



REPUBLIC OF KENYA



**KENYA LAW**  
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**Rutto v Ongiro (Environmental and Land Originating Summons  
E009 of 2024) [2025] KEELC 8624 (KLR) (10 December 2025) (Judgment)**

Neutral citation: [2025] KEELC 8624 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E009 OF 2024  
MN MWANYALE, J  
DECEMBER 10, 2025**

**BETWEEN**

**ERICK KIPKIRUI RUTTO ..... APPLICANT**

**AND**

**JAMES SAISI ONGIRO ..... RESPONDENT**

**JUDGMENT**

1. Vide the Originating Summons dated 29<sup>th</sup> Day of August 2024 the Applicant, now Plaintiff, Erick Kipkirui Rutto, sought determination on the following issues;
  - i. This Honourable court be pleased to declare that the Plaintiff and any other persons claiming under them have acquired by way of adverse possession a portion measuring 0.40 hectares of LR Transmara/ Olosakwana “B”/154.
  - ii. This Honourable court be pleased to declare that the Plaintiff is the new owner of the whole portion of LR Transmara/ Olosakwana “B”/154 measuring 0.40 Hectares to the exclusion of the defendant.
  - iii. This Honourable court be pleased to order the transfer of the whole portion measuring 0.40 Hectares of LR Transmara/ Olosakwana “B”/154 to be registered in the Plaintiff’s name.
  - iv. the Defendant be ordered and/or directed to execute and/or sign the necessary transfer instruments /documents and facilitate the transfer and registration of the suit property into the names of the Plaintiff in default of which the Deputy Registrar to execute the same in order to facilitate the transfer.
  - v. the court be pleased to order the defendant to bear the costs of the suit.
2. The said Originating Summons was based on the grounds, *inter alia*,



- a. that the Plaintiff has occupied the suit property for a period of about 16 years a period exceeding 12 years peacefully and openly without interference from the Respondents.
  - b. that the Defendant through procrastination has failed and/or refused to transfer the suit property despite pleas and numerous requests to do so.
  - c. the plaintiff's occupation constitutes an overriding interest under section 28B of the [Land Registration Act](#).
  - d. the defendant has failed and/or neglected to take any steps and/or commenced any legal steps to defeat and/or interrupt the Plaintiff's occupation which occupation has been continuous uninterrupted open for more than 12 years.
3. The Application was supported by the affidavit of the Applicant who reiterated the grounds of the application in his depositions and annexed a copy of the certificate of official search, photographs showing houses and well as a farm vegetation.
  4. The Defendant did not enter appearance and filed defence, the court directed service of the summons through the Area chief of Emurua Dikkir Location with the assistance of a court process server and once an affidavit of service was filed the court directed the plaintiff to follow up on the requisite motions of seeking an interlocutory judgment against the defendant so as to enable the matter proceed as undefended. The court further directed the Land surveyor to file a ground / site visit report on occupation by the Plaintiff.
  5. On 4.4.2025 the Honourable Deputy Registrar entered Interlocutory Judgment against the Defendant paving way for the matter to proceed as undefended. The survey report was equally filed as directed.
  6. Directions in respect of the O.S were not issued but the Plaintiff having elected to give viva voce evidence and call his witnesses the Originating summons was deemed to have been converted to a Plaint under the holding in the decision of Shadrack Bungei v. Selina Jerotich Civil Appeal No. 4 of 2018 Eldoret

#### **Plaintiff's Case .**

7. The Plaintiff testified and called 2 witnesses. It was his testimony while adopting is witness statement that he was in occupation off the suit property, he had not seen the defendant neither did he know the defendant, the defendant had equally not visited the suit property. He asked the court to allow the O.S and that he be registered as the owner.
8. PW2 the plaintiff's neighbor Mr. Chelule Kipchirchir testified that he knew the plaintiff who was his neighbor and lived in property number 154 since 2009 but had not seen the defendant neither did he know the defendant. he did not know whether the defendant was alive or dead and whether mr. Rutto the Plaintiff was in occupation with permission or not.
9. PW3 The Area Chief of Emurua Dikkir testified that the Plaintiff lived in his area and that he occupied parcels number 154 and 155. he had lived there for about 16 years. the witness stated that he did not know the defendant who had not visited the suit property at all. He was not aware whether the defendant was alive or not.
10. With the testimony of the 3 witnesses the Plaintiff closed his case. Since the defendant entered no appearance and he filed no defence his case was equally deemed closed. The plaintiff filed written submissions.



11. The matter having proceeded undefended against the defendant the defence case was closed without any testimony.

**Plaintiffs Submissions: -**

12. In the written submissions before Court the Plaintiff who was acting in person urged the Court to consider the Originating Summons, supporting affidavit and the testimony of the witnesses and be guided by article 40 of the *Constitution*, Sections 7 and 38 of the *Limitation of Actions Act* as well as the Order 37 Rules 7 and note that he had been in occupation for more than 12 years, in open and notorious and continuous. He placed reliance on the decision in the cases of *Mtana Lewa v Kabindi Ngala Mwagandi* as well as *Kweyu v Oruto*.
13. On the strength of the evidence and submissions the Plaintiff urged the court to allow the payers sought in the Originating summons as it was undefended.
14. As observed earlier in this judgment, the matter is undefended but as was observed by the Court of Appeal in the decision in the case of *Karugi and others v Kabiya & 3 others* 1983 (eKLR) where the Court held

“the burden on a Plaintiff to prove his case remains the same throughout the case even though the burden may become easier to discharge where the matter is not validly defended, the burden of proof is not way lessened because this is heard by way of formal proof.”

15. The Court shall now examine the matter in light of the above holding of the Court of Appeal with regard to an undefended suit.

