



REPUBLIC OF KENYA



KENYA LAW
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**Kimongo v Sotuan & another (Environment and Land Case
E015 of 2024) [2026] KEELC 164 (KLR) (26 January 2026) (Judgment)**

Neutral citation: [2026] KEELC 164 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND CASE E015 OF 2024**

**MN MWANYALE, J
JANUARY 26, 2026**

BETWEEN

NKORIAT ENE KIMONGO PLAINTIFF

AND

DAVID LESHOO SOTUAN 1ST DEFENDANT

SAMUEL LEKAKENY NAKERI 2ND DEFENDANT

JUDGMENT

1. Vide her Complaint dated 4th June 2024, the plaintiff Nkoriat Ene Kimongo sued the Defendants David Leshoo Sotuan and Samuel Lekakeny Naker and sought the following reliefs against them.
 - i. A permanent order of injunction restraining the Defendants, their servants, licencees, agents or any other person acting on their behalf from howsoever trespassing, occupying, cultivating, harassing or interfering with the ownership, quiet possession and occupation by the plaintiff of parcel known as title number Transmara/Shartuka/722.
 - ii. A declaration that the plaintiff herein is the owner of the suit property and is entitled to exclusive, quiet and peaceful enjoyment of all that parcel of land known as title number Transmara/Shartuka/722.
 - iii. An order of eviction be issued against the Defendants, their agents and/or anybody claiming through them from the suit property.
 - iv. Special damages for trespass.
 - v. Costs of the suit and further or any other relief deemed just by the court.
 - vi. Any such further and/or other reliefs as the Honourable court may deem fit and expedient to grant.



Plaintiff's case and Evidence

2. It is the plaintiff's case as pleaded in the Plaint dated 4th of June 2024 that;
 - i. She is the registered proprietor of all that parcel of land known as Transmara/Shartuka/722 having acquired the same lawfully through adjudication process; thus, entitled to absolute and exclusive rights over the suit property including the right to occupation, possession use, alienation, sale and/or disposal thereof to the exclusion of all and sundry including the Defendants.
 - ii. That the Defendants forcefully entered the suit property on 2nd of May 2018 laying claim to the said parcel and that they have a different number over the same land and occupied 4 acres, and constructed homes thereon with impunity and efforts to stop them were unsuccessful.
 - iii. The plaintiff has had quiet possession since 1997 and has regularly monitored the boundaries so as to guard against encroachment and interference.
 - iv. That as a result of the actions of the Defendants, the plaintiff has been divested and/or deprived of a substantial portion of the suit property, thus suffering loss and damage in the sense that; -
 - a. She has lost use of a substantial position of her property encroached by the Defendants.
 - b. Entire topography of the parcel of land has changed owing to the encroachment and misuse of the parcels by the Defendants.
 - c. Plaintiff's plan to develop and improve the suit property have been impeded and truncated by the encroachment by the Defendants on the suit property.
 - d. The encroachment and attendant illegal occupation by the Defendants has devalued the property.
3. That the Defendants have thus trespassed the suit property and caused nuisance therein.
4. On the strength of the above facts as pleaded the plaintiff sought for the reliefs set out at paragraph 1 of this judgment.

Plaintiffs' Evidence

5. The plaintiff testified as the sole witness, being PW1. She adopted her witness statement dated 04.06.2024 as part of her evidence in chief. It was her testimony chief that the Defendants had trespassed her suit property in 2018 for about 7 years, she had been allocated the suit property as she was a member of the Shartuka Group Ranch and produced the documents she had listed in her list of documents dated 04.06.2024 as P.Exhibit 1 to 5, together with photographs showing the houses constructed by the Defendants in a bundle as P.Exhibit 6. She sought for the eviction of the Defendants from the suit land.
6. In cross-examination, PW1 stated that the Defendants had trespassed on her property 7 years ago, and that he had reported the trespass at Kilgoris police station. The witness stated that she knew the Defendants were orphans but that their mother and grandmother were not buried on the suit property as they alleged.
7. She denied having attended the funeral of the Defendant's mother and grandmother, and stated that there was a pending criminal case in which she had reported the 1st Defendant for cutting the live fence.



8. In re-examination the witness stated that the Defendants had trespassed 7 years ago; she reiterated that the two ladies had been buried elsewhere; and not on the suit land.
9. With the testimony of the plaintiff as the sole witness, the plaintiff closed her case.

