

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KAPSABET

ELCLC CASE NO. E003 OF 2024 (O.S)

**IN THE MATTER OF CLAIM FOR ADVERSE
POSSESSION PURSUANT TO SECTION 38 OF THE
LIMITATION OF ACTIONS ACT.**

MARGRATE CHEROTICH

MARITIM.....PLAINTIFF/APPLICANT

-VERSUS-

SIMION KIPCHOGE

KORIR.....DEFENDANT/RESPONDENT

JUDGMENT

1. At the heart of the instant dispute is a portion of land measuring approximately five acres out of the suit land namely LR NUMBER NANDI/CHEPNOET/558 measuring approximately Two Decimal Zero Zero hectares (2.00 Ha) in area located within Nandi County.

2. It is important to note that on 12th November 2025, Ms Chumba learned Counsel for the Plaintiff made an application that 'LR NO. NANDI/CHEPNOET/554' appearing in error in orders 2 and 3 of the originating summons, be corrected to read the suit land as stated in paragraph 1 above. The court allowed the application accordingly.
3. The Plaintiff represented by Korir, Jepleting and Company Advocates, generated the suit by an originating summons dated 30th May 2024 claiming adverse ownership of the suit land seeking the following orders;
 - a) A declaration that the Defendant's right to recover the whole suit land is barred under the Limitation of Actions Act Cap 22 Laws of Kenya and title over a portion on occupation of the Plaintiff thereto extinguished on the grounds that the plaintiff herein has openly, peacefully and continuously been in occupation and possession of the aforesaid land parcel for a period exceeding 12 years.
 - b) That there be an order that the Plaintiff be registered as the proprietor of the suit land in place of the Defendant and/or the register thereof be rectified to reflect the Plaintiff's ownership of the suit land.

- c) That the defendant herein be ordered to execute all the requisite papers necessary to have the Plaintiff be registered as owner of portion the suit land.
 - d) Costs of the suit to be borne by the Defendant.
 - e) Such further and/or other orders be made as the Court may deem fit and expedient in the circumstances of this case.
4. The originating summons is premised upon the Plaintiff's 13-paragraphed supporting affidavit and eight grounds which include;
- a) The Plaintiff has peacefully and openly occupied and cultivated the portion of the suit land for uninterrupted duration exceeding 12 years with effect from 1972, and has thus acquired ownership of it by way of prescription and/or adverse possession.
 - b) That the Defendant herein is the registered owner of the suit land.
 - c) That the Defendant holds the title in trust in favour of the Plaintiff by operation of the law.
5. In a nutshell, the Plaintiff's case is that in the year 1972 or thereabout, her husband, Tirop Seurei Maritim (Deceased-1) purchased five acres out of the suit land from it's

original owner, Kipkorir Arap Tarno (Deceased-2) who received full purchase price, survey carried out including demarcation and beacons installed thereof. That in 1992, Deceased-2 clarified at a meeting, the ownership of the suit land and that he had no claim over the same. That after the death of Deceased-2 in 1996, the alleged dependants including the Defendant, raised concerns over ownership of the suit land which the Plaintiff has possessed and occupied openly, peacefully and continuously for over 30 years hence, precipitating the present suit.

6. The Defendant was duly served as disclosed in the affidavits of service sworn on 22nd May 2025 and 11th November 2025 herein. However, he opted not to enter appearance or file statement of defence as observed in the case of **Ogada-vs-Mollin (2009) eKLR**.
7. The suit was heard ex-parte pursuant to the application by way of chamber summons dated 12th December 2025 that was allowed accordingly.
8. The Plaintiff (PW1) aged 99 years relied on her supporting affidavit to the originating summons and list of documents of even date serial numbers 1, 2 3 and 4 being copies of

green card, certificate of official search, agreement and Limited Grant of Letters of Administration Ad Litem (P Exhibits 1, 2, 3 and 4 respectively) as part of her testimony. She besought the court to grant the prayers set out on the face of the originating summons.

9. According to PW2, Abdarahman Kibitok, a neighbour to both PW1 and the Defendant, fives acres being a portion of the suit land is possessed and occupied by PW2 since 1972 without any interruption. He relied upon his statement dated 30th May 2024 as part of his evidence.

10. The third witness, a village elder, Jacob Kiptoo Kirarei (PW3) relied on his statement dated 30th May 2024 as part of his testimony. He stated that PW1 and her family have occupied the portion of the suit land continuously.

11. Learned Counsel for the Plaintiff filed submissions dated 20th November 2025 making reference to the originating summons in entirety, sections 7 and 38 of the Limitation of Actions Act Cap 22 Laws of Kenya and delineated two issues relating to the Plaintiff's acquisition of the suit land by adverse possession and costs of the suit. Counsel cited the case of **Wilson Kazungu Katana and 101 others-vs-Salim Abdalla Bakshein and**

another (2015) eKLR where the Court of Appeal outlined the criteria for acquisition of title under Adverse possession doctrine. That PW1 has possessed and occupied the portion of the suit land since 1972 and has witness statements to attest thereto.

12. Further, Counsel cited the case of **Kinyanjui-vs-Kariuki {2025} KEELC 3710 (KLR)** alongside the case of in **Mtana Lewa-vs-Kahindi NgalaMwangandi (2015) eKLR** regarding the definition of adverse possession. Counsel submitted that the Defendant's actions over the suit land are unwarranted, calculated at denying the Plaintiff her right to the same and delay the course of justice thus, urged the court to grant the orders sought in the originating summons.