**Issues for Determination: -**

16. Having analyzed the Plaintiff's case, the evidence on record and considered the law, the court frames the following as issues for determination
  - i) whether or not the Plaintiff has tendered evidence to support the Originating Summons?
  - ii) whether or not the Plaintiff has proven his case and
  - iii) what reliefs ought to issue?

**Analysis and Determination: -**

17. In ground c of his Originating Summons being the pleadings in the matter, the Plaintiff pleaded that the defendant was procrastinating in transferring the suit property to him despite repeated pleas and requests to do so. In their testimony the plaintiff as well as the P w2 and P w3 stated that he had never met the defendant who had not visited the suit property, nor was he aware that the defendant was alive or dead.
18. In this regard the plaintiff's evidence and his pleadings were at variance. It is trite law that parties are bound by their pleadings. The Court of Appeal in its decision in the case of *IEBC and another v Stephen Mutinda Mule and 3 others* Civil Appeal No. 219 of 2013 (2014 eKLR) reaffirmed this position and quoted the decision of the Nigerian Supreme Court in *Adetoun Oladeji (NIG) ltd v Nigeria Breweries*

“it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or



put in other way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

19. Having found that the testimony by the witnesses is inconsistent and at variance with the pleadings especially the ground that, despite repeated requests and pleas to transfer the defendant had procrastinated to sign the transfer, the court wonders how such pleas and requests were made in the first place since the plaintiff has never the defendant and they are not known to each other with the defendant and where there was no sale involved pleaded in the first place and noting the principles laid down in the above cited decision, and noting further that the plaintiff did not produce the documents that he had annexed to his supporting affidavit having elected to proceed with viva voce evidence as opposed to affidavit evidence the photographs, the official search and the ground report ought to have been produced formally in court as evidence. The above finding reflects the legal position as espoused in the decision in the case of *Kenneth Nyaga Mwige v Austin Kiguta & 2 others* Where the court of Appeal observed as follows:

“20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.”

20. The failure to do so coupled with the testimony and the pleadings been at variance the court reaches the conclusion that the plaintiff did not tender evidence in support of the originating summons thus in answer to issue number 1 the Court finds that the Plaintiff has not tendered evidence to support the Originating Summons.

21. On the second issue as to whether the Plaintiff has proven the ingredients of adverse possession. The ingredients were stated in the case of *Daniel Kimani Rucine v Swift Tutherfood Company Ltd. & Another* (1977) eKLR where the Court stated

“the Plaintiffs have to prove that they have used this land which they clam as of right; nec vo, nec clam nec plecario (no force, no secrecy, no ecaion). So, the Plaintiffs must show that the Defendant had knowledge (or the means of knowing, actual or constructive) of the possession of occupation. The possession must be continuous. I t must not be broken for any temporary purposes of by any evidence to interrupt it or by any recurrent consideration.”

22. From the said decision and applying the principles thereto to the current case, the Plaintiff has established, occupation for a period of more than 12 years, and the occupation is open and notorious. The Plaintiff is further required to show knowledge of his occupation by the Defendant. The Court of Appeal in the decision in the case of *Francis Gicharu Kariri v Peter Njoroge Mairu* Civil Appeal No. 293 of 2002, as well as the decision in the case of *Titus Kigoro Munyi v Peter Mburu Kimani* Civil Appeal No. 28/2014 confirmed that knowledge by the Defendant of the occupation is an ingredient of adverse possession. In *Francis Gicharu Kariri v Peter Njoroge Mairu* Civil Appeal No. 293/2002 the Court approved the decision of the High Court in *Kimani Ruchire v Swift Rutherfoods & Company Ltd.*



23. Similarly, in *Titus Kigoro Munyi v Peter Mburu Kimani* Civil Appeal No. 28/2014 the Court held as follows

“Guided by the dicta as stated by Kneller J, herein above and as adopted by this Court in *Francis Gicharu Kariri v Peter Njoroge Mairu* we are of the considered view that a claim for adverse possession actual or constructive knowledge of adverse possession by a third party on the part of the registered owner must be proved.”

24. It follows from the above decisions that Plaintiff ought to prove knowledge of his occupation of the suit property by the Defendant as an ingredient of adverse possession.

25. Has the Plaintiff proved this? In his testimony as well as the testimony of his witnesses they categorically stated that they had never met the defendant, who had not claimed the suit property and they were not aware whether he was alive or dead confirms that the plaintiff stay on the suit property is not with the knowledge of the defendant. In the Supporting Affidavit to the Originating Summons as well as in his witness statement, the Plaintiff narrated of taking possession and having conducted an investigation on the owner he found that the property to belong the Defendant.

26. In answer to issue number 2, the Court finds that the Plaintiff did not prove all the ingredient of adverse possession. Particularly did not prove knowledge by the registered owner of his occupation on the suit property

27. On issue number 3, having found the evidence and pleadings to be at variance, and further that documentary evidence in support of occupation like the photographs and the ground report were not produced in and having found that the element of knowledge of occupation as an ingredient was not proven, it follows that the Plaintiff has not discharge his burden of proof as required under section 107 to 109 of the *Evidence Act* and consequently did not proven his case.

28. The inevitable conclusion is that the Plaintiffs suit though undefended has not proven and the same is hereby dismissed. The prose litigants like the plaintiff herein will greatly benefit from the recently validated manual for the Pro Se litigants in ELC Matter recently validated having been developed by the ELC and some Development partners to empower the prose litigants.

29. There shall be no orders as to costs.

**JUDGMENT, DATED AND DELIVERED AT KILIGORIS THIS 10<sup>TH</sup> DAY OF DECEMBER, 2025.**

**HON. M. N. MWANYALE,**

**JUDGE**

In the presence of;

CA Emmanuel/Sylvia/Sandra

Mr. Rutto plaintiff acting in person

N/a for the Defendants

