

**REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI
ELCL NO. E017 OF 2025 (OS)**

KIGO STEPHEN - **PLAINTIFF**

VS

ROSEMARY ANN CALDER - **DEFENDANT**

JUDGMENT

The pleadings

1. In the originating summons dated 5/3/2025, the Plaintiff seeks the following orders against the Defendant; -

- a. That a declaration be and is hereby made that the Plaintiff is absolutely entitled by way of adverse possession to all that property known as Land Reference Number 7336/11 within Nairobi County.
- b. That a declaration be and is hereby made that the Defendant's rights to title in the leasehold property known as Land Reference Number 7336/11 has extinguished in favour of the Plaintiff under Section 37 & 38 of the Limitation of Actions Act.
- c. That an order be and is hereby made directing the Deputy Registrar of this Court to sign all such transfer forms and such necessary documents on behalf of the Defendant in order to cause the Plaintiff to be registered as the sole owner of the suit property known as Land Reference Number 7336/11.
- d. That an order be and is hereby made directing the Chief Lands Registrar to cancel the Defendant's proprietorship of the suit property known as Land Reference Number 7336/11 and issue the Plaintiff with a Certificate of Title in respect of the same.
- e. That there be no orders as to costs.

The Plaintiff's case

2. The Plaintiff's case as stated in the grounds in support of the summons and his Supporting Affidavit of even date is as follows; that the suit land is registered in the name of the Defendant and he wishes to be registered

as the absolute owner of the residual period in the leasehold title for the suit property. He avers that he has lived on the suit property with his family for over thirty-five (35) years having been there since the 1990 to date.

3. The Plaintiff contends that he is entitled to be registered as a proprietor of the suit property having been in open and peaceful occupation for over 12 years and made physical use of it without the consent of the Defendant. That he has been cultivating crops and constructed both permanent and semi-permanent structures including houses without interruption from the Defendant. He asserts that he took possession of the suit property without force, fraud or collusion from the registered owner who has all along been aware of his activities on the suit property. That he was not granted permission to take control of the suit property.
4. He deposes that he has acquired prescriptive rights over the suit property having entered and remained in open possession and occupation of the suit property for thirty-five (35) years. He argues that he is an adverse possessor as no one has demanded him to vacate. That his occupation has not been interrupted for all that time that he has been in occupation thereon. He urges the court to remove the Defendant's name from the register and replace it his as the Defendant's title to the property was extinguished by operation of law.
5. In support of his case, the Plaintiff attached the following documents to the Supporting Affidavit;
 - a. Copy of his National Identity Card
 - b. Copy of KRA PIN Certificate
 - c. Certificate of title in the name of the Defendant certified by the Registrar of Titles on 3/3/2025.
6. The Defendant was served with the Originating Summons by way of substituted service on 21/3/2025 through advertisement in the Standard Newspaper as per the Newspaper extract attached to the Affidavit of Service of Abigael Musebe Ngalu sworn on 5/4/2025. However, the

Defendant did not file any response to the summons. The suit therefore proceeded as undefended.

The evidence adduced

7. The matter proceeded to formal proof hearing on 7/10/2025 with the Plaintiff testifying as the only witness in support of his case. He relied on his Supporting Affidavit as his evidence in chief. He stated that he has lived on the land for 35 years having entered thereon in 1990 as it was vacant. That he entered the land without the Defendant's permission nor knowledge.
8. He testified that he has been in continuous occupation of the land and the defendant has not evicted him. That he has built a home on the suit property where he lives with his family and that the neighbours know him. He averred that he has built a mabati house thereon. That Julian Bauer (the holder of a Lease for a term of 2 years from 1/7/1999 as per the Certificate of Title) was not on the land either. It was his evidence that the Defendant does not know that he is in occupation of the land. With that he closed his case.

The written submissions

9. Upon the close of the hearing, Counsel for the Plaintiff sought time to file written submissions. To this end, the court proceeded to and prescribed the timelines for the filing of written submissions. Counsel for the Plaintiff complied and filed submissions dated 21/10/2025. The written submissions are on record and have been taken into account by the court.

