



REPUBLIC OF KENYA



**Mwalimu & 16 others v Njeru (Environmental and Land Originating Summons  
122 of 2022) [2025] KEELC 7601 (KLR) (5 November 2025) (Judgment)**

Neutral citation: [2025] KEELC 7601 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 122 OF 2022  
SM KIBUNJA, J  
NOVEMBER 5, 2025**

**BETWEEN**

**FATUMA MWALIMU & 16 OTHERS & 16 OTHERS ..... APPLICANT**

**AND**

**LUCY KARIMI NJERU ..... RESPONDENT**

**JUDGMENT**

1. The applicants commenced their claim through the originating summons dated 28th October 2022 seeking for among others to be registered as proprietors of land known as L.R 11285/I/MN (Original 274/I/MN) measuring 1.372 acres under adverse possession. The originating summons is supported by the affidavit of Bakari Karisa, 3rd applicant, sworn on 28th October 2022, in which he inter alia deposed that they have been in occupation of the said land since 2006; that they have constructed permanent and temporary houses thereon, and have planted crops on the land; that they fear that the respondent will evict them and that they have no other place to move to should they be rendered destitute.
2. The applicants' claim is opposed by the respondent through her replying affidavit, sworn on 22nd April 2024, in which she inter alia deposed that the applicants application is frivolous, vexatious bad in law, defective and an abuse of court process; that the applicants have been filing suits on the same subject matter, and this is the third one; that on 17th March 2021 the applicants through proxies filed Mombasa ELCC 45 of 2021 Ummie Mavumba & Others versus Lucy Njeri & 2 Others, seeking for a permanent injunction against the defendants over the suit property; that the applicants also filed ELCOS 199 of 2021 Fatuma Mwalimu & Others versus Lucy Karimi Njeri claiming adverse possession over the suit property; that the applicants abandoned those suits once their applications for injunctive orders were denied; her husband, the late David Nguti Gitau, and Abiud Macharia Chege had purchased the suit property from Margaret Kavingi Bryant, and after both her husband and the said Abiud Macharia passed away, a grant of representation was issued to one Mary Mboi and herself for their respective husband's estates; that she is not the registered owner of the suit property; that the



applicants have not been in possession of the suit property, as it the family of the late Abiud Macharia Chege that has been in occupation; that they had dug a well, constructed a two bedroomed house, a toilet, and were farming on the suit property; that the late Abiud Macharia Chege was buried in the suit property sometime in 2015, and had employed a worker, named Kenga Charo, who has also lived on the farm since 2013.

