

**REPUBLIC OF KENYA**  
**ENVIRONMENT & LAND COURT OF KENYA AT BUNGOMA**  
**ELCLOS NO. E004 OF 2023**

MUCHAI LUMATETE WALUBENGO alias ROGERS LUMATETE  
WALUBENGO (Suing for and on behalf of the Estate of SELINA  
NABANGALA WALUBENGO  
(Deceased).....PLAINTIFF/PLAINTIFF

VERSUS

MARTIN SIKUKU MUKWANA.....1<sup>ST</sup>  
DEFENDANT/DEFENDANT MAXMILLAN  
WANYAMA.....2<sup>ND</sup> DEFENDANT/DEFENDANT  
JAMES MUTELE WEINDABA..... 3<sup>RD</sup>  
DEFENDANT/DEFENDANT  
LAND REGISTRAR, BUNGOMA. ....4<sup>TH</sup>  
DEFENDANT/DEFENDANT

**JUDGMENT.**

**1.** The plaintiffs filed originating summons dated 09/10/2023 where they claim they are entitled to and to be declared as the proprietors of Land Title Number NDISI/MUCHI/3446 situate in Bungoma County by virtue of adverse possession for the period prescribed in the Limitation of Actions Act, Cap 22 Laws of Kenya.

**2.** The originating summons is supported by the affidavit of Muchai Lumatete Walubengo sworn on 09/10/2023 where he stated that the 1st and 2nd Defendants are the current registered owners of all that parcel known as Land Title Number Ndivisi/Muchi/3446 situate in Bungoma County, measuring 0.07ha. That the 4th Defendant herein was the sole registered owner of the suit parcel until sometimes in September 2023

when he sold the same to the 1st and 2nd defendants. That their mother entered the suit land in 1992 where she was undertaking farming until August 2023 when she passed on and the Plaintiffs took possession of the land and put up a perimeter wall and stalls for renting. That their occupation has been open, non-permissive, peaceful, notorious, exclusive and adverse to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants for over 12 years. That by operation of the law, he is entitled to be the legal and registered owner of the suit property under the doctrine of adverse possession.

**3.** The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a replying affidavit sworn on 28/11/2023 where they deposed that together with the 2nd Defendant, they are the registered owners of all that parcel of land known as Ndivisi/Muchi/3446 having purchased the land from the 3rd Defendant herein. That they conducted a search and established that the title was in the name of the 3rd Defendant herein. That they also conducted a physical visit of the land and found that there was a perimeter wall on the sides which they were informed was constructed by the Plaintiff who once intended to purchase the land but failed to do so.

**4.** It was further stated that they found out that there were businesses at the front which they established that the structures thereon were built by the said business owners between 2017 and 2022. That further, the Plaintiff had built permanent structures for the businesses and was collecting ground rent. That they later entered into discussions with the

business owners on their occupation of the land. They denied the Plaintiffs and their mother's occupation of the suit land.

**5.** The 3<sup>rd</sup> Defendant filed a replying affidavit sworn on 28/11/2023 where it was deposed that he purchased the suit land-Ndivisi/Muchi/3446 in 1996 from James Wakhungu and thereafter, he was issued with a title deed. That after purchase, he took possession of the land and commenced usage thereof immediately and constructed temporary structures and thereafter invited his brother -Jackson Obingo Weindaba-now deceased and his wife Judith Namukuru to run a posho-mill on the said land in 1997 until December 2014 when the same was closed. That in 2016, the Plaintiff illegally fenced off part of the suit land in a bid to grab the same.

**6.** It was further deposed that this was reported to the area chief and when the main highway was being constructed, businesses along the road were pushed into adjacent parcels of land thus invading the suit land. That between 2017 and 2022 the Plaintiff constructed permanent stalls on the land and collected rent from the business owners. That the Plaintiff later expressed interest in purchasing the land but he did not honour his intentions to make the purchase. He deposed that he later sold the land to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and transferred it to them. He contended that the Plaintiff only occupied the land in 2015 after his brother relocated and denied the Plaintiffs claim in its entirety.

**7.** The 4<sup>th</sup> Defendant entered appearance but did not file a response to the originating summons.

**8.** At the close of pleadings, directions were taken and was agreed that the suit proceeds by way of viva voce evidence.

