

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MIGORI**  
**ELCLOS NO. E024 OF 2024**

**DAVID NGOINA**

**MWITA.....APPLICANT**

**VERSUS**

**PAMELA MWANI MAROA.....1<sup>ST</sup>**

**RESPONDENT**

**MARWA WAMBURA.....2<sup>ND</sup>**

**RESPONDENT**

**JUDGMENT**

**1.** The Plaintiff commenced this suit by way of an Originating Summons dated 22nd August 2024. He brought it under Sections 7 and 38 of the Limitation of Actions Act, Chapter 22. Laws of Kenya, Sections 1A, and 1B of the Civil Procedure Act and Order 37 Rules 7 and 14 of the Civil Procedure Rules and all other enabling provisions of the law. He prayed that the Court finds that he had acquired title to 1.1/4 (sic) Hectares (one and a quarter hectares) out of Nyabasi/Busonga/76 measuring 10.6 hectares by way of adverse possession and/ or prescription. He set out five issues for determination. These were that;

- 1. This honorable court be pleased to declare that the Plaintiff and any other person claiming under him has acquired by way of adverse possession a portion measuring 1.1/4 hectares out of L.R. No. Nyabasi/Busonga/76 measuring 10.6 hectares in total.**
- 2. This honorable Court be pleased to declare that the plaintiff is the owner of the portion of L.R. No. Nyabasi/Busonga/76 measuring 1.1/4 hectares to the exclusion of the defendants.**
- 3. This honorable court be pleased to order the transfer of the portion measuring 1.1/4 hectares to the applicant off L.R. No. Nyabasi/Busonga/76 and the same be registered into the plaintiff's names.**
- 4. The defendant be ordered and/ or directed to execute and/ or sign all the necessary transfer instruments/ documents and facilitate the transfer and registration of the suit property into the names of the Plaintiff, in default of which the**

**Deputy Registrar to execute the same in order to facilitate the transfer.**

**5. This honorable Court be pleased to order the defendant to bear the costs of this suit.**

**2.** The Summons was based on the grounds that the Plaintiff was a purchaser of the portion measuring 1.14 hectares, having long been put, upon purchase, into occupation of the same. The land was part of L.R. No. Nyabasi/Busonga/76. Further, the Plaintiff had occupied the suit land measuring 1.1/4 hectares for a period of more than 12 years peacefully without any interference. The plaintiff's occupation and use of the portion began before its registration in favor of the Respondent. The defendant, through procrastination even after taking out letters of administration of the first registered proprietor, had since failed and refused to transfer the portion to the plaintiff. This was despite the plaintiff's numerous requests or pleadings to him to transfer the land.

**3.** A further ground was that the Plaintiff had occupied and used the portion measuring 1.1/4 hectares for a period of more than 12 years. The plaintiff had been in long, open, continuous and

uninterrupted occupation of the suit property for more than 20 years, a period in excess of 12 years. The defendant had not taken or commenced any legal or precipitated steps to defeat or interrupt the plaintiff's occupation of the land. The plaintiff's occupation of the suit land constituted an overriding interest which is protected by Section 28 of the Land Registration Act. The Plaintiff had been in adverse occupation of the said portion of land for more than 12 years. The plaintiff's interest over the portion of land measuring 01.1/4 hectares of the suit property merited registration in his name.

- 4.** The Originating Summons was supported by an Affidavit sworn by the Applicant, David Ngoina Mwita, on 22nd August 2024. He deposed that he bought the suit land from one of the beneficial occupiers and owners of the land in 1993, for a sum of KShs. 12,200/= . He annexed and marked as "DNM I" a copy of the sale agreement. He added that he had been in full and open occupation of the 1.14 hectares of suit land for a period exceeding twenty (20) years. Further, he had been in occupation and use of the suit land for the past 31 years. The

Defendants had never taken any steps to remove him or defeat his occupational status of the said portion.

