

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MALINDI
ELCOS NO E001 OF 2024

ALIA KHALIFA HIRBAYE
PLAINTIFF

SAID HASSAN SALILU
DEFENDANT

JUDGMENT

1. The Originating Summons dated 24th December 2024 is seeking orders:
 - a. **Of declaration, declaring that the title of Said Hassan Salilu in respect of land title number Lamu/Witu/365 occupied by the applicant has been extinguished by virtue of adverse possession;**
 - b. **Of declaration, declaring that the applicant has acquired title by way of adverse possession of the suit land and the said land as occupied and used by the applicant has vested in the applicant;**
 - c. **That the applicant be registered in place of Hassan Said Salilu as the absolute proprietor of the suit land;**
 - d. **That the suit land as occupied and possessed by the applicant be vested and or transferred to the applicant.**

2. The Originating Summons is supported by the annexed affidavits of the applicant, the affidavit of **Jabir Khalifa Bodole** and the affidavit of **Suleiman Dabaso**.

3. The grounds upon which the originating summons has been taken out are that the applicant has been in open exclusive and uninterrupted occupation of the suit land for a period in excess of **12** years and the respondent's title has thus been extinguished; that the said title has vested in the applicant. The applicant claims to have occupied the suit land since 2007 alongside her husband and children. They still reside on the suit land to date, and the respondent has never attempted to dispossess them of the land. They have erected semi-permanent structures on the suit property.

4. In his affidavit Jabir states that he has known the applicant since the year **2008** when he moved to reside on a farm located adjacent to the suit land; that he has observed the applicant being in uninterrupted and open possession and use of the suit land since **2008** for a homestead, farming, grazing, and other domestic purposes peacefully and without any interference from anyone. He has always regarded the applicant as the lawful owner of the suit land; he has never heard any disputes between him anyone over the suit property. The affidavit of Suleiman Dabaso contains material similar to that of the affidavit of Jabir.
5. There is an affidavit of service sworn by **Mary Njeri Mungai**, dated 5/4/2025, in which she stated that she served the Originating Summons on the respondent at his premises in Witu town on 4th April 2025. That notwithstanding, the respondent never filed any response to the suit.
6. The Originating Summons proceeded to hearing by way of *viva voce* evidence and the applicant, Suleiman and Jabir all testified on 14/10/2025 and adopted the contents of their affidavits analyzed herein above.

ANALYSIS AND DETERMINATION.

7. The issue that arises is whether the respondent's title to the suit land has been extinguished and whether the applicant has become entitled to be registered as the proprietor of the suit land by virtue of the doctrine of adverse possession.
8. The constitutionality of the doctrine of adverse possession as enshrined in the Limitation of Actions Act was unsuccessfully impugned in **Malindi Civil Appeal No. 56 Of 2014 Mtana Lewa v Kahindi Ngala Mwangandi**. The doctrine thus still operates in Kenya, being 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.”

9. **Section 13** of the Limitation of Actions Act provides as follows:

“(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 afresh 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.”

Sections 37 and 38 of the Limitation of Actions Act stipulate that if the land is registered under one of the registration acts then the title is not extinguished, but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him.”

10. Under **Section 38**, a person who claims to have become entitled by adverse possession to land registered under any of the Acts cited in **Section 37** of the Act, or land comprised in a lease registered under any of those Acts may apply to this 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.

11. In law the recognized ingredients for adverse possession to crystallize are that the possession of the land must be *nec per vi, nec*

clam, nec precario, meaning the possession must be without force, open or without secrecy, and exclusive or hostile to the rights of the proprietor of the land. In **Mtana Lewa** (supra) this principle was aptly expressed as follows:

“The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

12. The court in citing a court of appeal case stated as follows:

“33. Section 17 of the said Act stipulates that upon the expiry of the period (12 years) prescribed by the Act for a person to bring an action to recover land, the title of that person to the land stands extinguished.

34. The Court of Appeal in the case of Benjamin Kamau Murma & Others vs Gladys Njeri, C A No. 213 of 1996 held as follows:

“The combined effect of the relevant provisions of sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.”

35. The onus is on the person or persons claiming adverse possession:

“.. 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 evasion). 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 purpose or by any endeavors to interrupt it or by any recurrent consideration”

13. The question that arises is whether the plaintiff has established the above ingredients of adverse possession. In this court’s view, the evidence of the plaintiff and his witnesses is corroborative. It has been established that the plaintiff has been in uninterrupted occupation of

the suit land without the registered owner's consent since **2008**. The present suit was filed in **2025** which is more than the requisite **12** years prescribed for adverse possession under the Limitation of Actions Act. There is evidence, including photographic evidence, that the plaintiff and his family have been utilizing the land as though it were their own and in a manner hostile to the interests of the registered proprietor by farming, grazing livestock and establishing a homestead thereon. There is also evidence that during the lengthy period of occupation the defendant has never attempted to evict the plaintiff from the suit land or commenced any action for the purpose of securing eviction orders, which is indicative of peaceful possession all throughout that period.

14. The defendant was served and offered an opportunity to defend the suit but he failed to appear or present evidence to counter that of the plaintiff. In this court's view the plaintiff has established his claim to the suit land by virtue of the doctrine of adverse possession and I allow the originating summons dated 24/12/2024 and I issue the following final orders:

- a. **A declaration is hereby issued, declaring that the title of SAID HASSAN SALILU in respect of land title number Lamu/Witu/365 occupied by ALIA KHALIFA HIRBAYE, the applicant herein, has been extinguished by virtue of the applicant's adverse possession thereof;**
- b. **A declaration is hereby issued, declaring that ALIA KHALIFA HIRBAYE, the applicant, has acquired title to land title number Lamu/Witu/365 by way of adverse possession of the suit land and the suit land has vested in her;**
- c. **That ALIA KHALIFA HIRBAYE shall be registered in place of HASSAN SAID SALILU as the absolute proprietor of the suit land;**
- d. **Each party shall bear their own costs of the suit.**

Dated, signed and delivered at Malindi on this 16th day of December 2025.



**MWANGI NJOROGE
JUDGE, ELC, MALINDI**