**Plaintiff's case.**

**9.** PW1, Muchai Lumaletе Walubengo, testified that he took possession of the suit land in 2003 after his mother's death. His mother had occupied it since 1992 as a purchaser. He built a perimeter wall in 2018, and tenants began occupying the land in 2019 until they were served with eviction notices in 2023. He also cultivated maize and beans. He acknowledged that the 3rd Defendant's brother ran a shop and posho mill on part of the land.

**10.** PW2, Moses Chetambe, stated that the 1st Defendant once approached him over parcels 3216 and 3446, and when they visited the land, they were told parcel 3446 belonged to the Plaintiff, though he had no proof of the approach.

**11.** PW3, Zacharia Sifuna, testified that the land originally belonged to Selina Walubengo (the Plaintiff's mother) until her death in 2003, after which it devolved to the Plaintiff, who developed it with the 3rd Defendant's consent. On cross-examination, however, he admitted the Plaintiff's mother may

have occupied a different parcel and that he left for Nairobi in 2008.

**Defendant's case.**

**12.** DW1, James Mutele, testified that the Plaintiff has only been in possession since 2017. He noted that the Plaintiff's mother's name was irregularly added to mutation forms.

**13.** DW2, Martin Shikuku, testified that records show parcel 2747 was subdivided for other parties, with no transfer indicated to Selina Walubengo. He claimed the structures on the land were put up by tenants, not the Plaintiff.

**14.** DW3, Judith Namukuru, testified that she and her late husband lived on the land from 1996 to 2014, running a posho mill and hotel.

**15.** DW4, Violet Nekesa, testified she has operated a butchery and shop on the land since 2017, constructing the premises herself with local authority approval, and later paying rent to the 1st and 2nd Defendants (backdated to 2017).

**16.** DW5, Daniel Sumba, testified he started his business on the land in 2021 with the Plaintiff's permission, finding it unoccupied except for DW4.

**Plaintiffs submissions.**

**17.** The Plaintiff in his submissions dated 28/07/2025 and 26/08/2025 central issues before this court are whether the plaintiff has proved his claim of adverse possession and who should bear the costs of this suit. The plaintiff emphasized that under sections 107, 109, and 112 of the Evidence Act, the burden of proof lies on the party asserting a fact, and in civil proceedings the standard is proof on a balance of probabilities. Citing **James Muniu Mucheru v. National Bank of Kenya Ltd (2017)**, he argued that the court must adopt the version of events that is more credible and consistent with the evidence.

**18.** According to the plaintiff, his late mother, Selina Nabangala Walubengo, openly and continuously occupied and cultivated the suit property, Ndivisi/Muchi/3446, from 1992 until her death in 2003. He then immediately took over possession, continuing cultivation until 2017 when he constructed permanent structures, and he remains in occupation to date. To support his position, he relied on the Court of Appeal's decision in **Kakuzi Ltd v. Makuyu Club (2020)**, which confirmed that cultivation is sufficient proof of possession. His account was corroborated by four witnesses.

**19.** In response, the defendants presented five witnesses, but their testimonies were unconvincing. DW1 admitted he had never personally used the property and lacked evidence of leasing it to others. DW3 claimed she lived on the land with her late husband between 1996 and 2014 and operated a posho

mill, hotel, and residence, but she failed to provide any documentary or photographic evidence, business approvals, or even proof of marriage. Their testimonies were therefore discredited as unsubstantiated hearsay. The 3rd Defendant himself conceded that he had not personally utilized the property from 1996 to 2023, as he resided in Nairobi, and only became aware of the plaintiff's presence in 2023. The plaintiff submitted that this failure to utilize or inspect the land fell within the principle laid down in **Maweu v. Liu Ranching & Farming Cooperative Society (1985)**, where the Court of Appeal held that a registered owner risks losing title if they neglect their land for over twelve years.

**20.** On the question of costs, the plaintiff maintained that having discharged his burden of proof, the general principle that "costs follow the event" entitled him to costs. He therefore prayed that the court find that his long, open, and uninterrupted possession since 1992 has ripened into ownership by adverse possession, order registration of Ndivisi/Muchi/3446 in his name, and award him costs.

**21.** The plaintiff also filed supplementary submissions pursuant to leave granted on 30 June 2025, addressing new issues raised by the Defendants. The first was whether adverse possession can arise where occupation began under a sale agreement. The Defendants argued this contradicted the doctrine, but the plaintiff relied on **Peter Mbiru Michuki v. Samuel Mugo**

**Michuki (2013)**, which recognized constructive adverse possession, contending that even if possession originated in a sale, it may mature into ownership by lapse of time. He distinguished **Joseph Mutafari Situma v. Nicholas Makhanu Cherongo (2022)**, relied on by the Defendants, noting that in that case there was a break between two possession periods due to a sale agreement, whereas in the present case there was no interruption.

