the other hand, the 3rd respondent relied on an undated replying affidavit filed on 30/1/2023, attaching a copy of the sale agreement dated 30/9/2003, which was the subject matter in the decree and judgment dated 30/9/2020, where she was the plaintiff and the 1st and 2nd respondents as the defendants.
10. After the close of the respondents' evidence, the parties were directed to put in written submissions.
11. The applicant relies on written submissions dated 4/11/2025. Reliance is placed on Titus Mutuku Kasuve -vs- Mwaani Investments Limited & 4 others [2004] eKLR, Titus Kigoro Munyi -vs- Peter Mburu Kimani, Civil Appeal No. 28 of 2015, Wambugu -vs- Njuguna [1983] KLR 172, Karuntimi Raiji -vs- M'Makinya [2013] eKLR, Ruth Wangari Muigai -vs- Edward Njuguna Mwangi Civil Appeal No. 144 of 2006, and Mtana Lewa -vs- Kahindi Ngala Mwangandi [2015] KECA 532 [KLR].
12. The 1st and 2nd respondents rely on written submissions dated 4/11/2025 and submitted that the ingredients of adverse possession have not been met. Reliance is placed on Samuel Miki Waweru -vs- Jane Njeri Richu Civil Appeal No. 122 of 2001.
13. The 3rd respondent relies on written submissions dated 4/11/2025. It is submitted that adverse possession can only be against a registered proprietor of land, as held in Karan -vs- Onyango & Another [2024] KEELC 19825 [KLR].
14. It is submitted that the applicant has not proved adverse possession against her. Reliance is placed on Mbala & Others -vs- Makau & Others [2023] KEELC 14592 [KLR], Mwasi & Others -vs- Nyatta & Others [2024] KEELC 21376 KLR, Karnataka Board of Wakf -vs- Govt. of India (2004) 10 SCC 779 Ruth Wangari Kanyagia -vs- Josephine Muthoni Kinyanjui [2017] eKLR, and Githu -vs- Ndeete [1984] KLR 776.
15. The single issue for determination is whether the applicant has met the ingredients of adverse possession to be entitled to ½ an acre out of L.R. No. 2116/571 Kitale Municipality, otherwise to confer ownership.
16. For one to succeed in a claim for adverse possession, he must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without licence or permission



- of the land owner, and with the intention to have the land. See Samuel Kihamba -vs- Mary Mbaisi [2015] eKLR.
17. In Samuel Muki Waweru -vs- Jane Njeri Richu (supra), the court cited Jandu -vs- Kirpal [1975] EA 225, that possession does not become adverse before the end of the period for which permission, either out of a lease or an agreement of sale, has not terminated. See Public Trustee -vs- Wanduru Ndegwa [1984] KECA 72 (KLR)
 18. In Mtana Lewa -vs- Kahindi Ngala Mwangandi (supra), the court defined adverse possession as a situation where a person takes possession of land and asserts rights over it, and the person having title to it ignores or neglects to take action against such a person, for a period of 12 years.
 19. Inaction or default, which is neither by force, nor stealth, nor under a licence of the owner, which is adequate, in continuity, in publicity, is what, according to the court, makes adverse claim materialize.
 20. In Chevron (K) Ltd -vs- Harrison Charo Wa Shutu [2016] eKLR, the court said that at the expiration of the 12 years, the proprietor's title will be extinguished by operation of the law. Section 38 of the Limitation of Actions Act permits the adverse possessor to apply to the High Court for an order to be registered as the proprietor of the land.
 21. An adverse possessor, therefore, has to prove two critical concepts: dispossession and discontinuance of possession. See Wambugu -vs- Njuguna (supra).
 22. In this suit, the applicant came into the ½ acre of the suit land by virtue of a sale agreement dated 4/6/2005. She purchased the land from the 3rd respondent, pursuant to rights acquired from the initial registered owner, who had sold her a larger portion as per the judgment produced as D. Exh. No.3. The 3rd respondent had described herself in the sale agreement as a beneficial equitable owner of the land registered in the name of Enock Mokoit Psenjen.
 23. Certificate of grant dated 23/7/2015, the initial owner passed on on 10/9/2012. His estate revolved to the 1st and 2nd respondents with effect from 23/7/2015.
 24. Time for adversely out of a sale agreement as held in M'Riria & Others -vs- Muthomi Civil Appeal 253 of 2019 [2025] KECA 951 [KLR] (4th April, 2025) (Judgment), where the court cited with approval Wambugu -vs- Njuguna (supra), that time starts to run after the payment of the last instalment of the purchase price.
 25. In this suit, the applicant has the burden to prove payment of the last installment, non-permissive or non-consensual entry by the true owner, actual, open, notorious, exclusive, and adverse use by her of the ½ acre for a period of 12 years.
 26. The applicant dwelt with the 3rd respondent and not the true owner in 2005. There is no evidence that the true owner, up to his death on 10/9/2012, had asserted a superior title, driven out the applicant, or made an effective entry on the suit land. Between 23/7/2015 and the filing of the suit in 2022, there is no evidence that the 1st and 2nd respondents asserted superior rights, made an effective entry, and or instituted eviction proceedings against the applicant.
 27. Interruption of the time from running or interference of the physical act of exclusive possession are important factors to consider, as held in Songoi -vs- Songoi [2020] eKLR.
 28. The applicant has pleaded and testified that she has been in exclusive possession of the ½ acre of the suit land since May 2005. She has identified the specific portion under her exclusive control as required by law. See Wilson Kazungu Katana & 101 others -vs- Salim Abdalla Bakshwein & another [2015] eKLR.



Abundant use of the land by the true owner is not enough. See Alfred Welimo -vs- Mulaa Sumba Barasa, CA No 186 of 2011.

29. Over and above an abundance of time, the applicant has to demonstrate taking possession with the intention to possess or own the land. Acts of planting Kei Apple, erecting semi-permanent structures, and a permanent toilet are inconsistent with the rights of the true owner. The significance of those adverse acts for 12 years, since 2005, shows that the true owner, by 2012, and the 1st and 2nd respondents from 2015 to 2022, became dispossessed of the ½ an acre of the suit land.
30. Adverse possession, as held in Maweu -vs- Liu Ranching & Farming Cooperative Society [1985] eKLR, is a fact to be observed from the land and not the title. There is no evidence that for the 12 years, the respondent inspected the land, drove out the intruder, or asserted a superior title.
31. Mere change of ownership does not defeat overriding rights. The respondents, as held in Githu -vs- Ndeete (supra), failed to take or assert their rights, take legal proceedings against the applicant, or make an effective entry into the suit land, for the purpose of stopping the running of time in favour of the applicant, from 2005 to 2022. The former suit was not against the applicant; it did not stop time from running.
32. The upshot from the evidence tendered is that the applicant's suit succeeds with costs. A declaration is hereby issued that the applicant is entitled to ½ an acre of the deceased's L.R. No. 2116/571, by virtue of Section 38 of the *Limitation of Actions Act*. The 1st and 2nd respondents to subdivide and excise the portion within 2 months from the date hereof; in default, the Deputy Registrar to sign the forms.
33. Orders accordingly.

JUDGMENT DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 5TH DAY OF NOVEMBER 2025.

In the presence of:

Court Assistant – Dennis

Bikunda for the applicants present

Nabwile for the 3rd respondent present

Katama Ngeywa for the 1st and 2nd defendants absent

HON. C.K. NZILI

JUDGE, ELC KITALE.