3. During the hearing, the applicants called Bakari Karisa, the 3<sup>rd</sup> applicant, who testified as PW1. He relied on his affidavits dated 28th October 2022 and 6th November 2023 and inter alia deposed that all the applicants have lived on the suit property, where he was also born; that he did not recognize the respondent and was not aware that the respondent's husband and another were the owners of the suit property, or that they had bought the suit property from Mary Bryant; that he was not aware that Macharia was buried on the suit property or that there is a caretaker by the name Kenga on the said land; that no farming activities was taking place on the suit property, as all the 1 ½ acres of the suit property is filled with buildings; that the owner of the suit property was his grandfather; that his national identification card indicated he was born in Ganze, but explained that he misrepresented that fact so that he could be issued with an identity card, insisting that he was born in 1994 on the suit property and later left for Ganze, before moving back to the suit property in 2006; he disputed that the late Macharia's family have been living on the suit property since 2013; he denied that the squatters started invading the suit property in 2019, but admitted that the respondent started bringing police officers to disturb their peace in 2005, before stopping in 2006 after filing this suit.
4. The respondent testified as DW1, and relied on her statement dated 22nd April 2024 and reiterated that the 2½ acre suit property belongs to her deceased husband and his friend Macharia Chege who are still registered as the owners. She testified that the land was vacant, and that Mary Macharia Chege, wife to the late Macharia, was the first to occupy the suit property, which she started cultivating in 2013, built a two roomed house for the employee, connected electricity and dug a borehole. She further stated that when Macharia passed away, he was buried on the 1½ acre portion which he owned, as the other one acre belonged to her husband. DW1 testified that sometime in 2019, Mary informed her of trespassers who had moved onto the suit property and built a structure which prompted her to report to the police. That police officers accompanied her to the land, and on finding no one there, they demolished the structure. Then sometime in 2020 during the Corona virus pandemic, more trespassers invaded the suit property and erected one roomed houses, some permanent and others temporary. That the squatters removed the fence and stole some goats belonging to Mary and beat up Mr. Kenga. On cross-examination DW1 stated that she has never resided on the suit property and that the said Mary and herself are yet to file a succession cause for the estate of their husbands. She further stated that they have not been able to use the suit property since 2022, as it has been built up wholly, including a permanent storey building.
5. The respondent called Mary Mboi, widow to Macharia, who testified as DW2. She relied on her statement dated 22nd April 2024 and reiterated DW1's testimony that the suit property was bought in 2000 by their late husbands from the said Mary Bryant. That the suit property was vacant and in 2013 they cleared the bushes and burnt charcoal, dug a borehole and started farming vegetables and fruits. That sometime in 2019 some people came and demolished her house, toilet and fence, and that in 2022 others people came and completely took over the suit property. She added that sometime in 2021 the squatters' erected buildings, and sold portions to others. That the squatters were being led by Cecil Mae, who was among the first squatters in 2019. She admitted to having letters of administration for her husband's estate. On cross-examination, DW2 stated that she used to visit the suit property from 2000 and there were no people on it. She added that they obtained approvals from the County Government before interring her husband on the suit property. She revealed that Cecil Mae had sued



them in another suit, which ended in her favour and she alleged that it was his influence on the applicants, which brought to the filing of this suit.

6. The respondent also called Kenga Charo who testified as DW3. He relied on his statement dated 22nd April 2025 and he stated that he used to be employed by the late Macharia as a labourer on the suit property. He narrated that Cecil Mae come to the land and boldly stated that they would be neighbours. That true to his words, the said Cecil Mae came with other people to the suit property and chased them away, after the death of the late Macharia, who had been residing there with his family. He also reiterated that the late Macharia was buried on the suit property and that Cecil Mae, PW1 and others demolished the late Macharia's house. On cross-examination, DW3 admitted that he did not live with his family on the suit property. He confirmed that the late Macharia built a toilet and a permanent two-roomed house on the suit property, and connected electricity. He also confirmed that DW1 and DW2 used to visit the suit property frequently. He stated that he did not report to the police when they were chased away, as he left that to DW1 and DW2.
7. The learned counsel for the applicants and the respondent filed their submissions dated 30th July 2025 and 14th August 2025 respectively, which the court has considered.
8. The issues raised in this suit for the court's determinations are as follows:
  - a. Who is the registered owner(s) of the suit property.
  - b. Whether the applicants have been in adverse possession of the suit property, and from when.
  - c. Whether the applicants are entitled to any of the prayers sought.
  - d. Who bears the costs of the originating summons/suit?
9. The court has meticulously considered the grounds on originating summons, the affidavit evidence, submissions by the learned counsel, superior courts decisions and come to the following determinations:
  - a. Adverse possession is a legal doctrine which was described in *Wilson Njoroge Kamau versus Nganga Muceru Kamau* [2020] KEELC 3904 (KLR) as follows:

“In deciding the issue of Adverse Possession, the primary function of a Court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is a matter of legal conclusion to be drawn from the findings of facts” *Kweyu v Omuto*, C A Civ Appeal 8 of 1990 (as yet unreported).”

It has been admitted by all the witnesses called by the applicants and respondent, that the current occupiers of the suit property are the squatters/applicants, and thus possession is factual.
  - b. Therefore, the next question is whether the applicants' possession was adverse to the Respondent's title to the suit property. In the case of *Samuel Kihamba versus Mary Mbaisi* [2015] eKLR the court held that:

“Strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. 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”

Hence, it behooved the applicants to first show who is the owner of the suit property. From the transfer document provided by the applicants and respondent, and agreement of sale provided by the respondent, one Mary Kavingi Bryant sold the suit property to the David Nguti Gitau and Abiud Macharia Chege sometime in 2000. None of the parties provided a certified copy of the title or extract of the green card to demonstrate who was the registered owner of the suit property at the time of filing of the suit or even presently.

