

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ELCL(OS) NO. E002 OF 2025.

IN THE MATTER OF PARCEL NO. KAKAMEGA/BUGONDA/1744

AND

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS
ACT, CAP 22 LAWS OF KENYA

BETWEEN

PHEMINES MAKUNGU BOND APPLICANT

AND

FRANCIS MUDANGAYA NGOLI..... RESPONDENT

JUDGEMENT

Introduction

Vide the Originating Summons dated 29th January 2025 the applicant sought for orders that; -

- a) A declaration be issued that the applicant has been in open, continuous and uninterrupted possession and occupation of all that parcel of land known as land reference number KAKAMEGA/BUGONDA/1744 measuring approximately 0.24 Hectares for a period in excess of 12 years.
- b) A declaration that the Respondent's title deed over the suit land has been extinguished by virtue of the doctrine of adverse possession.
- c) A declaration that the title deed to the suit land is being held in trust by the respondent for the applicant.
- d) The applicant be registered as the proprietor of the suit land in place of the Respondent.

- e) The Respondent do execute the requisite instruments for transfer of title deed of the suit land to the applicant and in default the Deputy Registrar of this honourable court do execute the same
- f) Costs of this suit be provided for.

The Respondent filed a Replying Affidavit sworn on 10th February 2025 in response to the applicant's claim.

The matter was disposed of by way of viva voce evidence.

Applicant's evidence

The applicant testified as PW1 and called 3 witnesses. She adopted the contents of her witness statement dated 5th December 2025 as her evidence in chief. She had stated in the witness statement that she has an interest in the suit land parcel known as KAKAMEGA/BUGONDA/1744. That the land was formerly registered in the name of her brother by the name of WILLIAM KEYA, deceased, who died while domiciled in Tanzania. That the estate was succeeded by the deceased's daughter known as Johan Ngaira who secretly succeeded the estate and sold the land to the respondent. That she was neither informed of nor gave consent for the sale. That she had been in occupation of the land for over 70 years.

That the land had originally belonged to the applicant's father who conveyed it to William Keya, deceased, to hold in trust for the rest of the family members. That the actions of the respondent and the daughter of William Keya were done with full knowledge of the applicant's occupancy of the land and that none of them bothered to factor the applicant in.

The applicant produced exhibits namely; a copy of certificate of official search for KAKAMEGA/BUGONDA/1744, a copy of green card and court order dated 22nd March 2022.

On Cross examination the applicant stated that she wants the name of the respondent to be cancelled from the register of the suit land because of adverse possession. That Johan Ngaira cannot come to claim land in Kenya yet they live in Tanzania. That she did not want Johan to inherit the land because the father had moved to Tanzania. That the transmission of the suit land into Johan's name was not lawful as the family members were not involved. That the respondent had not been on the land for 12 years. That she (applicant) stays at the place where she does business.

PW2 was Margaret Afandi Keya. She stated vide the contents of her witness statement dated 5th February 2025 which was adopted as her evidence in chief, that William Keya was their only brother. That during land adjudication the suit land was registered in the name of William Keya although he was residing in Tanzania with the hope that he will one time come back to Kenya and because he was the only son.

That William Keya refused to come to Kenya claiming that he had become a citizen in Tanzania and was not interested in the land in Kenya and that his family had settled in Tanzania. That he buried his daughter, son and wife who died in Tanzania. That William Keya never attended his father's funeral. That for case No. Vihiga Civil Suit No. 78 of 1994, against a trespasser to the suit land, William Keya wrote a letter to the court confirming that the suit land was their ancestral land and that he had no problem if his sisters used it. That since then, she (PW2) had been using the land till the month of February 2025 when they found out that the land had been fenced off. That her mother had planted trees, bananas and nappier grass on the land which have now been destroyed. That her mother's house was destroyed. That she did not know who was doing the destruction. That

she later learnt that it was the respondent who is their neighbor who was responsible. She urged the court to assist them to get their land back.

On Cross examination she stated that she is the one who has been cultivating the land. That even if she is married or not, she is entitled to inherit the land that belongs to her father.

PW3 was Jane Kageha Mzee. She adopted the contents of her witness statement dated 5th February 2025 as her evidence. She rehashed the contents of the statements by PW1 and PW2 and added that the land was given to her and her sister. That she entirely depends on the suit land as she was never blessed with any child and the suit land is the only place that she knows as home.

On Cross –examination, PW3 stated that she stays in Kakamega County and that she does not know Johan Ngaira.

PW4 was Daniel Ombayi Lyavoga who testified vide his witness statement dated 5th February 2025. He rehashed the contents of the witness statement of PW2 and 3. He stated that PW2 had been tilling the land.

On Cross-examination he stated that the applicant and PW2 were children of William Keya and that they were not his sisters. That the suit land belonged to Reuben Keya who was the father of all those people.

Respondent's evidence

The respondent testified as DW1. He adopted the contents of his Replying Affidavit sworn on 10th February 2025 as his evidence in chief. He had stated in the Replying Affidavit that he is the registered proprietor of the land parcel known as KAKAMEGA/BUGONDA/1744 which he lawfully purchased from Johan Ngaira who had acquired ownership through a valid succession process. That the property was transferred to him legally and he was issued with a title deed.

