



**Mucioka v Munyi & 3 others (Environmental and Land Originating Summons E035 of 2021) [2025] KEELC 5730 (KLR) (30 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5730 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E035 OF 2021  
A KANIARU, J  
JULY 30, 2025  
IN THE MATTER OF SECTION 38 OF THE LIMITATION  
OF ACTIONS ACT CAP 22 LAWS OF KENYA**

**BETWEEN**

**LINCOLN NJERU MUCIOKA ..... PLAINTIFF**

**AND**

**PENINA WANYAGA MUNYI ..... 1<sup>ST</sup> DEFENDANT**

**JAMES MWANGANGI MUNYI ..... 2<sup>ND</sup> DEFENDANT**

**PATRICK IRERI MUNYI ..... 3<sup>RD</sup> DEFENDANT**

**FLORA MUTHONGI KIARAGO ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff – Lincoln Njeru Mucioka – initially filed this matter in court on 24.9.2021 vide an originating summons of even date. The summons was thereafter amended again and again with the final version, styled Further Amended Originating summons, dated 5.4.2024. Via the summons, the plaintiff is claiming Land Parcel No. Embu/Kithunthiri/1187 (“suit land” hereafter) as a disseissor. The defendants are the registered owners of the suit land. They are Penina Wanyaga Munyi, James Mwangangi Munyi, Patrick Ileri Munyi and Flora Muthoni Kiarago, and are said to be members of the same family.
2. The court is invited to determine whether the plaintiff has become entitled to be registered as owner or proprietor of the suit land and whether the defendants’ titles to the land have been extinguished by operation of the law. It is also desired that the court decides whether the defendants should pay costs.
3. The plaintiff expects a determination favourable to him and has therefore asked for the following orders.



1. A declaration that he has acquired title to the suit land by the doctrine of adverse possession.
2. An order directing the Land Registrar, Mbeere, to cancel the register and titles in respect of the suit land and cause registration in the name of the plaintiff.
3. An order to issue authorizing the Deputy Registrar to execute all necessary document to facilitate registration of the plaintiff as the absolute proprietor of the suit land.
4. That costs be awarded to the plaintiff.
4. The originating summons is premised on the grounds, inter alia, that the plaintiff has been in open, continuous, exclusive, adverse, peaceful, and uninterrupted possession of the suit land for a period of eighteen years. It was stated that the plaintiff's use of the land has been without force to date.
5. The grounds are amplified in the supporting affidavit that came with the summons. The supporting affidavit also has details concerning the history, background, and antecedents surrounding the matter. The plaintiff deposed that he had purchased the suit land from 1<sup>st</sup> defendant and had subsequently gone into possession. The 1<sup>st</sup> defendant allegedly even surrendered the original title deed to him but later asked for it ostensibly to initiate the process of transfer. It appears clear that succession had to be done first as the title was in the name of the 1<sup>st</sup> defendant's deceased husband. What happened later is that succession was done and concluded but the 1<sup>st</sup> defendant transferred the suit land to herself and her children.
6. The plaintiff's own children are on the land and are cultivating on it. All this has been happening without the permission of the 1<sup>st</sup> defendant.
7. The 1<sup>st</sup> defendant responded to the originating summons on her own behalf and on behalf of the other defendants. She did so vide a replying affidavit dated 28.4.2023 and filed on 2.5.2023. According to her, the suit land was registered initially in the name of her late husband. She and the other defendants are said to live far from the suit land. The plaintiff on the other hand has his land just next to the suit land. He is said to have taken advantage of the defendants' absence and occupied the land. The 1<sup>st</sup> defendant denied ever entering into a sale agreement with the plaintiff. She deposed that when she was undertaking succession proceedings, the plaintiff tried to lodge an objection which was dismissed. She also deposed that she and her children only became registered owners recently and the plaintiff therefore cannot be an adverse possessor against them.
8. The court started hearing the matter on 14.5.2024. The plaintiff was the first to testify. He gave evidence as PW1 and adopted his written statement as evidence. The statement shows him saying that he bought the suit land from 1<sup>st</sup> defendant in the year 2000; that he was even handed the original title deed; that he went into possession soon after purchase; that he lives there, has planted crops, and done other developments. He further stated that he gave back the title deed to 1<sup>st</sup> defendant on the understanding that she would book appointment with the Land Control Board with a view to transferring the land to him; that she later reneged on the promise of transfer which got the plaintiff concerned and he reported the matter to the area chief.
9. The plaintiff's oral testimony in court is in general agreement with the statement he made. From it, it is clear that he purchased the suit land through cash and barter transactions, specifically for Kshs. 33,000/= plus two goats and two cows. He reiterated that it is the 1<sup>st</sup> defendant who approached him saying her house was falling, that her children were out of school, and that the family faced hunger.
10. The oral testimony even seems to be more vivid than the written statement. For instance, while the written statements states that the 1<sup>st</sup> defendant was the registered owner of the suit land, the testimony