**22.** The second issue was whether time can be combined between a deceased person and their estate. The plaintiff again relied on **Peter Mbiri Michuki (2013)**, where the Court of Appeal affirmed that time may be aggregated in such circumstances.

**23.** In conclusion, the plaintiff urged the court to disregard irrelevant authorities cited by the Defendants, and to find that the long, continuous, and uninterrupted occupation of the suit property by his late mother and himself has matured into ownership by adverse possession, entitling him to be registered as proprietor of Ndivisi/Muchi/3446 and to be awarded costs.

#### **Defendant's submissions.**

**24.** The in their submissions dated Defendants submit that the Plaintiff has failed to establish the legal requirements for adverse possession. Relying on authorities including **Kasuve v. Mwaani Investments Ltd (2004)** and **Daniel Kimani Ruchine v. Swift Rutherford & Co. Ltd (1977)**, the

Defendants argue that for adverse possession to succeed, occupation must be exclusive, open, without interruption, and continuous for at least 12 years. They identify two key issues for determination.

**25.** First, whether the Plaintiff's late mother, Selina Nabangala Walubengo, was in exclusive possession for the requisite period. The Defendants contend that her alleged occupation from 1992 until her death in 2003 amounts to only 11 years of the 12-year statutory minimum. Thus, she had not acquired prescriptive rights by the time of her death, and her estate cannot inherit what she had not obtained. They relied on **Situma v. Cherongo (2007)**, where the Court of Appeal held that an estate cannot claim adverse possession where the deceased's occupation fell short of the statutory period.

**26.** Second, whether the Plaintiff himself has established possession. The Defendants argue that the Plaintiff's case is inconsistent, since his witnesses testified that Selina entered the land as a purchaser, not as a trespasser, which contradicts the doctrine of adverse possession. They rely on **Richard Wefwafwa Songoi v. Ben Munyifwa Songoi (2020)** and **Mohan Lal v. Mirza Abdul Gaffar (India SC)**, which held that one cannot claim both ownership by purchase or gift and at the same time by adverse possession, as the two are mutually exclusive.

**27.** Further, the Defendants highlighted evidentiary gaps. The Plaintiff has not provided a clear chronology of occupation between 2003 and 2018. On the other hand, the 3rd Defendant showed that he purchased the land in 1996, placed his brother as caretaker until 2014, and thereafter, others including DW3, DW4 and DW5 occupied and conducted businesses on the land. Evidence also showed that the Plaintiff only erected a perimeter wall in 2021 when DW4 was already in occupation. This demonstrates that the Plaintiff was not in continuous possession prior to 2017.

**28.** In conclusion the Defendants submit that both Selina's estate and the Plaintiff fall short of proving the statutory threshold of 12 years of uninterrupted adverse possession. They urge the court to dismiss the suit with costs.

**Analysis and determination.**

**29.** Having read and considered the pleadings, the evidence adduced during the hearing, the written submissions and all the material placed before the court, the following issues commend for determination;

- a) **Whether the Plaintiff has proven a claim by way of adverse possession.**
- b) **Who shall bear the cost of the suit?**

**30.** The principles of adverse possession was outlined by the Court of Appeal in Mtana Lewa v Kahindi Ngala Mwahindi [2015] eKLR where the court stated: ***“In terms of Sections 7, 9,13,17,37 and 38 of the title of a registered owner of land will be extinguished and vested in a third party who proves that he has been in possession of the land continuously and uninterrupted for a period of 12 years; that such possession has been open and notorious to the knowledge of the owner; that the possession has been without the permission of the owner; and that the third party has asserted a hostile title and dispossessed the true owner.”***

**31.** The law lays the foundation, but it is through judicial interpretation that the true contours of adverse possession emerge. In Gabriel Mbui v Mukindia Maranya [1993] eKLR the Court adopted the definition of adverse possession in the following terms: ***“...it is possible to define “adverse possession” more fully, as the nonpermissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true***