That the applicant had only occupied the land for the past 4 years on mutual agreement with Johan Ngaira. That there were no developments on the land. That the applicant's father had his own land in the neighborhood namely; parcel No. SOUTH MARAGOLI/BUGONDA/1887 which they occupy. That the applicant's claim is a calculated move to disposes the rightful owner. That the applicant's claim is untenable and the court should dismiss it.

DW1 produced exhibits namely; Certificate of Confirmation of Grant dated 21/2/2024, title deed, photographs and certificate of official search for Kakamega/Bugonda/1887.

On Cross –examination DW1 stated that the person who was using the suit land upto the year 2021 was one Solomon Ludenyi. That when Solomon died in the year 2021, the applicant, PW2 and PW3 opposed that he should be buried on the land so Johan came from Tanzania to resolve the dispute. That there were no crops on the land. That he paid cash Kshs 2,000,000/= as purchase price for the land.

DW2 was Reuben Ngoli who adopted the contents of his witness statement dated 9th June 2025. On Cross examination he stated that he signed the land sale agreement as a witness. That the seller was the owner of the land.

DW3 was Joan Ngaira Keya who relied on the contents of her witness statement dated 9th June 2025. She stated that she filed a succession cause through which the suit land was transmitted in her favour. That she was the only child of her father William Keya, deceased, and that she is the one who sold the land to the respondent after succession.

On Cross-examination she stated that she lives in Tanzania but used to come to Kenya to visit her grandmother. That the applicant, PW2 and PW3 were step sisters to her father. That the house on the land belonged to her grandmother and

that PW2 caused it to be demolished. That the applicant and her sisters never had occupation of the suit land before the death of Solomon. That the respondent paid to her cash 2,000,000/- for the land.

Submissions

Written submissions dated 21st July 2025 were filed by Obura Obwatinya & Co advocates on behalf of the applicant.

It was submitted on behalf of the applicant that in a claim of adverse possession the applicant needs to establish peaceful and uninterrupted possession for 12 years. Counsel relied on the case of Loise Nduta Ititia -vs- Aziz Said Hamisi (2020) eKLR for that submission.

That the applicant's case was that their late brother William Keya was the owner of the suit land, that the same was held on their behalf in a constructive trust. Relying on the case of Wambugu -vs- Njuguna (1983) KLR 173 Counsel submitted that the applicant and members of her family have been in possession of the land since the 1960s when they were born. That the nature of possession was that the brother held the land in trust for them as he was the only brother. That the respondent who is their immediate neighbor knew of the possession. That the possession was open and undisturbed for the requisite period of 12 years and more. That the applicant had approached the court seeking to obtain title to the suit land by adverse possession for a portion measuring 0.24 ha. That the fact that objection to succession proceedings was dismissed, means that the applicant can only seek reprieve from the court alone. Counsel urged the court to allow the claim.

Written submissions dated 16th September 2025 were filed by D.C Chitwah & Co Advocates on behalf of the respondent. It was submitted that the elements of adverse possession which must be proved are actual possession- that is to say that

the claimant must physically occupy the land and use it as an owner would. That the evidence before court is that there has never been physical occupation or use of the suit land by the applicant.

That the claim against the respondent should start running from the time he obtained title in the year 2024. That open and notorious occupation and hostile and exclusive and continuous and uninterrupted possession were not proved. That the burden of proof is with the applicant as the person claiming adverse possession. That under the doctrine of indefeasibility of title and the Torrens system once a person is registered as the proprietor of land their titles is protected under section 26 of the Land Registration Act. That no evidence of fraud, misrepresentation illegality or corrupt scheme has been placed before the court.

Counsel urged the court to dismiss the claim with costs.

Issues for determination

The sole issue that emerges for determination is whether or not the applicant has acquired title to the suit land by adverse possession.

Analysis and determination

Adverse possession is a doctrine of law vide which a party obtains legal title to land by reason of actual, open, hostile and continuous occupation of it to the exclusion of the registered owner for a prescribed period. In Kenya adverse possession is anchored on the provisions of sections 7, 13, 17 and 38 of the Limitation of actions Act. Adverse possession is recognized by the law in section 7 of the Land Act as one of the ways of acquiring title to land and in section 28 of the Land Registration Act as an overriding interest to which registered land is

subject. Under section 7 of the Limitation of Actions Act, the prescribed period of exclusive possession for adverse possession to crystalize is 12 years. That is to say that if the registered owner of the subject land takes no action to assert his/her title or rights to the land within 12 years from the date the adverse possessor took possession, then the title of the registered owner becomes extinguished under the provisions of section 17 of the Act and the adverse possessor's claim matures. The adverse possessors can then seek redress as provided for under section 38 of the Limitation of actions Act and Order 37 of the Civil Procedure Rules, 2010.

The burden of prove of adverse possession as provided for in sections 107 to 109 of the Evidence Act, rests with the claimant/adverse possessor as the party who desires that the court gives judgement in his favour and as the party who would fail if no evidence at all were given by either party also as the party who wishes the court to believe the existence of adverse possession.