- 5.** He repeated the rest of the contents of the grounds in support of the Summons but in deposition form. He added that the Defendants had delayed in transferring and or refused to transfer to him the position he occupied despite the fact that they had taken out letters of administration of the Estates of the deceased. He annexed and marked “DNM II” a copy of a letter from the Area Chief confirming his occupation status on the land.
- 6.** To evidence the registration status of the land being in favor of one Mosei Masiga (deceased), he annexed and marked as “DNM III (a) and (b)” copies of the certificate of official search and green card. He added that the Defendant, while taking out letters of administration, was aware of the Applicant’s occupational status. He deposed further that having occupied the portion of land more than twelve (12) years he had acquired the suit land by adverse possession. He added that, on the one hand, he stood to suffer irreparable loss and damage in the event that the Court did not grant the reliefs

sought. On the other hand, the Defendants would not suffer any loss since they retained the remaining 9.3 hectares of the land for distribution.

**7.** The Defendants entered appearance and filed a Replying Affidavit sworn by the 2<sup>nd</sup> Respondent, Marwa Wambura, on 17<sup>th</sup> April 2025. He stated that he and the other Defendant were the lawful registered owners of the suit land parcel number L.R. Nyabasi/Busonga/76 having acquired it through transmission. He annexed and marked as **MW 1a, b and c** copies of the certificate of Official Search, Gazette Notice and Letters of Grant. He added that he knew that his late father never sold any portion of land to the Plaintiff or any other person to his death on 12<sup>th</sup> August 1992. He added that the Plaintiff's claim was therefore baseless.

**8.** He deposed that the plaintiff had pleaded that he bought the portion of land in the year 1993 from a beneficial occupier, but the said seller had no legal capacity to dispose of any portion of the suit land. He added that he knew it was illegal for one to sell a person's asset without succession hence the alleged sale of 1.1/4 acres was null and void.

**9.** His further deposition was that in the month of March 2023 the Plaintiff bought a portion of land from Marwa Ikwabe Mageta who was their neighbour but a total stranger to the Estate of Moseti Masaga.

**10.** His further deposition was that the agreement dated 6<sup>th</sup> January 1993 did not show on which parcel of land he bought the claimed parcel of land, hence the agreement should be expunged. He added that the plaintiff had failed terribly to show on which land he had been in occupation as he falsely alleged. Further, that the Plaintiff failed to show photographs showing his occupation of the suit land for more than twenty years as alleged because there was no such occupation. He deposed further that the Plaintiff only trespassed onto the suit land in the year 2023, hence his claim was premature. He added that since 2023 when the Plaintiff trespassed, their request for him to vacate the land had been thwarted hence his claim that he had been in open, peaceful, continuous and uninterrupted occupation of the suit land was false and he had never occupied the land for more than twelve years. He

annexed and marked **MW2** a copy of a letter from the Area Chief summoning the Plaintiff.

- 11.** It was the Respondent's claim that the plaintiff should not hide under adverse possession of part of their suit land on the allegation that he bought the portion from a beneficial occupier who was a stranger to the Defendants.
- 12.** The deponent then stated further that instead of filing the instant suit the Plaintiff should have mounted Objection Proceedings in the Succession Cause which the defendants filed in Kehancha SPMC Succession Cause No. E23 of 2023 to claim a portion of the suit land as a liability to the Estate of their deceased father or file a claim for refund from Maria Ikwabe Mageta.
- 13.** Further, the Plaintiff's claim was misleading and full of falsehood and had been brought in bad faith. He added that the prayers sought were lame with no feet to stand on because they were not anchored in law and fact to prove the claim for adverse possession. It was mischievous and brought in bad faith and should, in the interest of justice, be dismissed with costs.

