



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ELC CIVIL SUIT NO. E007 OF 2021 (OS)**

**BETWEEN**

**ATANUS MUTUKU NDAVI .....**  
**.....PLAINTIFF**

**VERSUS**

**FREDRICK KIMEU NGEWA (*as the administrator of the***  
***Estate of Jonathan Ngewa Ndolo - deceased*)**  
**.....DEFENDANT**

**AND**

**JACKSON MUSYOKA KASIA.....1<sup>ST</sup>**  
**INTERESTED PARTY**  
**STANLEY MUTINDA KASIA.....2<sup>ND</sup>**  
**INTERESTED PARTY**  
**NICODEMUS NZIOKI KASIA.....3<sup>RD</sup>**  
**INTERESTED PARTY**  
**DANSON KITOLO KASIA.....4<sup>TH</sup>**  
**INTERESTED PARTY**

**JOHNSON NGEWA KASIA.....5<sup>TH</sup> INTERESTED PARTY**

**MICHAEL KASIA.....6<sup>TH</sup> INTERESTED PARTY**

**SHADRACK MUTHINI KASIA.....7<sup>TH</sup> INTERESTED PARTY**

## **JUDGMENT**

### **Background**

1. The plaintiff instituted this suit against the deceased defendant through an originating summons (“OS”) dated 23/02/2021, supported by the grounds on its face and the plaintiff’s supporting affidavit. In a nutshell, the main ground in support of the OS was that he had, for a period exceeding 12 years, been in adverse possession of 2 acres of land parcel no **Masii/Kithangaini/353 (“disputed portion”)**, which was registered in the name of the deceased defendant.
2. The 1st, 2nd, 5th and 6th interested parties (**“IPs”**) were identified as witnesses to an alleged agreement for sale and payment, as well as beneficiaries of the deceased’s estate. The plaintiff sought the following reliefs: -

***a) A declaration that the plaintiff has acquired a portion of the disputed portion by way of adverse possession.***

***b) An order directing the defendant and interested parties herein to transfer the disputed portion to the plaintiff.***

***c) An order that the plaintiff be registered as the proprietor of the disputed portion.***

***d) Any other declaration, order and/or relief the court deems fit.***

***e) Costs of this suit.***

3. On service, the law firm of **Ms Nzei & Co. Advocates**, representing the defendant and interested parties, filed a replying affidavit in opposition to the OS, sworn on 22/11/2023 by Fredrick Kimeu Ngewa ("**Fredrick**"), who was and is the legal administrator of the deceased defendant's estate. Following pre-trial directions, the case proceeded by *viva voce* evidence, with the contesting parties adducing their respective evidence.

#### **Hearing and evidence**

4. The suit commenced for hearing on 31/7/2024, and the plaintiff testified as **PW1**. His evidence was led by **Gerald Wambua (PW2)** and **Mutuku Mutua (PW3)**. The plaintiff also produced documents to support his case, marked as **Pex. 1-5**. Regarding the deceased defendant and IPs, only Fredrick testified and produced supporting documents, marked as **Dex. 1-3**. Additionally, all these witnesses relied on witness statements, replying affidavits (as appropriate), and also testified orally.

5. In chief, the plaintiff's evidence was a reiteration of the averments contained in his supporting affidavit. He testified that prior to his death, the deceased defendant had distributed the land parcel no **Masii/Kithangaini/353** ("**mother parcel**") to his children, including Benjamin Kasia Ngewa ("**Benjamin**"), who on 5/02/2000 sold the disputed portion, which was his (Benjamin's portion), at Ksh. 60,000, as shown by the various agreements for sale (**Pex. 1-4**), and that he fully paid the purchase price.
6. He informed the court that immediately after purchase, a surveyor demarcated the disputed portion, which was marked with a sisal hedge. He took possession and has been farming peacefully since then, as evidenced by the bundle of photographs tendered to the court (**Pex. 5**). In their evidence in chief, **PW2**, who was allegedly a neighbour, corroborated this evidence, whereas **PW3**, who was alleged to have witnessed the agreements, affirmed this.
7. On cross-examination, the plaintiff stated he never conducted an official search to ascertain the registration status of the suit property at the time of purchase and that, although he never presented a certificate of electronic evidence to authenticate the photographs, he had planted trees and food crops on the disputed portion. He also maintained that he was unaware that Benjamin did not have the capacity to sell the disputed portion to him.