***owners enjoyment of the land for the purposes for which the owner intended to use it.”***

**32.** Kuloba J's (*as he then was*) in the above case refers to the essence of adverse possession with precision where he states that... ***“In my view, at its core, adverse possession is not a matter of mere presence but of possession that is deliberate, exclusive, and hostile to the rights of the true owner. It demands an unambiguous assertion of dominion; possession that is neither covert nor permissive, but one that stands in open defiance of the owner's title. Without this essential conflict between the possessor and the rightful owner, there can be no adverse possession, for the law does not reward mere occupation but the usurpation of ownership itself.”***

**33.** In the case of **Mbira -v- Gachuhi, (2002) IEALR 137** where it was held that: ***“... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption....”***

**34.** The Plaintiff must therefore show that his occupation amounted not to mere presence, but to open and notorious possession exercised as of right, and without the permission of the registered owners for over 12 years.

**35.** The Plaintiff argued that his mother occupied land parcel Ndivisi/Muchi/3446, from 1992 until her death in 2003. He then immediately took over possession, continuing cultivation until 2017 when he constructed permanent structures, and he remains in occupation to date. From the evidence presented the Plaintiff also argues that his mother came into possession of the said property by virtue of being a purchaser. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants produced into evidence a letter of consent, transfer forms, minutes of a meeting dated 14/05/1990 and sketch plans of a mutation form (D-Exhibit 7,8 ,9,10) showing that the Plaintiff's mother purchased her portion i.e Ndivisi/Muchi/3178 which is a sub-division of Ndivisi/Muchi/3138 which was sub-divided from Ndivisi/Muchi/2747 and sold by one Francis Wanjala Wakalikha .It also emerges that the said seller also sold a portion i.e Ndivisi/Muchi/3446 (the suit property) of land sub-divided from Ndivisi/Muchi/3138 to John Wakhungu who in turn sold to the 3<sup>rd</sup> Defendant.

**36.** The Plaintiff averred that he had fenced the side and uppers side of the suit property and had put up some permanent structures which he was renting out. While it is key to note that the Respondents agree to the fencing, they called evidence (PW4&5) who testified that they occupied the permanent structures on the suit land and that they had put them up themselves with the consent of the 3<sup>rd</sup> Defendant and added that they currently pay rent to the 1<sup>st</sup> and 2<sup>nd</sup> defendant's.

Justice Kuloba J, (as he then was,) in **Gabriel Mbui v Mukindia Maranya (supra)**, stated that held:

***“The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown”***

**37.** Further, it is significant to point out that PW3, in his oral testimony, stated that both the Plaintiff’s mother and himself resided on a different parcel of land and not the suit property. No documentary or cogent evidence has been presented to demonstrate that the Plaintiff’s mother was ever in actual possession of the suit land. On his part, the Plaintiff claimed to have fenced the suit property and erected permanent structures now occupied by tenants. However, the Respondents’ witnesses gave contrary testimony, insisting that it was them who constructed the said structures. In particular, DW4 testified that she pays rent directly to the 1st and 2nd Defendants. The Court in **Gabriel Mbui v Mukindia Maranya** (supra) underscored that adverse possession is not established by mere physical presence, but by acts of occupation that are open, continuous, exclusive, and hostile to the interests of the registered proprietor.

**38.** The testimony of DW4, asserting payment of rent to the Defendants, was not successfully rebutted by the Plaintiff. The provisions of section 107 of the evidence Act is clear on the burden of proof. In light of this, the Court is not persuaded that the Plaintiff, apart from erecting a fence, has demonstrated the requisite degree of dominion or control over the suit property to support a claim of adverse possession. The absence of credible proof that he cultivated crops or that he is the true beneficiary of the alleged permanent structures weakens his claim. Consequently, the Plaintiff has fallen short of showing possession that is deliberate, adverse, and inconsistent with the rights of the registered owners.

**39.** In the instant case however, upon careful examination, the Plaintiff's claim dissolves under the weight of its own deficiencies. The evidence fails to establish the requisite elements, and where the law demands certainty, mere occupation is not enough.

**40.** The upshot of the foregoing is that the Plaintiff's claim for adverse possession must fail. The Originating summons dated 09/10/2023 is hereby dismissed with costs to the Defendants.

**DATED, SIGNED and DELIVERED** at **BUNGOMA** this 27<sup>th</sup> day of November, 2025.

.....  
**HON.E.C CHERONO**  
**ELC JUDGE**

In the presence of;

1. Mr. Walubengo for the Applicant.
2. Mr. Anwar for the Respondents.
3. Bett C/A.