clarifies that the 1<sup>st</sup> defendant's deceased husband was the actual registered owner. He stated further that succession proceedings had to be undertaken and that he sponsored the proceedings in order that he could get the land; that he realized later that he did not feature anywhere in the proceedings and he lodged an objection which was dismissed; and that he later decided to file this case. The succession matter was said to have been concluded and the 1<sup>st</sup> defendant transferred the suit land to herself and her children. The children are the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants.

11. During cross-examination, the plaintiff said, inter alia, that the suit land belonged to 1<sup>st</sup> defendant's deceased husband; that he knew that as a fact but he viewed or considered the 1<sup>st</sup> defendant and her deceased husband as one; that he fully paid for the suit land; that he has been on the land for nineteen years, has constructed on it, planted crops, and even buried his deceased child there.
12. The plaintiff's other witness was PW2 – Mati Kigaru – who, like the plaintiff, adopted his written statement as evidence. The statement shows the witness saying he has known the plaintiff for long; that he is aware the 1<sup>st</sup> defendant sold the suit land to the plaintiff; that the plaintiff took immediate possession and the defendants are aware of this; and that the plaintiff has acquired the land by adverse possession. In his oral testimony in court, he said, inter alia, that the plaintiff and the 1<sup>st</sup> defendant belonged to the same clan. He reiterated that the plaintiff bought the suit land, is in possession of it, has cultivated it, and lives there with his family.
13. PW2 was cross-examined by defendants' counsel. He said that the suit land was originally clan land but it was allocated by the same clan to 1<sup>st</sup> defendant's deceased husband. He said further that 1<sup>st</sup> defendant undertook succession proceedings and that the plaintiff participated in the proceedings and lost.
14. Joseph Muriuki Kigaru was another witness. He is PW3 in the matter and like the other two witnesses preceding him, he adopted his written statement as evidence. In the statement, the witness was clear that the plaintiff and 1<sup>st</sup> defendant were well known to him; that he knew that the 1<sup>st</sup> defendant sold the suit land to the plaintiff; that the defendants are all aware that the plaintiff is in possession of the suit land; and that the plaintiff is entitled to the suit land by way of adverse possession. The testimony of this witness in court is in harmony with his written statement.
15. This witness was also cross-examined. He confirmed being present when the suit land was sold. He said the 1<sup>st</sup> defendant sold it before conducting succession proceedings; that the plaintiff cultivates the land and has planted crops on it; that the 1<sup>st</sup> defendant lives in a place called Karorina; and finally that it is not correct to say that the plaintiff was a caretaker of the suit land.
16. The final witness on the plaintiff's side is Josphat Muriuki Nyaga and he gave evidence as PW4. He adopted his written statement as his evidence. He said that the plaintiff is well known to him and that the plaintiff has been living on the suit land since year 2000 when he purchased it. The plaintiff is said to have extensively developed the land; has built on it, and is growing crops there. The oral testimony of the witness in court is in agreement with his written statement and has even amplified some aspects of it. For instance, it's clear he belongs to the same clan as the parties, that the plaintiff sponsored succession proceedings, and that the 1<sup>st</sup> defendant refused to transfer the suit land to the plaintiff after succession was conducted.
17. This witness like others, was also cross-examined. He is shown saying in answer to the questions posed that the 1<sup>st</sup> defendant refused to take the plaintiff to Land Control Board; that it was 1<sup>st</sup> defendant's duty to do so as the land was hers; and that the plaintiff took possession of the suit land and his children started living on it.