In order for a claim based on adverse possession to succeed, the claimant must prove that the land belongs to a registered owner who or whose personal representative is the defendant in the suit, that the claimant's entry and occupation of the suit land is contrary to the interest of the registered owner. That the occupation was with the knowledge but without the consent or permission of the registered owner and that the occupation has been open, hostile, continuous uninterrupted and peaceful for the period of 12 years.

These ingredients of adverse possession have been outlined in case law for instance in Kimani Ruchure vs Swift Rutherfords & Co. Ltd (1980)KLR 10 Kneller J held that “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 persuasion)

And in Gabriel Mbui vs Mukindia Maranya [1993] eKLR the court held adverse possession to be:

“..the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owner’s enjoyment of land for purposes for which the owner intended to use it.”

In the present case it is acknowledged by both parties that the suit land is currently registered in the name of the respondent. This was confirmed by copy of certificate of official search annexed to the Affidavit in Support of the Originating Summons. The certificate of official search dated 27th January 2025 shows that the suit land was transferred in favour and registered in the name of the respondent on 25th March 2024 and title deed issued on the same date.

This means that assuming that the applicant indeed had possession of the suit land, the period for which she had possession of the suit land when it was registered in the name of the respondent prior to the filing of the suit was less than one (1) year as the suit land was registered in the name of the respondent in March 2024 and the suit was filed in January 2025.

The green card produced as exhibit shows that the suit land was registered in the name of William Keya on 17th June 1976 when the register in respect thereof was opened and that it remained so registered until 4th March 2024 when it was transmitted in favour of Johan Ngaira pursuant to Succ C. No 262 of 2022 at Vihiga and later transferred in favour of the respondent on 25th March 2024.

The previous owner either by himself or his personal representatives was not been sued or joined in the proceedings.

The applicant who claims to have occupied the land for the past 70 years is aged 66 years according to her testimony and her national Identity Card No. 16059111 attached to her written witness statement.

She testified that she was on the land by reason of being the child of the Original owner one Reuben Keya who was also the father of PW2, PW3 and the said William Keya.

There was no documentary evidence tendered that the land originally belonged to Reuben Keya. But be that as it may, if it is true that the land belonged to the applicant's father and that she was on the land on that basis, then a claim of adverse possession is not sustainable. One cannot adversely occupy family land or land that belongs to her, or her ancestral land.

The applicant produced no evidence of possession. She stated that she stays at the place where she does business and that it was PW2 who was using the land. PW 2 stated that the trees, bananas and nappier grass on the land had been planted by her mother and that she (PW3) planted maize on the land. No evidence of existence of these crops was exhibited. If indeed PW2 had possession of the land, then it is her who should have filed the suit. There is no evidence that the applicant brought the suit in a representative capacity.

PW3 also claimed that the land was given to her, that it is the land that she knows as her home and has no other home.

On the other hand the respondent testified that it was one Solomon Ludenyo, deceased who had been using the land and that it was only upon his death in the year 2021 that the applicant and her sisters entered the land.

DW1 demonstrated that he bought the land from DW3 who had undertaken succession to the estate of her father the registered owner. DW1 further testified that he had taken possession of the suit land and fenced round it. That means that whatever occupation that any other party may have had or been having over the land was terminated by the respondent's entry onto the land and taking possession thereof as the owner.

While PW2 testified that the land was registered in the name of William Keya because he was the only son and in trust for the whole family, she went ahead to list the names of her other brothers namely; Herbert and Daniel thereby defeating the narrative that William was her only brother and hence the reason why the land was registered in his name in trust for other family members.

While PW3 testified that the suit land was the only land of her parents, the only place that she calls home, evidence was produced through the testimony of PW3 that Reuben Keya had another land parcel No. BUGONDA/1887. A certificate of official search in respect thereof was produced by DW1 as exhibit D.4 and it showed that land parcel No, BUGONDA/1887 is registered in the name of Reuben Keya.

For the foregoing reasons, the court finds that; -

- a) The applicant has failed to prove that she has had open, continuous and uninterrupted possession and occupation of the suit land for a period of more than 12 years or at all.
- b) The applicant has not proved that the respondent's title to the suit land had become extinguished as provided in section 17 of the Limitation of Actions Act.
- c) The applicant has not proved that title to the suit land is held in trust for the applicant.
- d) There is no basis for the court to make an order for the land to be registered in the name of the applicant or to compel the Deputy Registrar of the court to execute transfer forms.

In Conclusion the court finds that the applicant has failed to prove her claim on a balance of probabilities.

- i. The suit is hereby dismissed.**
- ii. Given that the parties and witnesses herein are either close family members or neighbors, the court hereby orders each party to bear own costs of the suit.**

Orders accordingly.

Judgement dated and signed at Vihiga and delivered virtually this 20th day of January 2026.

**E. ASATI,
JUDGE.**

In the presence of:

Ajevi- Court Assistant.

Obwatinya for the Applicant

N/A for the Respondent.