13. It is notable that **Order 15 of the Civil Procedure Rules 2010** provides for framing of issues and materials from which issues may be framed. Further, it is established law that the issues for determination in a suit generally arise out of either the pleadings or as framed by the parties for the court's determination; See **Galaxy Paints Co Ltd-vs-Falcon Guards Ltd. (1999) eKLR.**

14. Having considered the originating summons, the Plaintiff's evidence and written submissions, the issues for determination are as set out on the face of the originating summons in line with the decision in **Wilson Kazungu Katana case (supra)**, that adverse possession dictates that;

- a) The parcel of land in dispute must be registered in the name of a person other than the applicant,
- b) The Applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner,
- c) The Applicant must be in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.

15. Additionally, the applicant must demonstrate that such possession was without the permission of the owner; see **Richard W.Songoi -vs- Ben M. Songoi (2020) eKLR.**

16. On the first dictate, the testimonies of PW1 and PW2 were that the Plaintiff's claim is for a portion measuring

approximately five acres of the suit land. Indeed, PW1 testified in part;

‘.....The portion of land is five acres of the suit land reference NANDI/CHEPNOET/558.’

17. In that regard, the plaintiff’s claim is over a definite portion of the suit land; see also **Muthuita -vs- Wanoe & 2 others (2008) 1KLR (G&F) 1024.**

18. As at 18th January 1994, the suit land was registered in the name of Deceased-2 as shown in P Exhibit 2. The same got registered in the name of the defendant with effect from 28th October 2022 as per P Exhibit1.

19. Regarding the second dictate, PW1 stated that she has possessed and occupied the portion of the suit land openly, peacefully and continuously. Her testimony was corroborated by PW2, her neighbour.

20. Notably, PW2 testified, inter alia;

‘.....The suit land reference number NANDI/CHEPNOET/558 measuring 5 acres possessed and occupied by PW1 since 1972 without interruption.....’

21. As regards the third dictate, the testimonies of PW1, PW2 and PW3 are in line with **Kinyanjui, Lewa and**

Katana cases (all supra) that the Plaintiff is on the suit land is by adverse possession to the right of the registered owner, the Defendant. In the case of **Mbugua Njuguna-vs-Elijah Mburu Wanyoike (2004) KECA 92 (KLR)**, the Court of Appeal stated;

‘The appellant was not claiming the land through a contract of sale.....he was put in exclusive possession of the 4 acres through a contract of sale which was not specifically performed and since then his possession of the 4 acres was adverse to the right of the registered owner.’

22. It has therefore, emerged that the defendant has been dispossessed from the five acres of the suit land. In the case of **Elijah O.L Opar-versus-Tobias Odhiambo Abach (2019) eKLR** at page 6, the Court of Appeal observed-

“...evidence sufficient to prove on a balance of probabilities that he had entered upon the subject land openly, peacefully, without permission of Opar, and had continued in such possession for an uninterrupted period of at least 12 years thereby dispossessing Opar and extinguishing his right and

title thereto. These are the ingredients of adverse possession.....” (Ingredients eemphasized)

23. Furthermore, at ground (e) of the originating summons and paragraph 11 of the plaintiff’s affidavit in support of the summons, constructive trust is disclosed further to order number 5 sought in the said pleading and the decision in **Odd Jobs-vs-Mubia (1970) EA 476** on issues in a case. So, the principles of equity and in particular, constructive trust apply in favour of the plaintiff against the defendant in view of the agreement and Ad Litem (P Exhibits 3 and 4 respectively) and the decision in **Mbugua Njuguna case (supra)** being guided by the Court of Appeal decision in **Willy Kitilit-vs-Michael Kibet {2018} KECA 573 (KLR)** and **Article 10 (2) (b) of the Constitution of Kenya 2010** on the principles of equity in the circumstances.

24. It is settled law that the burden is always on the party bringing the suit to prove their case on a balance of probabilities. This burden is not lessened even if the case is heard by way of formal proof; see **Kirugi & another-vs-Kabiya & 3 others (1987) eKLR.**

25. In the case of **Nganga Kiongo & 3 others-vs-Town Council of Kikuyu (2012) eKLR, Odunga J (Now, J A)** held that the Plaintiffs had given evidence on oath and the defendant failed to present evidence to counter it. That therefore, the claim was uncontroverted, unchallenged and likely to succeed on a balance of probabilities.
26. In this suit, the plaintiff's claim for adverse possession and constructive trust in respect of five acres of the suit land against the defendant is uncontroverted and established on a balance of probability.
27. Wherefore, Judgement is hereby entered for the Plaintiff against the defendant in terms of prayers 1, 2, 3, 4 in the originating summons dated 30th May 2024 and that the Defendant holds the five acres of the suit land in trust for the Plaintiff by dint of prayer number 5 in the said summons as set out in paragraph 3 (a) to (e) hereinabove.
28. It is so ordered.

DATED and **DELIVERED** at **KAPSABET** this **26th** day of **NOVEMBER 2025**

HON. G M A ONGONDO

JUDGE

In the presence of;

1. Ms Chumba learned counsel for the Plaintiff
2. Walter, Court Assistant