18. The court took the 1<sup>st</sup> defendant's evidence on 15.10.2024, which was immediately after the plaintiff's case was closed. The 1<sup>st</sup> defendant adopted her written statement as her evidence. She is captured as DW1 in the court proceedings. In writing, she stated, inter alia, that the suit land was initially registered in the names of her late husband who died way back in 1984. She didn't apply for letters of administration until 2016. The plaintiff is said to have lodged his claim in the succession proceedings and lost. He subsequently filed this case. According to the 1<sup>st</sup> defendant, the plaintiff took advantage of her absence from the suit land and invaded it on the pretext that he had purchased it from her. She denied entering into a sale agreement with the plaintiff and said that the one made available by the plaintiff is a forgery and an afterthought.
19. Further, she stated that she couldn't sell the land as that would be intermeddling with the estate of her late husband, which would be criminal and punishable under the law. The photos showing alleged developments and occupation of the land by the plaintiff were said to be showing the neighboring land and not the suit land. The 1<sup>st</sup> defendant also stated that that this suit was filed against her and other defendants barely three (3) years after they became registered owners and therefore the twelve (12) year requisite period required for proof of adverse possession is not yet complete. She asked that the plaintiff's suit be dismissed with costs and that the plaintiff be ordered to vacate her land.
20. In the 1<sup>st</sup> defendant's oral testimony in court, she reiterated that she didn't sell the suit land to the plaintiff. She said that the plaintiff and his witnesses have contrived to deprive her of the land. According to her, the plaintiff was a caretaker of the suit land but he later decided to claim it as his own. She said that plaintiff had put up houses on the land and when she asked him about it, he said she wouldn't take him anywhere as she was poor.
21. This witness was cross-examined. In response to some of the questions asked, she said she lives at a place called Karurina and has never lived on the suit land. She said too that the plaintiff didn't sponsor succession proceedings. She sold cows, she said, to finance the proceedings. She further said she does not use the suit land; the plaintiff uses it instead. Asked whether she reported the plaintiff to police when she discovered he was using the land, she said she didn't.
22. The focus then shifted to the sale of the suit land and the 1<sup>st</sup> defendant denied selling it to the plaintiff. She denied giving the plaintiff her identity card and pleaded ignorance as to how the plaintiff got the number of her identity card. She also denied knowing the witnesses whose names appear in the sale agreement. Moreover, she pleaded lack of knowledge as to how the plaintiff got the original title deed of the suit land.
23. In the course of hearing, both sides produced various exhibits. From the plaintiff's side, there were the following exhibits;
  1. Copy of search certificate showing ownership of the suit land; P EX NO. 1.
  2. Sale agreement; P EX No. 2.
  3. Photographs showing developments that the plaintiff has undertaken on the suit land; PEX NO. 3 (a), (b), (c) and (d).
24. On the defence side, the following exhibits were produced;
  1. Confirmed Grant issued after conclusion of succession proceedings; D EX No. 11.
  2. Ruling from the lower court at Siakago showing dismissal of the objection lodged by the plaintiff; D EX No. 2.



