



Ng'ang'a & another v Swaleh (Enviromental and Land Originating Summons E006 of 2023) [2025] KEELC 7629 (KLR) (5 November 2025) (Judgment)

Neutral citation: [2025] KEELC 7629 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E006 OF 2023
SM KIBUNJA, J
NOVEMBER 5, 2025**

BETWEEN

JOSEPH NDONGA NG'ANG'A 1ST APPLICANT

MICHAEL NGANG'I NG'ANG'A 2ND APPLICANT

AND

SABAH ALI SWALEH RESPONDENT

JUDGMENT

1. The applicants filed this suit through the originating summons dated 16th May 2023, seeking for inter alia to declared as entitled to Mombasa/Block XI/352, suit property, by virtue of virtue of having been in adverse possession of the same for over 53 years. The summons is supported by the affidavit sworn by the two applicants on 16th May 2023, in which they inter alia deposed that they have lived on the suit property for around 53 years after moving in with their uncle, one Antony Kamau, who had lived there since 1939; that they moved onto the suit property in 1970, and lived with their uncle until his demise in 1987; that in 1975, the then Municipal Council of Mombasa issued a notice to Mr. Kamau to demolish the house standing on the property as it was done without approval, but no further action was taken; that unknown to Mr. Kamau, one Mohamed Ahmed Mwasau and Mohamed Abdalla Yusuf secured title deeds over the suit property after independence in 1963, but did not interfere with their uncle's occupation; that through Criminal Case No. 1590 OF 2014 where their sisters, a nephew and themselves were charged with forcible detainer, they discovered that that Mr. Mwasau and Yusuf had sold the suit property to the respondent sometime in 2004; that the respondent had not taken any action against them for over 10 years after obtaining title; that they occupied the suit property openly, without force, without secrecy and without permission; that on 2nd September 2004, they were arrested by police officers from Makupa Police Station, their house was demolished and charged with forcible detainer in the above criminal case; that during the hearing of the criminal case, the respondent's husband testified that he had enquired about their presence on the land and the vendors



had told him that they were watchmen; that when they heard rumours that the suit property has a title deed, they sought the intervention of the National Land Commission who received a letter dated 28th June 2014 from the Land Registrar to the effect that the land had no parcel file, but only a green card marked with a pencil bearing the words “forged/suspect”; that after their house was demolished, they tried to rebuild them, but were stopped by the County Government of Mombasa for want of approved development plans and the rates had not been paid; that even after the determination of the criminal suit, the respondent has not approached them or interfered with the suit property.

2. The applicants’ claim is opposed by the respondent through the replying affidavit sworn by herself on 1st July 2024 where she deposed inter alia that she is the registered owner of the suit property after having acquired the same on 5th October 2004; that she visited the suit property sometime in May 2014 in the company of the her husband, Mohamed Ahmed Abdalla, and found strangers who had encroached onto the suit; that Mr. Abdalla reported the said strangers to the Chief, but one Francis Mbugua, who had been summoned to a meeting by the said chief, rejected the intervention and walked out; that on 8th May 2014 she instructed her advocates to issue a notice to vacate from a portion of the suit property and remove all temporary structures; that she received a response from the said Francis Mbugua’s Advocates alleging that the said Francis Mbugua and his family were the owners of the suit property; that in July 2014 she applied and was granted a development approval by the County Government of Mombasa to construct a boundary wall; that her husband received summons from Makupa Police Station, and when he went there, he was informed that the applicants had lodged a complaint of trespass and assault against them; that after availing evidence of ownership of the suit property, the applicants were arrest and charged in Criminal Case No. 1590 of 2014; that in August 2015, she tried putting up a temporary boundary but were confronted by goons led by the applicants; that the applicants have never been in possession as the property is completely fenced off, and under her control and possession.
3. The applicants filed a supplementary affidavit sworn on 6th September 2024 deposing inter alia that they are the ones who fenced the suit property and placed a caretaker on the land, but the respondent later sent strangers who broke an removed their padlock and replaced it with another, and has been trying to sell of the property; they denied lodging any complaints against the respondent with the police.
4. During the hearing, the applicants called Michael Ng’ang’i Ng’ang’a, the 2nd applicant, who testified as PW1. He relied on the depositions in their affidavits sworn on 16th May 2023 and 6th September 2024 and relied on the documents attached to the said affidavits as his evidence in chief. He further testified that he did KCPE in 1969 and joined Antony Muiruri, his uncle, in Mombasa in 1970. That later the 1st applicant, Wahu and Njeri joined them and lived peacefully until 2002, when they learned that somebody else claimed to own the suit property. That they were arrested one evening and charged with forcible detainer in a criminal case but acquitted after trial. During cross-examination, PW1 stated that the 1st applicant and himself built their houses on their father’s land at Mangu, Kiambu County, in 1967. That he left his wife on that land when he came to Mombasa in 1970. That he returned to Mangu in August 1971 and got employed by KTM until 1980, when he returned to Mombasa as a driver of one Mbugua at Kwale Roads Construction sites, before returning to his uncle’s place. That his uncle died without a wife or children, sometime in 1978 at Coast General Hospital and was buried at their ancestral home at Mangu. That they are seeking the suit property as it belonged to their uncle. He acknowledged that the house on the photograph dated 19th August 2014 has since been demolished and that one Mohamed had constructed the boundary wall. He also conceded that they no longer stay on the suit property as Wahu and Njeri live in Mshomoroni. That they had returned to the suit property but were stopped from reconstructing the houses by the County Government of Mombasa due to lack of approved development plans, and payment of rates.



