

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ELCEPCC NO. E004 OF 2025

YAKUB F. SEBIT
APPLICANT
DUDU KHAMIS JABER
.....APPLICANT

VERSUS

JOED NGARUIYA & ANOTHER
RESPONDENT
LILIANA WAIRIMU NGARUIYA
RESPONDENT

JUDGMENT

1. The originating summons dated 26th February 2025 seeks the determination of whether the title by the 1st and 2nd respondents has been extinguished by way of effluxion of time and whether the applicants have acquired title to the parcel of land known as LR No (hereinafter also referred to as" the *suit land*") by way of adverse possession.
2. The originating summons is supported by the affidavit of the second applicant. In that affidavit the deponent states that the 1st applicant is her husband; that they entered into a contractual agreement with the 1st and 2nd respondents whereby the respondents willingly sold the suit property to them on 13th July 2004 vide a written agreement. She exhibited a copy of the said sale agreement. The respondents handed over the original title deed as well as the deed plan to the property which are still held by the applicants to date. Copies of these documents were exhibited in the

affidavit also. Subsequent to the execution of the sale agreement the applicants made numerous requests to the respondents to effect the formal transfer of the suit property into their names in vain. A copy of a letter dated exhorting the respondents to effect the transfer is attached to the affidavit as evidence of that effort on the part of the applicants; that after year 2004 the applicants have been in continuous and interrupted and exclusive occupation and possession of the suit property for a period exceeding 20 years and during that period they undertook substantial developments on the property, there by demonstrating their unequivocal intention to possess the land as owners. The deponent attached what she states is a copy of an approved plan for the structures erected on the suit land. she stated that their continuous possession for a period of more than 20 years has resulted in the extinguishment of the respondents' rights over the suit land by virtue of the doctrine of adverse possession. That their possession of the suit property has been open notorious continuous and peaceful and at no time during the possession have the respondents exercised any form of control or possession over the suit property, thereby reinforcing their claim of exclusive possession. The deponent attached photographs of the suit property as at the date of filing of these proceedings as evidence in this case. She stated that possession of the suit property has been without the permission or consent of the respondents in that they have not been tenants or licensees of the respondents on the suit property. Their actions on the suit

property have been consistent with the typical use and development of land within the locality. That they have dealt with third parties regarding the suit property as though they were the owners thereof. They maintain that the respondents title to the suit property has been extinguished by operation of law through the applicant's adverse possession thereof.

3. The originating summons was served by way of substituted service by way of a newspaper advertisement in the Daily Nation of Thursday, August 7th 2025, giving the respondents notice to respond to the suit within **21** days as ordered by the court. No response was filed by the respondent within the time provided and the originating summons was thus consequently heard *ex parte* by way of written submissions filed only by the applicants on 10th November 2025.
4. In her submissions counsel for the applicants reiterated the matters contained in the originating summons and supporting affidavit as herein above described. She relied on **Sections 7,13, 17 and 38** of the Limitations of Actions Act Cap 22 and the cases of **Mtana lewa versus kahindi Ngala mwagandi 2015 eklr, castleman versus mwani investment limited and four others 2004 eklr, wamboo versus juguna 1983 klr 173, Chevron k limited versus Harrison charow washotu 2016 eklr ca, where you versus omuto 1990 klr 709, and finally Samuel Mickey waweru versus genie Jerry richo 2007 eklr.** She stressed that the cases above emphasize that possession that begins under a sale agreement becomes adverse once the completion period

lapses and the vendor fails to transfer title. In this case, such adverse possession would have commenced around October 2004; that by the time of filing the originating summons on 26th February 2025, over 20 years and 4 months had elapsed from the date the agreement was made. She asserted that there has been open and notorious possession, exclusive and adverse possession, and proper identification of the property affected. She maintained that the applicants are entitled to the declaratory orders sought under **Sections 7 and 17** of the Act. citing **Public Trustee Versus Wanduru 1984 KLR 314** she stated that the respondents should be restrained from interfering with a suit land.

ANALYSIS AND DETERMINATION

5. The present originating summons is unopposed. The applicants' possession of the suit property commenced by way of a sale agreement dated 13th July 2004. This court has examined that agreement. It is in respect of land known as plot number **LR 2217 Malindi** together with all the improvements they are on. Identity card numbers of the sellers are given on their agreement which is also attested to by an advocate.
6. The agreement shows that the respondents herein agreed to sell to the applicants the suit land for the sum of **Kenya Shillings 380,000/-**. The vendors agreed to transfer to the purchasers the suit land upon the balance being received subject to the Law Society's Conditions of Sale in so far as they are inconsistent with the conditions contained in the

agreement. The applicants appear to have met and discussed and agreed on a sale of the suit land with the registered owners culminating in an agreement that was not completed.