- c. In the case of *Mtana Lewa versus Kahindi Ngala Mwangandi* [2015] eKLR the court in describing the doctrine of adverse possession held 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 inaction of the owner. The essential prerequisites 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. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act*.....”

In the absence of a certified copy of the title or extract of the green card, the court cannot be expected to hold or make a finding based on assumptions that the late David Nguti Gitau and Abiud Macharia Chege or the Respondent for that matter are the registered proprietors of the suit property.

- d. This suit was evidently commenced through the originating summons dated 28<sup>th</sup> October 2022. Originating summons are generally provided for under Order 37 of Civil Procedure Rules. Rule 7 provides for adverse possession applications as follows:

“7.

- (1) An application under section 38 of the *Limitation of Actions Act* shall be made by originating summons.
- (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.
- (3) The court shall direct on whom and in what manner the summons shall be served.”[underlining mine]

The court has perused all the eleven (11) paragraphs of the supporting affidavit sworn by Bakari Karisa on the 28<sup>th</sup> October 2022, and there is no certified extract of the title to the suit land that has been annexed. The transfer document referred to at paragraph 4 thereof and marked “B” cannot be a substitute for the extract of the title to the suit property. I have also perused the applicants’ list of documents, which has only photographs of the homestead and no extract of the title to the suit property. The failure to comply with the mandatory provision of Order 37 Rule 7(2) of the Civil Procedure Rules makes the applicants’ originating summons defective, bad in law and an abuse of the court process,



- e. The importance of the requirement to attach a certified copy of the extract of the title to the suit property subject herein is reinforced by the provision of section 26(1) of the [Land Registration Act](#) Chapter 300 of Laws of Kenya which provides that:

“26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject of challenge, except-
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

That in view of the foregoing, the court has no difficulties in finding that the applicants have failed to prove that the respondent is the registered proprietor of the suit property, and the court cannot issue orders to extinguish her presumed title to the suit property, without first there being proof that she is indeed the registered owner.

- f. PW1 in his testimony testified inter alia as stated as follows:

“I do not know Lucy Karimi Njeru, the defendant. I had heard that the suit property belonged to an old man who later died.....

I am not aware that the land belonged to defendant’s husband and another and that they had bought it from Mary Bryant.....

There was a family that used to claim the land was theirs and it was the one that caused the plaintiffs to come to court. ....

I do not know any other owner of the land except my grandfather....”

The above extract of the testimony of PW1 shows the applicants claim that the respondent was not the registered owner of the suit property, yet they expect the court to grant their prayer to extinguish the registered proprietor’s title and in its place order their registration as owners. Secondly, PW1’s claim that he only knew the land belonged to his grandfather is self-defeating as he could not be an adverse possessor of land that he occupied as a grandson of the owner, probably on license or permission of the owner or potential owner through inheritance.

- g. Having come to the foregoing conclusions, the applicants suit is without merit and the court need not go on to consider the other issues, as it is evident the applicants have failed to establish who the real owner of the suit property is, and their originating summons is fatally defective.



- h. The applicants having failed to prove their claim to the standard of the law required, the respondent is entitled to costs as provided for under section 27 of the *Civil Procedure Act*, chapter 21 of Laws of Kenya.
10. From the foregoing determinations, the court finds the Applicants/Plaintiffs have failed to prove their claim to the standard required of balance of probabilities, and the court orders as follows:
- a. That the Applicants' suit is dismissed in its entirety.
- b. That the Applicants to bear the costs of this suit.

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 5TH DAY OF NOVEMBER 2025.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In The Presence Of:

Applicants : Mr Birir

Respondent : No Appearance

Kalekye-court Assistant.