Analysis and Determination

10. Having reviewed the originating summons; the supporting affidavit thereto; the evidence tendered [both oral and documentary] and upon consideration of the written submissions filed on behalf of the Plaintiff, the only issue for determination in the instant is; Whether the Plaintiff has established and proved his claim to the requisite standard or otherwise;
11. Claims under adverse possession are governed by the provisions of the law in the Limitation of Actions Act. Under Section 7 of the Limitation

of Actions Act the law places a time bar on an action to recover land of 12 years from the date the right accrued. For purposes of emphasis the Court will highlight some of the key provisions in the said Act as follows:

Section 7 provides:-

“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:-

“(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 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), the land in reversion is taken to be adverse possession of the land.”

Section 38 states:

“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.”

12. The concept of adverse possession is one of the methods of acquiring land in Kenya. The Land Act Section 7 provides that title to land may be acquired through:-

- (a) allocation;
- (b) land adjudication process;
- (c) compulsory acquisition;
- (d) prescription;
- (e) settlement programs;
- (f) transmissions;
- (g) transfers;
- (h) long term leases exceeding twenty-one years created out of private land; or
- (i) any other manner prescribed in an Act of Parliament.

13. Acquisition of land by adverse possession or prescription is one of the oldest methods of land acquisition that was applicable in England even in the medieval ages. In the case of Little Dale versus Liver Pool College (1900) 1 Ch 19, 21 the Court stated as follows: -

“In order to acquire by the statute of limitations a Title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it...Two things appear to be contemplated by that enactment; disposition and discontinuance of possession...if this is the correct way to approach the problem, the question becomes, has the claimant proved that the Title holder has been dispossessed or has discontinued his possession of the land in question for the statutory period" Rather than has the claimant proved that he (through himself or others on whose possession he can rely) been in possession for the requisite number of years"

The next question therefore is what constituted dispossession of the proprietor. It simply means that in order to defeat a title by dispossession the former owner there must be demonstration of existence of acts done which are in consistent with his enjoyment of the soil for the purpose for which he intended to use it.”

14. Courts in this country have distilled relevant principles that guide the Court in determining claims of adverse possession for example in the case of *Githu Vs. Ndeete* (1984)KLR 776 where the Court of Appeal held interalia as follows:-

“(1) The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such persons adverse possession.

(2) Where the person in possession has already began and is in the course of acquiring rights under section 7 of the limitation of Actions Act (cap 22) and by virtue of section 30(f) of the Registered land Act (cap 300) those rights are overriding interests to which the new registered purchasers’ title will be subject.

(3) Time ceases to run under the limitation of Actions Act either when the owner takes or asserts his rights or when his right is admitted by adverse possession assertion occurs when the owner takes legal proceedings or makes an effective entry into the land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the limitations of Action Act.

(4) A Title by adverse possession can be acquired under the limitation of Actions Act to a portion of the piece of land which the owner holds”

15. Further in the case of ***Wambugu Vs. Njuguna*** (1983)KLR 172 additional guiding principles were stated as follows:-

“(1) The general principle is that until the contrary is proved possession in law follows the right to possess.

(2) In order to acquire by the statute of limitation title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it...

(3) The limitation of Actions Act, in adverse possession contemplates two concepts, disposition and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.

(4) Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale or agreement, the possession becomes adverse and time begin to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse but with permission. The occupation can only be either with permission or adverse; the two concepts cannot co-exist...

(5) The rule on permissive possession is that possession does not become adverse before the end of the period during which the possessor is permitted to occupy the land...

(6) Adverse possession means that a person is in possession in whose favour time can run...

(7) Where the claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to run in favour of the purchaser pending completion when it is clear that he was only

allowed to continue to stay because of the pending purchase because had it not been for the pending purchase the vendors would have evicted him. The possession can only become adverse once the contract is repudiated...

(8) Where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is the claimant's possession as deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation of at least 12 years after such payment."

See also the recent Court of Appeal decision in **Njuguna v Kamau (Civil Appeal 53 of 2019) [2025] KECA 368 (KLR)**

16. In this case, for the Court to decide on the issue in controversy, it will examine how and when the Plaintiff entered the suit land, whether there was consent from the Defendant, whether possession was adverse to the Defendant, and whether, overall, the Plaintiff has proven title through adverse possession.
17. Beginning with the Plaintiff's entry into the suit premises, the Plaintiff has presented conflicting evidence regarding the exact time he entered and took possession of the suit property. It is unclear whether he entered in 1986 or 1990. This creates uncertainty about when the period for possession or claim began.
18. Furthermore, the Plaintiff presented evidence and stated that the registered owner was unaware that he was using the suit land. One of the key criteria to prove adverse possession is the open and notorious occupation of the land. It should not be kept secret. If the owner was unaware that he was occupying the land, then a claim of adverse possession cannot be upheld.