7. The contents of **Condition Number 8.1.1** of the Law Society's Conditions of Sale are that "*completion date*" is defined as the date specified in the agreement failing which the 90th day after the date of their agreement. The argument being one that lacks in a specific date of completion property defined was executed on 13th July 2004.
8. In the case of **Samuel Miki Waweru V Jane Njeri Richu [2007] KECA 465 (KLR)** the respondent had entered into a formal agreement with the owner of the land by which she paid the consideration and the purchased land was demarcated for her. At the time of the purchase the owner did not have title deed to the land therefore the transfer could not be effected immediately, but the respondent settled on the land and built the same into a permanent house and granary and continued cultivating the land up to the date of the lodging of suit for adverse possession. The trial judge had found that the sale agreement and the alleged lease agreement became null and void after the expiry of the respective 6 months for lack of consent of the Land Control Board under the Land Control Act and proceeded to determine the disputes already on the basis of the claim of adverse possession, and he was satisfied that the respondent had established a claim to the land by way of adverse possession. The trial judge stated as follows

“The applicant lived on the suit land from 1970 after the expiry of the 6 months period within which Land Board Consent could have been obtained until 1997 when the deceased died. That is a period of 27 years. Thus occupation or possession was with full knowledge of the deceased, open, notorious and uninterrupted.

If the cultivation was on and off basis or for short seasons, the position would have been different. But the continuous cultivation which involved planting of long lasting crops like coffee and erecting thereon a residential house went beyond a mere licence and gave the applicant the position of an adverse possessor”.

9. On appeal, the Court of Appeal stated as follows:

“It is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise. Further as the High Court correctly held in Jandu vs. Kilpal [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been given. The principle to be extracted from the case of Sisto Wambugu vs. Kamau Njuguna (1982 - 88) 1 KAR 217 relied on by Mr. Gitonga, learned counsel for the appellant, seems to be that a purchaser of land under a contract of sale who is in possession of the land with the permission of the vendor pending completion cannot lay a claim of adverse possession of such land at any time during the period of validity of the contract unless and until the contract of sale has first been repudiated or rescinded by parties in which case adverse possession starts from date of the termination of the contract.”

10. The Court of Appeal further stated as follows in that case:

“Thus, the agreement of sale in this case was terminated for all purposes by the operation of law and the continuation of possession by the respondent thereafter could not be referable to the agreement of sale or the permission of the original owner. It was an independent possession adverse to the title of the original owner.”

11. It is therefore correct that under the Law Society’s Conditions of Sale, the date of completion of the agreement between the present parties was

12th October 2004. From that presumed date of completion, if they did not perform their part of the contract, the applicants were in the opinion of this court on the suit land without the consent of the registered owners, the respondents. They became trespassers thereon and time began to run in their favour in respect of the cause of action of adverse possession.

12. **Annexure DJK6** is a copy of development plans which appear to have a local authority stamp of approval on apparently signed by the Town Clerk. Exhibit **DKJ7** comprises of several photographs showing the development on the suit land which is a stone built structure comprising of the ground floor and **2** stories above it, apparently with a penthouse with water tanks on top. There is also a perimeter wall and a gate. In this court's view these are considerable developments which the applicants must have erected in the confidence that save for the absence of the formal transfer of the suit land to them, they owned the suit land. These developments have an air of permanence about them. This court is of the view that the agreement exhibited by the applicants is genuine and that the respondent must have sold the land to the applicants. I am persuaded that the applicants have extensively developed the land by building a three-story house there on. there is therefore evidence of an intention to use the land in a manner that is adverse to the title of the registered holders; that in other words, *animus possidendi* on the part of the applicants has been proved.

13. In **Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] KECA 248**

(KLR) the Court of Appeal held as follows:

“We are equally satisfied from the evidence that, by building structures on the suit premises without obtaining permission from the appellant, as described earlier in this judgment, the respondent manifested *animus possidendi*, a clear mind and intention of dealing with the suit premises as if it was exclusively his and in a manner that was in clear conflict with the appellant's rights. The appellant was, as such dispossessed of the suit premises by those acts. The respondent's acts were *nec vi, nec clam, nec precario* (that is, neither by force, nor secretly and without permission).”

14. The agreement is short of detailed timelines but in one of the clauses the sale was made subject to the Law Society's Conditions of Sale. That was therefore the completion date. According to the applicants their Agreement was not completed because the respondents failed respond requests by the applicants for a transfer of the suit to them.


15. This court is satisfied that possession of the suit property was not obtained by force or by secrecy, but by way of an agreement for sale between the parties in this case which was not completed.

16. In this court view the computation of time with effect from 12th October 2004 result in occupation for the land for a period of more than 12 years required in Section 7 of the Limitation of Actions Act. This court is thus satisfied that the applicants have been in peaceful and continuous possession of the suit land over a period in excess of the 12 years provided for in Section 7 of the Limitation of Actions Act Cap 22. The title of the respondents to the suit land has therefore been extinguished.

17. The upshot of the foregoing is that the applicants have proved their claim on a balance of probabilities and I hereby allow the originating summons dated 26/2/2025 and I grant the following final orders:

- a. The respondents' title to portion no 2217-malindi has been extinguished under the provisions of Section 7 of the Limitation of Actions Act;**
- b. The applicants herein have become and are hereby declared the owners of the suit land by virtue of the doctrine of adverse possession and shall be registered as such by the registrar of titles Mombasa;**
- c. A permanent injunction is hereby issued restraining the respondents from in any manner whatsoever interfering with the applicants' title or use and occupation 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.

A rectangular box containing a handwritten signature in blue ink, which appears to read 'Mwangi Njoroge'.

**MWANGI NJOROGE
JUDGE, ELC, MALINDI**