**14.** By 24<sup>th</sup> April 2025 when the suit came up for pretrial conference, the Defendants had not filed their response to the Originating Summons hence the suit was fixed for formal proof for 16<sup>th</sup> July 2025. The said response was filed on 19<sup>th</sup> June 2025 which was over four months from the time the Defendants were given leave, on 25/02/2025, to file it within fourteen days. Leave of the court was never sought to extend the time to file the same. Thus, when the matter for hearing on 16<sup>th</sup> July 2025 the documents were struck out of the record for being filed without leave of the court. The matter then proceeded for formal proof.

**15.** The suit proceeded ex parte, after both counsel for the Plaintiff and the Defendants appeared in earlier in the day, the defendants' response was struck out in the presence of both, and the matter given time allocation after the Call Over of the Cause List matters. By the time of hearing of the matter on the said date, the neither the Defendant nor his counsel attended Court hence the matter proceeded in absence of the Defendants, to the conclusion of both cases that same date.

**16.** The plaintiff testified as PW1. He stated that he was a retired pharmacist residing in Kebarisia location of Kuria East Subcounty. That he bought land on 06/01/1993 and had occupied it since then. He adopted his affidavit sworn on 22/08/2024. He produced copies of documents annexed to it. He produced as PExh1 the copy of the Green card for the parcel of land No. Nyabasi/Busonga/76 and PExh 2 a copy of the official search on the same parcel. He also produced as PExh 3 a copy of the agreement dated 6<sup>th</sup> January 1993. He added that he bought one and a quarter (1.1/4) acre of part of the said land. He added that they had never tried to resolve the matter, but he had a letter dated 16/06/2023 written by the area Chief of Komotobo Location to show that he resided on the parcel of land. He produced it as PExh 4. He prayed for the reliefs sought in the Originating Summons.

**17.** This court has considered the Originating Summons and the law. It is of the view that two issues lie before it for determination. The first one is whether the Plaintiff has proved his case on a balance of probabilities. The second one is, who to bear the costs of the Summons.

**18.** It is clear from the record that since the response by the Defendants was struck out on 16<sup>th</sup> July 2025, the facts deposed, hence pleaded, in the Originating Summons were not controverted. Thus, all the Plaintiff was required to do was to prove them in terms of Section 107 of the Evidence Act by adducing evidence to the required standard of a balance of probabilities.

**19.** This court would therefore wish to proceed with the determination of whether the plaintiff discharged the burden of proof as stated above, using the tool of legal analysis of sequential determination of the Issue (I), Rule (R), Application (A) and Conclusion (C), simply abbreviated as IRAC.

**20.** Therefore, the first step to ascertain is what the issue between the parties herein is. The issue between them is that the Plaintiff claims to have acquired ownership of 1.1/4 acres of which he allegedly occupies being part of land parcel number L.R. Nyabasi/Busonga/76 which measures 10.6 hectares which belongs to or is owned by the Defendants by virtue of transmission.

**21.** The law or Rule on adverse possession be anchored on Sections 7, 13 and 38 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya. A claim for adverse possession succeeds when the party who has instituted it proves the elements thereof. These elements flow from the exposition by court on the said provisions of law.

**22. Section 7** of the Limitation of Actions Act is couched on the following 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.”**

**23.** The Limitation of Actions Act makes a further provision for adverse possession at **Section 13** that:

**“ (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.”**

**24.** Under section 38 of the Limitation of Actions Act, a party claiming land by adverse possession may approach the court for a declaration that the property devolved to him in accordance with the doctrine. Section 38(1) of the Act states as follows;

**“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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 a proprietor of the land.”**

**25.** Since the promulgation of the 2010 Constitution, the reference to the High Court in the above provision has been now interpreted to be the Environment and Land Court as established under the Environment and Land Court Act. This is pursuant to Article 162(2) of the Constitution of Kenya. This interpretation is followed by a number of decisions which expound on the ingredients of a successful claim for adverse possession, some of which I now turn to below.