3. Copy of the green card showing ownership of the suit land; E EX No.3.
  4. Burial permit for the plaintiff's late husband; D EX No. 4.
  5. Extract of court order showing dismissal of the objection lodged by the plaintiff in the succession proceedings; D EX No. 5.
25. Hearing over, both sides filed written submissions. The plaintiff's submissions are dated 21.10.2024. He gave an overview of the entire case and they delineated the issues for determination thus;
- i. Has the plaintiff acquired a free hold interest in land parcel Embu/Kithunthiri/1187 by way of adverse possession for a period of more than 12 years?
  - ii. Whether the titles in the names of Penina Wanyaga Munyi, James Mwangangi Munyi, Patrick Ileri Munyi and Flora Muthoni Kiarago in respect of all that land parcel number L.R Embu/Kinthonthiri/1187 measuring three decimal four (3.4) Hectares have been distinguished (sic should be extinguished) by and under operation of the law and that the applicant herein has become entitled to the whole parcel of land through adverse possession as per Limitation of Actions Act, Cap 22, Section 17.
  - iii. Is the plaintiff entitled to the prayers sought?
  - iv. Who is to bear the cost.
26. It was then pointed out that in order to prove adverse possession, the possession itself should be actual, open, notorious, exclusive and continuous. The case of Maweu vs Liu Ranching & Farming Cooperative Society [1985] KLR 430 was cited and quoted to drive the point home. Several provisions of law – Like Article 40 of the Constitution, Section 7 of the Land Act, and Sections 7 and 13 of the Limitations of Actions Act – were cited and quoted for their actual or perceived relevance.
27. It was further reiterated that the plaintiff entered the suit land in the year 2000 and has been in occupation to date. A period of 21 years is said to have lapsed since the plaintiff purchased the land. Some of the other cases cited in support of the plaintiff's case include Richard Wefwafwa Songoi vs Ben Munyifwa Civil App. No. 110 of 2016, Kisumu, Gachuma Gacheru vs Kaina Kabuchwa [2016] eKLR and Peter Kamau Njau vs Emmanuel Charo Tinga [2016] eKLR.
28. The defendants' submissions are dated 28.10.2024. According to the defendants, the issues to be determined are whether the plaintiff is entitled to be registered as proprietor of the suit land, whether he is entitled in priority to the defendants to inherit the suit land; and whether the defendants should pay costs.
29. The defendants then submitted that the plaintiff has not shown that he occupies the whole of the suit land. It was submitted that he only occupies a portion while the rest of the land is occupied by his Sons. Further, the plaintiff was faulted for not specifying the size of the portion that he occupies. It was further submitted that the plaintiff's claim of adverse possession is premature as the defendants became registered proprietors on 25.5.2019 while this suit itself was filed on 21.9.2021. The twelve (12) year period necessary for proof of adverse possession is said not to have been attained.
30. It was alleged too that the plaintiff occupied a portion of the suit land while the said land was still owned by the 1<sup>st</sup> defendant's deceased husband. The occupation was said to amount to intermeddling with the estate of a deceased person. This is said to be violation of law and therefore an act of criminality. Further, the plaintiff's claim was said to be res judicata as he had tried to claim the land in succession proceedings and failed. This court was urged to dismiss the plaintiff's claim with costs. As regards the



issue of intermeddling with the estate of a deceased person, the defendants cited the case of Patrick Muasya Mutuku & Another vs David Musembi Mutua: Succession Cause No. 372 of 2012, Machakos [2022] eKLR.