19. In the case of **Kimani Ruchire v. Swift Rutherford & Co. Ltd. [1980] KLR. 10** at page 16 Letter B, Kneller J (as he then was) said: -

“The plaintiffs have to prove that they have used this land which they claim as of right. Nec vi, nec clam, nec precario (No force, no secrecy, no permission). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it or by way of recurrent consideration.”

20. Similarly, in the case of **Benson Mukuna Wachira v Assumption Sisters of Nairobi Registered Trustees [2016] eKLR**, this Court held that:

“A claim for adverse possession arises where land owned by a person is claimed by a trespasser on the basis that the trespasser, with the knowledge of the owner, has occupied it adversely to the title of the owner continuously for an uninterrupted period of not less than 12 years.

21. In the case of **Gabriel Mbui-Vs- Mukindia Maranya [1993] EKLR** (supra) held that ;

“..it has always been the holding of Courts in the common law world, that acts of user are not enough to take the title out of the true owner unless they are inconsistent with the enjoyment of the soil for the purpose for which he intended to use it; and that acts of user committed upon land which do not interfere and are consistent with the purpose to which the owner intends to devote it, do not amount to adverse possession, and are not evidence of dispossession or discontinuance of possession. Accordingly, when the true owner of land intends to use it for a particular purpose in the future, but meanwhile has no immediate use for

it, and so leaves it unoccupied, he does not lose his title to it simply because some other person enters on it and uses it for some purpose; not even if this purpose continues year after year for twelve years or more (see Leigh v Jack [1879] 5 Ex D 264; Williams Brothers Direct Supply Stores Ltd -Vs- Raftery [1957] 3 All E R 593; Hayward and another -VS- Chaloner [1967] 3 WLR 10 68). The reason is not because the user does not amount to actual possession; it may. The line between acts of user and acts of possession is too fine for words.”

22. Furthermore, the Plaintiff provided a title deed as proof of the Defendant’s ownership. A review of the title shows that a short-term lease was registered on 1/7/1999 for a period of two years. The lease expired on 1/7/2001. Although the Plaintiff claims that the registered owner is unavailable, documentary evidence suggests otherwise. The issuance of the lease to Julian Bauer proves that the Defendant was present and managing her land in 2001. It has not been stated whether the leaseholder, Julian Bauer, took possession of the land during the lease period or if she is still in possession of the land in question. If yes, where does this leave the Plaintiff?
23. The Plaintiff also failed to demonstrate that he used the land in a manner inconsistent with that of the title holder. He failed to prove occupation, and if any such occupation existed, there was no evidence that it was adverse to the title holder. Although he claims to have built some permanent structures on the property, no evidence was presented to substantiate this assertion. The Plaintiff did not submit any approved building plans or photographic evidence to support his claim. Furthermore, despite alleging that the neighbours are known to him, the Plaintiff did not call any of the alleged neighbours to corroborate his evidence.

24. Although the claim was undefended, the Plaintiff bears the burden or obligation of presenting plausible, cogent, and credible evidence to establish his claim to the suit property.

25. The law as it pertains to the burden of proof and on whom same lies has crystallized over time. In the case of **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR** the Court of Appeal stated thus;

“It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.”

26. As stated in the case of **Little Dale versus Liverpool College (1900) Ich19, 21 [supra]**, the Plaintiff failed to introduce evidence that the paper title owner relinquished possession of her suit land or that she was dispossessed by the Plaintiff in a manner that would establish adversity. In any event, the title owner has no knowledge that the Plaintiff is in possession. Possession and dispossession connote a scenario where the owner of the land neglects to remove a trespasser and elects to leave him for a period of 12 years.

27. Final orders for disposal

- a. Based on the above analysis, I find that the Plaintiff has not met the required standard to prove his claim.
- b. To this end, I have concluded that the Plaintiff's case is devoid of merit.
- c. It is hereby dismissed with no orders as to costs.

28. It is so ordered

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 11TH DAY OF
DECEMBER 2025 VIA MICROSOFT TEAMS.**

**J. G. KEMEI
JUDGE**

Delivered online in the presence of;

1. Mr Lubullelah for the Plaintiff
2. N/A for the Defendant
3. C/A - Ms Yvette Njoroge