5. The respondent testified as DW1, and relied on her replying affidavit sworn on 1st July 2024 and the attached documents. She told the court that the land was vacant when she bought it in 2004. That they had planned to fence of the suit property but her son got sick and they went abroad but when they came back, they found kiosks on the suit property, and they reported to the police. The squatters were summoned, and after they failed to produce documents of ownership, they were evicted, and County Government personnel removed their kiosks around 20th March 2014. On cross-examination, DW1 stated that the squatters were removed from the plot in 2014, but she denied that they were arrested and their houses demolished. She told the court that the squatters had been given notices to vacate, but they declined. That she had erected a fence with a gate on the said property and had placed a caretaker to guard it. That she has been paying rates for the suit property, and was not aware that said land's documents were missing from the parcel file.
6. The learned counsel for the applicants and the respondent filed their submissions dated 15th July 2025 and 22nd July 2025 respectively, which the court has considered.
7. The following are the issues arising in this suit for the court's determinations:
 - a. Who is the registered owner of the suit property.
 - b. Whether the applicants have met the threshold to be declared as proprietors of the suit property under adverse possession.
 - c. Who bears the costs of the suit?
8. The court has meticulously considered the grounds on the originating summons, affidavit and oral evidence presented by both sides, submissions by the learned counsel and come to the following determinations:
 - a. Prior to determining whether the applicants have established the ingredients or elements of adverse possession, it behoves this court to first, establish the registered owner of the suit property. Section 26(1) of the *Land Registration Act* Chapter 300 of Laws of Kenya, provides the following on the effect of a registered certificate of title:

“ 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 acwuired illegally, unprocedurally or through a corrupt scheme.”



Order 37 Rule 7(1) of the Civil Procedure Rules requires applicants moving the court for adverse possession reliefs to attach an extract of title of the land subject matter as can be seen below;

“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]

In compliance of the said provision, the applicants herein have attached a copy of title issued in the name of the respondent on 22nd November 2004 to the supporting affidavit sworn on 16th May 2023.

- b. Also annexed to the said affidavit is a letter from the Mombasa Land Registrar dated 28th June 2014 to the Chairman, National Land Commission, that sates as follows:

“RE: Mombasa/Block X1/352

Your letter No. NLC/Chairman/VOL. V/145 of 13th June 20014 (sic) refers.

Kindly be informed that the deed file with all the relevant instruments confirming ownership has not been traced, the only record available is the green card marked in pencil with the words ‘forged/suspect’.

We are appealing for more time to trace the same.”

That while the copy of the title deed annexed to the supporting affidavit may probably pass as evidence that the suit property was registered in the name of the respondent, the contents of the Land Registrar’s letter dated 28th June 2014, that “all the relevant instruments confirming ownership has not been traced” and that the only document found was “the green card marked with pencil with the words ‘forged/suspect’ raises some doubts as to the question of proprietorship of the suit property. Further, considering the National Land Commission and the Land Registrar are not parties in this suit, and the applicants do not appear to have followed up with the two to confirm whether the instruments found missing from the parcel file were later traced by the time they filed this suit in 2023, the court has to be wary lest it is used to sanitize the respondent’s title, while there are already unresolved questions on its legality. An applicant seeking for the registered proprietor’s title to be extinguished, and for their registration with the land under the adverse possession principle should not be seen to question the legality or regularity of the same title, as to do so in a suit commenced through originating summons would lead to a failure in their quest.

- c. If the applicants’ intention in bringing the contents of the Land Registrar’s letter to the attention of the court was to show that the respondent’s title to the land was forged or fraudulently obtained, then they should have commenced their suit through a plaint so that they can set out the particulars of fraud or forgery thereof and prove the same thereafter. In



the case of *Alberta Mae Gacci -vs- Attorney General & 4 Others* [2006] eKLR, the court had this to say in respect to land acquired unprocedurally:

“Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the day when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come.....”

- d. Though it is apparent the respondent was aware of the contents of the Land Registrar’s letter dated 28th June 2014, as it was served to her with the suit papers, including the originating summons that she replied to, it appears she was not bothered by its contents or take any steps to verify its contents. In her testimony during cross-examination in court, she stated that she was not aware of any missing documents from the suit property’s parcel file. Though the respondent claim of title to the suit property was as a purchaser, she needed to do more than just relying on her title deed, especially after learning of the Land Registrar’s letter, in view of the Supreme Court of Kenya decision in the case of *Dina Management Limited versus County Government of Mombasa & 5 Others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) where the court held as follows:

“

“93. As held by the Court of Appeal in *Munyu Maina versus Hiram Gathiha Maina* Civil Appeal No. 239 of 2009 [2013] eKLR, where the registered proprietor’s root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.”

In view of the apparent shadows over the proprietorship of the suit property, the court finds this suit is for dismissal even without making a determination on the applicants’ adverse possession claim, as the ownership of the land is doubtful.

- e. That under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the event unless where for good reasons the court direct differently. Though the respondent should have been entitled to costs, as the applicants have failed in their suit, the court has after considering the fact that the respondent’s title to the suit property was surrounded by some mystery of some instruments missing from the parcel file, and green card noted ‘forged/suspect’ as far back as 2014, and the previous criminal proceedings between the parties, that justice will be better served by an order that each party bears their own costs.
9. From the foregoing conclusions, the court finds the applicants have failed to prove their claim against the respondent to the level required of balance of probabilities. The court therefore orders as follows:
- a. That the suit is dismissed.



b. That each party to bear their own costs.

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. Odongo

Respondent : M/s Takah For Mutubia

Kalekye-court Assistant.