31. In my view, the main issue of consideration is whether or not the plaintiff has sufficiently demonstrated that he is an adverse possessor. But before that issue is considered, there are other relevant or germane considerations such as how the plaintiff entered the suit land and whether the defendant, who only became registered owners in 2019, can be said to have their ownership rights defeated through adverse possession. The defendants' position in this regard is that they were brought to court barely three years after they became owners yet the law requires that they should be registered owners for at least twelve (12) years.
32. So how did the plaintiff enter the suit land? Through purchase, he says. But what does the 1<sup>st</sup> defendant say about the plaintiff's entry? The plaintiff, 1<sup>st</sup> defendant said, took advantage of her absence from the land and entered. He put up houses and started using the land.
33. In the course of hearing, the plaintiff testified and called three other witnesses. These witnesses were clear that the plaintiff purchased the suit land from 1<sup>st</sup> defendant and subsequent to that purchase, the plaintiff went into possession and occupation. On the defence side, only the 1<sup>st</sup> defendant testified. I have already stated her position regarding the issue of entry. The court record shows a sale agreement between the 1<sup>st</sup> defendant and the plaintiff. It is an agreement that has 1<sup>st</sup> defendant's identification details. Asked how the plaintiff got to know her identification details, she said that she didn't know. She said the agreement was a forgery. But she couldn't explain why she didn't report to police. She said she discovered that the plaintiff had entered and occupied the suit land in the year 2003. Asked why she didn't sue him, she said she was poor. But she could, in my view, have reported him to police or to the area chief. It doesn't cost money to report a matter to police or to the chief.
34. The fact of the matter is that good and credible evidence preponderates showing well that the 1<sup>st</sup> defendant sold the suit land to the plaintiff. On the basis of that sale, the plaintiff went into possession, cultivated the land, constructed houses, and made other developments. It is clear that members of the plaintiff's family are on the land. The defendants would rather that the members be seen as different from the plaintiff. The truth however is that it is the plaintiff who put them on the land and they are members of his family. They cannot therefore be seen as separate from him. They are members of this family and they occupied and developed the suit land because the plaintiff, who is their father, had bought it.
35. My finding is that the evidence given by the plaintiff and his witnesses is credible and reliable. It is shown well that the 1<sup>st</sup> defendant had pressing needs at the time and this made her go to the plaintiff for help. She proposed to sell the land in order to raise money to address the needs. She was serious about it at the time but somewhere along the way, she changed her mind. But even after the change of mind, she didn't disclose it to the plaintiff and she acted complaisant all along thus duping the plaintiff into believing that all was kosher. It is in these prevailing circumstances that the plaintiff agreed to finance or fund succession proceedings in order that the disputed land could ultimately be transferred to him. This however was never to be and when the truth eventually dawned on the plaintiff, he first lodged his protest in the succession proceedings and after getting an unfavourable outcome, he filed this suit.
36. Now a question arises whether the plaintiff's possession, occupation, and use of the disputed land can be said to amount to adverse possession. There is not much doubt as to the fact that such possession, occupation, and use has been peaceful, continuous, notorious, open and with the requisite animus possidendi (intention to possess and own). The 1<sup>st</sup> defendant would wish the court to hold that all this does not amount to adverse possession because she and the other defendants only became registered



owners recently while much of the period referred by the plaintiff related to a period during which they were not registered owners.

37. On the face of it, this submission by the 1<sup>st</sup> defendant seems to make sound legal sense. Section 38 of the *Limitation of Actions Act* provides as follows;

Section 38:

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, or land comprised in a lease registered under any of the Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as the proprietor of the land.”

It would appear from this legal provision that adverse possession only arises if the suit land is already registered in the name of a person against whom the claim is made; and that the running of time for adverse possession claim does not begin as against a mere beneficial owner who is not already registered as the proprietor.

38. Sometimes however, our courts have had occasion to widen their interpretative space in order to accommodate deserving cases and serve the interests of justice. Such was the situation for instance in the Assumption Sisters of Nairobi Registered Trustees vs Wachira; Nairobi HCC No. 2658 of 1998 (OS) (Ojwang, J, as he then was) where the court took the position that the period of adverse possession could run even during the period when the paper title holder was not the registered owner. It is a position that was upheld by Visram, G. B. M. Kariuki, and Mwilu, JJAs (as they then were) when the case went on appeal in the fashion of Benson Mukuwa Wachira vs The Assumption Sisters of Nairobi Registered Trustees; Civil Appeal No. 121 of 2006 [2016 eKLR).
39. Further, in the case of Janet Ngendo Kamau –vs- Mary Wangari Mwangi; Civil Appeal No. 173 of 2003 [2007] eKLR the Court of Appeal (S. E. O. Bosire, E. M. Githinji, and W. S. Deverell, JJA’s as they then were) shed light on the issue when it expressed itself thus:

“The suit land is and has been at all material times registered under the Registered *Land Act*, Cap 300 Laws of Kenya. Under Section 30 (f), above, rights in the process of being acquired under the Limitations of Actions Act, are in the nature of overriding interests and go with the land and not with the registered proprietor. Change of ownership does not affect those rights as they attach to the land. In the circumstances as the plaintiff’s occupation started long before the defendant became the registered owner, his rights were in the nature of overriding interests over the land and could be enforced at the expiry of the limitations period. In view of the conclusion we have come to, it follows that Osiemo, J. erred in holding that adverse possession by the plaintiff started when the defendant became the registered owner.”