8. On cross-examination, **PW2** testified that the last payment of the purchase price was made in 2010, and for **PW3**, he asserted that the payments of the purchase price were made in instalments but could not recall the date of the last payment. He also averred that he had bought land from the plaintiff. Furthermore, he stated that the plaintiff purchased the disputed portion from Jonathan Kasia Ngewa, alias Kasia Ngewa, whom Fredrick later clarified was Benjamin's other name.
9. After the plaintiff had closed his case, Fredrick took the stand and stated that the suit property was at all times registered in the deceased defendant's name who died on 17/04/1991 as seen from the certificate of official search (**Dex. 1**) and his estate was the subject of probate proceedings as per the produced certificate of confirmation of grant (**Dex. 2**) which showed that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> interested parties and Maikua AIC Church were the beneficiaries of the suit property which measures 6.2 ha.
10. The defendant also mentioned that the plaintiff's attempt to be given the disputed portion by the probate court was rejected as he was found to have intermeddled with the estate of the deceased defendant, as demonstrated by the ruling in **In re Estate of Jonathan Ngewa Kitolo (Deceased) [2021] KEHC 9368 (KLR) (Dex. 3)** rendered on 8/02/2021. He also argued that this suit was tantamount to forum

shopping. He also testified that the deceased defendant did not distribute his assets during his lifetime and informed the court that the time for purposes of adverse possession had not commenced.

11. On being cross-examined, he contradicted his evidence in chief when he now stated that the deceased defendant distributed his land to his children before his death. He also averred that the plaintiff's claim should lie against Benjamin's children (IPs), who are now the owners of the suit property. When shown an agreement for sale dated 5/02/2000, between the plaintiff and Benjamin, he asserted that he was seeing it for the first time and was thus reluctant to comment on it.

### **Submissions**

12. After the hearing concluded, the parties filed written submissions, which were received from the law firm of **Ms Mulwa & Mulwa Advocates** representing the plaintiff, dated 9/05/2025, and from the defendant's and IPs' counsel dated 30/05/2025. Therefore, in its analysis and determination, the judgment will carefully consider the arguments presented in the rival submissions, along with the relevant law and judicial precedents cited.

### **Issues for determination, Analysis, and Determination**

13. Accordingly, after a thorough review of the pleadings, evidence, applicable law, jurisprudence, and the plaintiff's statement of issues dated 26/05/2022, the singular issue

requiring this court's adjudication, as emphasised in the submissions of both parties, pertains to **whether the plaintiff's claim satisfies the threshold for adverse possession.**

14. Nonetheless, it is essential to note that this matter is properly before this court, given that the claim of adverse possession invokes this court's jurisdiction as envisaged in **Article 162(2)(b)** of the **Constitution** and relevant statutes, including the **Environment and Land Court Act ("ELC Act")**. *Refer also* to the recent Court of Appeal decision in **Diasproperty Limited & 5 others v Githae & 10 others [2024] KECA 318 (KLR)**, which addressed the issue of the intersection between the probate court and this court over land matters.

15. Reverting to the substantive issue for determination and as submitted by the plaintiff, the legal foundation concerning adverse possession is statutorily established within our **Limitation of Actions Act**. The pertinent provisions are located in **Sections 7, 13, and 38** thereof, and they provide as follows: -

**Section 7** provides that:-

***"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to***

***him or, if it first accrued to some person through whom he claims, to that person.”***

**Section 13** states that: -

***“(1)A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.***

***(2)Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.***

***(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this***

***Act, the land in reversion is taken to be adverse possession of the land.”***

Lastly, **Section 38 (1)** elucidates that: -

***“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those 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 proprietor of the land.”***

16. The principles of law on adverse possession are settled in Kenya, and the onus is usually on the adverse possessor to strictly prove all the elements of adverse possession to the required standards. It must be emphasised that claims of adverse possession are factual matters observed on the land. The guiding principles were clarified in the decision of **Mwagandi v Lewa [2025] KECA 1036 (KLR)**, which the defendant relied upon, and it stated thus: -

***“As explained by Makhandia JA in Mtana Lewa v Kahindi Ngala Mwagandi [2015] eKLR:***

***“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, 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, which is in these terms:-“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”*

17. Having laid the law and guiding principles, we shall now proceed to test these principles against the facts as presented by the witnesses. On the first test of registration status of the land and considering the relevant law and jurisprudence, specifically **Sections 17** and **37** of the **Limitation of Action Act**, adverse possession is effective against the title; consequently, such claims must be brought against the registered owner or his legal representatives. This criterion

was satisfied, as evidenced by the certificate of an official search, which corroborated this uncontested evidence that the deceased defendant was the registered owner of the suit property.