**26.** The first one this Court is guided by is the *locus classicus* of **Mtana Lewa v Kahindi Ngala Mwangandi (2015) eKLR**, wherein the court said:-

**“Adverse possession is essentially a situation where a person takes possession of land and 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, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the 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.**

**27.** It follows that in order for a claim of adverse possession to succeed there are certain conditions that must be fulfilled. The Court of Appeal in the case of **Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR** stated as follows:-

**“At the expiration of the twelve-year period the proprietor’s title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the**

**High Court for an order that he be registered as the proprietor of the land.**

**Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it. See *Littledale v Liverpool College (1900)*<sup>1</sup> Ch.19, 21.**

**28.** This court thus needs to know whether the plaintiff has tendered evidence to prove the nec vi, nec clam, nec precario principle. In **Abdulkhalik Mohamed Abdulkhalik Mazurui & 2 others v Josiah Kafuta J. Mtila & another [2021] KECA 653 (KLR)** the Court of Appeal held,

“The burden of proving adverse possession lay with the 1<sup>st</sup> respondent who made the claim. That burden was to be discharged by him demonstrating, on a balance of probabilities, that his possession was adverse; open, peaceful, without consent of the 1<sup>st</sup> and 2<sup>nd</sup> appellants and for an uninterrupted period of 12 years, expressed in Latin as *nec vi, nec clam, nec precario*. Or, as Lord Hoffmann put it in **R. vs. Oxfordshire County Council ex p. Sunningwell Parish Council** [2000] 1AC 335 at 350, 'not by force, nor stealth, nor the licence of the owner'. See also **Kimani Ruchine vs. Swift Rutherford & Co.Ltd** [1980] KLR on this point.”

**29.** Of the Claimant in the instant case, this court holds the same way as the appellate court. It is clear from the evidence that the Applicant is in occupation of the disputed portion on the suit land. There is no contention that he pleaded and has adduced evidence to the effect that he has resided on the 1.1/4 acres of the suit land since he bought the same from defendant. He produced evidence, by way of an agreement, to that effect. The issue is not that the agreement was based on

an illegal agreement but it is whether he started occupying the land without the permission of the owner and has been in open, quiet and uninterrupted occupation of the same for over twelve years. The Defendants attempted through the documents struck out of the record that the plaintiff bought the land from a person who had no capacity to sell it. While the Court does not place reliance on the said struck out pleading, it makes a finding that for adverse possession to be established, the claimant should be in occupation of a specific portion of earth for a period and in the manner the law recognizes.

**30.** The plaintiff has by reason of the evidence he adduced orally and through PExhibits that he has satisfied on a balance of probabilities the elements of adverse possession. This court hereby therefore enters judgment for the plaintiff/ applicant against the defendants in terms of the Originating Summons as follows:

**a) A declaration be and is hereby issued that the Plaintiff, and/ or any other person claiming under him, has acquired by way of adverse possession a portion measuring 1.1/4 hectares out of L.R. No.**

- Nyabasi/Busonga/76 measuring 10.6 hectares in total.**
- b) The Land Registrar is ordered to transfer, upon the land being surveyed by a surveyor of the parties' choice the portion measuring 1.1/4 hectares or thereabout determined and mutation forms thereto signed by the parties, to the applicant off L.R. No. Nyabasi/Busonga/76 and the same be registered into the plaintiff's names.**
- c) The defendant is hereby ordered and/ or directed to execute and/ or sign all the necessary transfer instruments/ documents and facilitate the transfer and registration of the suit property into the names of the Plaintiff within the next thirty (30) days, in default of which the Deputy Registrar shall forthwith execute the same in order to facilitate the transfer.**
- d) Each party to bear costs.**

**31.** Orders accordingly.

**JUDGMENT** Dated, Signed and **Delivered** Virtually via the Teams Platform the **16<sup>th</sup> day of January 2026.**

**HON. DR. IUR NYAGAKA**

**JUDGE**

**From 08:45 AM, in the presence of**

Mwita Advocate for the Applicant

No appearance for the Respondents