

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELCLC OS NO. E002 OF 2025

SIMEON KASIMU KISALU

PLAINTIFF

VERSUS

DANIEL M. MWACHALA

DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit by an Originating Summons dated 15th September 2025 seeking inter alia entitlement to parcel known as TAITA TAVETA/LAKE JIPE SCHEME/153 which measures 6.4 Ha being by way of adverse possession.
2. The summons are grounded in the supporting affidavit of Simeon Kasimu Kisalu who stated that he has been the occupant of the sought property since 1974 openly, uninterrupted, exclusively and continuously for over 51

years and has accordingly acquired a rightful title by way of adverse possession.

3. The Respondent was served with the suit documents and the notices for the scheduled dates of pre-trial and hearing, but it failed to defend the suit.
4. Pursuant to the directions issued by this Court, the Originating Summons was heard by way of viva voce. During trial the Plaintiff testified as the sole witness. He adopted and relied on Affidavit and supporting documents on record. He added that he has been using the suit property since 1974. He has over the years engaged in farming activities on the property to date in the full glare of the public. He has had exclusive possession without any interruption from the Defendant who has never sought to evict him.
5. It was also his testimony that he has made substantial developments on the property. In the year 2000, his wife Serah Wausi Kasimu was buried there on the 18th February 2000. He produced a copy of the official search, title deed among other documents showing ownership of the property to the Defendant.

6. The Plaintiff also filed written submissions dated 17th December 2025 after the close of his case. The Plaintiff submitted on two issues being whether he has acquired the title to the suit property by way of adverse possession and what orders should issue as to costs. Relying on section 7, 13 and 38 of the Limitation of Actions Act and the Court of Appeal cases of **Wilson Kazungu Katana & 101 others Vs Salim Abdalla Bakshwein & another [2015] eKLR, Mtana Lewa -v- Kahindi Ngala Mwangandi- COA MALINDI (2015) eKLR** and **Jane Jeptoo Sawe -vs- Estate of Sysvester Kimagut Sang [2018] eKLR** it was submitted that the Plaintiff has proved his case and should be granted the orders sought.
7. The Court has considered the pleadings, the evidence on record and the written submissions filed and adopts the issues for determination outlined in the Plaintiff's written submissions being; **whether the Plaintiff has made out a case of adverse possessor in respect to land parcel TAITA TAVETA/LAKE JIPE SCHEME/153 and what orders should issue as to costs.**

8. The Plaintiff's claim is for adverse possession. The doctrine of adverse possession in Kenya is embodied in **Section 7** of the Limitation of Actions Act, which states that:

“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 38 of the Limitations of Actions Act** provides a framework on how an adverse possessor is to move the court for orders vesting the land in the adverse possessor. The Section provides as follows:

“(1) 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.

(2) An order made under Subsection (1) of this Section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

(3) A proprietor of land who has acquired a right to an easement under section 32 of this Act may apply to the High Court for an order vesting the easement in him, and may register any order so obtained in the register of the land or lease affected by the easement and in the register of the land or lease for whose benefit it has been acquired, and the easement comes into being upon such registration being made, but not before.

(4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.

(5) The Minister for the time being responsible for Land may make rules for facilitating the

registration of titles to land or to easements acquired under this Act.”

10. The essential and mandatory ingredients that a claimant seeking adverse possession orders under **Section 38 of the Limitation of Actions Act** must establish have been spelt out by our courts in various cases, among them; ***Kweyu v Omutut [1990] KLR 709, Patrick Magu Mwangi Kimnyu v Joreth Limited [2015]eKLR, Peter Mbiri Michuki v Samuel Mugo Michuki [2014]eKLR; and M’Mbaari M’lthara v James Mbaka [2019] eKLR*** among others.
11. In ***Celina Muthoni Kithinji v Safiya Binti Swaleh & 8 others [2018] eKLR***, the Court explained the conditions to be met for one to prove an entitlement in adverse possession. The court proceeded to quote various authorities which explain the entitlement and I wish to borrow fully from the decision and capture it as hereunder;

“The requirements for Adverse Possession in Kenya has also been set out in the case of Mbira -v- Gachuhi (2002) IEALR 137 in which the court held that:

.....a person who seeks to acquire title to land by the method of Adverse Possession for the applicable statutory period must prove non-permissive or non-consensual, actual, open, notorious, exclusive and Adverse use by him or those under whom he claims for the statutory prescribed period without interruption....”

12. In the case of **Mtana Lewa -v- Kahindi Ngala Mwangandi- COA MALINDI (2015) eKLR** it was held that:

“Adverse Possession is essentially a situation where a person takes Possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12 years.”

13. The evidence tendered herein reveals that the Defendant is the registered owner of the suit land. The Plaintiff in this suit testified that he entered into the suit land in December 1974

and has been in continued uninterrupted occupation of the land since then.

14. As to the nature of occupation, the Plaintiff contended that he has been in open, continuous and exclusive occupation. To determine the nature of possession, this Court is guided by the decision in **Kisumu Civil Appeal No. 27 of 2013; - Samuel Kihamba v Mary Mbaisi [2015] eKLR** where the court held:

“Strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land”.

15. The Defendant never called any witness to controvert the evidence adduced by the Plaintiff and in the circumstances, this Court finds that the Plaintiff has been able to prove on a balance of probabilities his claim for adverse possession against the Defendant and he is entitled to the orders sought.

16. In light of the above, it is the finding of this Court that the Plaintiff's claim is merited.

17. In respect to costs, the suit was not contested by the Defendant and as such, it is hereby ordered that each party shall bear own costs of the same.

18. The Plaintiff's claim for adverse possession succeeds and the Originating Summons dated 15th September 2025 is hereby allowed in the following terms;

1) Simeon Kasimu Kisalu is hereby declared to have acquired a title by adverse possession to the suit property being TAITA TAVETA/LAKE JIPE SCHEME/153 measuring six decimal four (6.4) hectares.

2)The registration of DANIEL M. MWACHALA as proprietor of the suit property being TAITA TAVETA/LAKE JIPE SCHEME/153 measuring six decimal four (6.4) hectares be and is hereby cancelled forthwith and the Land Registrar is hereby directed to issue title in the name of the Simeon Kasimu Kisalu as the registered proprietor of the suit property being TAITA TAVETA/LAKE JIPE SCHEME/153 measuring six decimal four (6.4) hectares

3)Each party to bear own costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 14TH DAY OF JANUARY 2026.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Mutinda for the Plaintiff.

N/A for the Defendant.

Court Assistant; Mary Ngoira.

ORIGINAL