18. The second test concerns the occupancy and the date of entry into the disputed portion. In this regard, the evidence presented by the plaintiff and his witnesses was consistent, demonstrating that the plaintiff entered the disputed portion at the time of purchase and had been cultivating it. This was corroborated by the agreement, which indicated the date of execution as 05/02/2000. The court finds the plaintiff's evidence and that of his witnesses to be credible, as they remained unshaken. To this extent, the defendant and IPs have submitted that they agree. Accordingly, the court determines that the plaintiff entered the disputed portion on 05/02/2000 and had occupied it for nearly twenty-one years as of the date of filing the lawsuit.
19. The findings related to the second criterion lead us to the third test of permission. Regarding this matter, the plaintiff has argued that although he entered the suit property via an agreement for sale, this agreement was with Benjamin and not the deceased defendant; therefore, the consent of the deceased defendant was never obtained.
20. Conversely, relying on **Cheromei v Muigai [2024] KEELC 5604 (KLR)** and **Gabriel Mbui v Mukindia Maranya [1993]**

**eKLR**, the defendant and IPs have contended that in cases of purchase, the purchaser's possession becomes non-permissive upon the completion of the purchase price or until the purchaser proves that the license which authorised his possession of the property has ceased to exist. They further argue that, based on uncontroverted evidence, the plaintiff made the final payment on 01/04/2010; consequently, under **Section 7** of the **Limitation of Actions Act**, the period of limitation commenced on 01/04/2010, rendering the suit premature.

21. Notwithstanding the concurrence of this court with **Cheromei (Supra)** and **Gabriel Mbui (Supra)**, the defendant's arguments cannot prevail in the present case, where the sale agreement is deemed invalid due to Benjamin's lack of legal capacity to either enter into the contract or grant permission to the plaintiff by virtue of the sale. Furthermore, as established in **In re Estate of Jonathan Ngewa (Supra)**, in which all parties involved in this matter participated, the court determined that the contract of sale was invalid for offending the provisions of **Sections 45** and **82** of the **Law of Succession Act**. In other words, the plaintiff illegally entered the disputed portion, and the element of permission or consent could not suffice.

22. Consequently, based on the findings of the preceding tests, on this fifth test, the court hereby determines that the period for the purposes of adverse possession commenced on

05/02/2000. Accordingly, the plaintiff's claim matured around 05/02/2012, which is twelve years from the date of entry. Accordingly, the court respectfully disagrees with the submissions of the plaintiff asserting that the time began to run in 1991, because time could not accrue in favour of Benjamin due to his status as a close family member of the deceased defendant, as established in the Court of Appeal decision of **Samuel Kihambo v. Mary Mbaisi [2015] KECA 853 (KLR)**, which is a binding precedent upon this court.

23. This court also humbly differs with the submissions of the defendant and IPs that **In re Estate of Jonathan Ngewa (Supra)** halted time from running. This is for the reason that time could only be considered to have ceased to run if the deceased defendant initiated legal proceedings against the plaintiff or made an effective entry into the disputed portion, which was not the case in the present matter. In **In re Estate of Jonathan Ngewa (Supra)**, the cause of action concerned the distribution of the deceased defendant's estate, and the plaintiff was not sued therein for eviction purposes. Furthermore, no evidence was submitted by Fredrick to demonstrate that an effective entry into the disputed portion had been made. **See Mwangi Githu v Livingstone Ndeete [1980] eKLR and Titus Kigoro Munyi v Peter Mburu Kimani [2015] KECA 952 (KLR).**

24. Concerning the other tests, the defendant and IPs did not contest that the plaintiff's occupation of the disputed portion was peaceful, open, continuous, public, and with the knowledge of the deceased defendant. Therefore, based on the aforementioned reasons and findings, this court finds that the plaintiff has satisfied the necessary burden of proof and is entitled to the reliefs sought. It is well established in law that costs follow the outcome of the case, and since the plaintiff was successful in his claim, costs are awarded in his favour. Consequently, the court hereby issues the following final orders: -

***a) A declaration is hereby made that the plaintiff has acquired a portion of land measuring 2 acres within land parcel no. Masii/Kithangaini/353 through adverse possession.***

***b) At the plaintiff's cost, it is hereby ordered that within one hundred and twenty (120) days from the date hereof, a subdivision and transfer shall be conducted by the relevant Land Registrar where Masii/Kithangaini/353 is situated, or such other officer as shall be delegated by the relevant Land Registrar, to survey, ascertain and excise a portion measuring 2 acres within land parcel no. Masii/Kithangaini/353 for purposes of registration in the plaintiff's favour.***

***c) In default of compliance with order (b) above, the deputy registrar or authorised officer shall execute all the necessary documents to confer a portion measuring 2 acres within land parcel no. Masii/Kithangaini/353 to the plaintiff.***

***d) The plaintiff shall have the costs of this suit.***

Judgment accordingly.

**Delivered and Dated at Machakos this 16<sup>th</sup> day of December, 2025.**

**HON. A. Y. KOROSS  
JUDGE  
16.12.2025**

**Judgment delivered virtually through Microsoft Teams  
Video Conferencing Platform**

In the presence of;

Ms Kanja Court Assistant

Miss Kwoma holding brief for Mr. Mulwa for plaintiff.

N/A for the defence.