40. It can clearly be seen in light of the above decided authorities, that the defendant’s submission to the effect that the plaintiff’s claim of adverse possession is premature for the reason that defendants only became registered owners sometimes in 2019 while this suit itself was filed in the year 2021 is fallacious and based on a misapprehension of the applicable law.
41. The 1<sup>st</sup> defendant raised an argument that at the time she is said to have entered into the contract of sale, she had no capacity to do so as such an act could be interpreted as intermeddling with the estate of a deceased person – in this case her deceased husband – contrary to Section 45 of Succession Act (Cap 160, Laws of Kenya). It is true that intermeddling is outlawed in Kenya. But it is necessary in my view to consider the matter at hand in its proper context. One of the mischiefs sought to be prevented by



the law is that of preventing intermeddlers from handling the estate of a deceased person in a manner that prejudices or imperils the rights and interests of the heirs.

42. But what is to be said when the person doing so is – as the 1<sup>st</sup> defendant herein actually was – the first in rank in terms of heirship and was doing so in apparent agreement or consent of another heir, her son? – (the 1<sup>st</sup> defendant’s own son was a signatory to the sale agreement). Would it be fair to uphold the argument of such a person? In my considered view, it would be wrong to uphold such an argument or submission. Pertinently, it is the 1<sup>st</sup> defendant who approached the plaintiff asking him to buy the suit land in order to raise money to save her family from starving and to attend to other needs. She even surrendered her deceased husband’s title deed to the plaintiff. She later approached him to finance succession proceedings, all this is time creating the impression that the suit land would be transferred to him. She then nonchalantly reneged on the agreement and transferred the suit land to herself and her children. This kind of behavior is reprehensible and unconscionable in the eye of Equity. It seems also to run afoul of Section 120 of the *Evidence Act* (Cap 86, Laws of Kenya) which states as follows:

Section 120:

When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.”

43. In my view, it would be wrong in the circumstances of this case to hold that there was intermeddling with the estate of a deceased person. And even if there was, the person raising the issue, that is the 1<sup>st</sup> defendant, was actually the first intermeddler and cannot therefore be entertained to accuse the others of it. The 1<sup>st</sup> defendant is the one who got the plaintiff into the situation and she now wants to cause him loss as she and her children reap accruing benefits. The 1<sup>st</sup> defendant contracted with the plaintiff with a view to transferring land to him when all the necessary legal processes were eventually to be fulfilled. It was a contract of sale which in spirit and intent had an aspect of anticipation or expectation. The maxim of equity that states that equity treats as done that which ought to be done needs to be applied here. Though the proper title to the suit land was not yet in 1<sup>st</sup> defendant’s hands at the time the sale agreement was entered into, it was expected to be in her hands sooner rather than later. The maxim of equity referred to essentially means that individuals would be obligated by their agreements or by law to perform some act of legal instance or obligation which needs to be done. And equity will treat that act as having been done as it ought to have been done even though it has actually not happened or occurred.
44. It therefore lies ill in the 1<sup>st</sup> defendant’s mouth to say that she had no title to the land or that the estate of her deceased husband was being intermeddled with. It would be wrong to allow her to eat her cake and have it. It would be wrong too to allow the 1<sup>st</sup> defendant to get away with a wrong cunningly caused and initiated by her. To this court, it is shown well that the plaintiff and his family went into possession and occupation of the suit land immediately after entry into sale agreement. They have been using the land and have developed it as their own. The plaintiff’s sons are even living on it. For all practical and legal purposes, they have used the land *nec vi, nec clam, nec precario* (without force, without secrecy, and without permission) for the requisite period, which is twelve (12) years, and in fact for much longer than that.
45. In light of the foregoing, the court grants the plaintiff the prayers sought in the further amended originating summons. These are the same prayers enumerated in paragraph 3 of this judgement.



**JUDGEMENT DATED, SIGNED AND DELIVERED ONLINE AT KITUI THIS 30<sup>TH</sup> DAY OF JULY, 2025.**

In the presence of,

Ms. Naliaka for Kiama for Defendant

Ms. Muriigi for Plaintiff – absent

Plaintiff – absent

Defendant - absent

Court Assistant - Musyoki

**A. KANIARU**

**JUDGE- ENVIRONMENT & LAND COURT, KITUI**