Defence case and evidence

10. Vide their Defence dated 13th December 2024, which was a defence and counter-claim by way of an Originating Summons; the Defendants' case was pleaded as herefollows; -
 - i. The defendants denied that the plaintiff was the registered owner of Transmara/Shartuka/722, they pleaded having had peaceful, continuous occupation and possession of the plaintiff's portion of title Transmara/Shartuka/722 for 46 years and 33 years respectively, denying any encroachment thereof.
 - ii. They further pleaded that their grandmother and mother died and were buried on the suit property and that the allocation done in 1997 was done without their knowledge of their grandmother and mother.
11. Vide their counter-claim, the Defendants now plaintiffs in the counter-claim pleaded that the Defendant in the counter-claim suit was time barred by virtue of the continuous, open and peaceful occupation over the portion of the suit property measuring 5.4 acres hence pleading adverse possession of the suit property, having occupied the same over 32 years since their respective date of births.
12. The plaintiffs in the counter-claim counter-claimed for 5.4 acres within Transmara/Shartuka/722 and that the same be transferred to them, having acquired ownership by virtue of adverse possession.

Defendant's Evidence

13. D.W.1 was David Leshoo Sotwan, the 1st Defendant and 1st plaintiff in the counter-claim, he adopted his witness statement and produced the list of documents dated 18.12.2024 as D.Exhibit 1 to 5. It was her testimony that her grandmother and mother died in 2006 and were buried on the said parcel; and they had fenced the property in which they were in occupation. He testified having lived in the suit peacefully since their childhood.
14. He stated that culturally he is untied with the deceased and cannot live away from the grave of his parents.
15. On cross-examination, he stated that the suit property belonged to Nkoria Ene Kimongo. He stated that they have lived in areas since 1990, while the first demarcation was 1992 and second demarcation in 1997. That they were members of the group ranch at time of demarcation but failed to file any objection during adjudication.
16. He stated that his parents' graves were on the suit land and had been marked by tree trunks.
17. The witness indicated that he had no witness to support his case. He stated that they were 4 houses on the suit property and had not sold the suit property, the witness relied on the survey report. The witness stated that they had live fence on the suit property.
18. On re-examination the witness indicated that the sketch maps produced by the plaintiff had live fences.
19. The witness indicated that when demarcation of Shartuka was undertaken his grandmother and mother were present but he was not present.



20. D.W.2, Mrs. Peter Okorosi, a survey assistant in private practice produced a survey report; which he amended the last paragraph. He testified that he saw two grave marks on the suit property and that the Defendants were occupying 5.4 acres in Transmara/Shartuka/722. He produced the report as D.Exhibit 5 and the photographs D.Exhibit 6.
21. It was his evidence that there was demarcation on the ground though his report indicated that there was no demarcation on the ground. There had been crops as well as cows on the property and that he has seen grave marks on two graves, that had been raised.
22. The surveyor equally expunged the last paragraph of the report.
23. In re-examination, the witness stated that they were logs erected on the grave side of the land.
24. The witness stated that he had made oral amendments to the report.
25. With the testimony of the two defence witnesses, the defence case was closed and court directed a survey exercise to be conducted as the survey report produced by the Defence, had been undertaken without the plaintiff's involvement as well as the involvement of the Area chief, and parties were given the liberty to file submissions on the report as well as the suit.

Plaintiff's submission

26. The plaintiff framed and submitted on 4 issues for determination, to wit,
 - a. whether the plaintiff is the lawful owner of suit property.
 - b. Whether the Defendant have rights over the disputed portion by adverse possession.
 - c. Whether the Defendants occupation amount to trespass.
 - d. Whether the plaintiff is entitled to the prayers sought.
27. On issue 1, the plaintiff submits that she is the registered owner of Transmara/Shartuka/772 a fact proven by a copy of her title deed and a copy of certificate of official search.
28. It was her submission that under the provisions of section 24(a) and 25(1) as well as section 26(1) of the *Land Registration Act*, a certificate of title vested absolute ownership of land to the registered owner as it was prima facie evidence, of ownership.
29. In respect of the counter-claim the plaintiff submits that the Defendants illegal entry was on 2nd of May 2018 and that the threshold of 12 years for adverse possession had not been met, hence the counter-claim ought to be dismissed.
30. The plaintiff placed reliance on the decision of the court of Appeal in Richard Wefwafwa Sangol Vs. Ben Munifwa Sangol 2020 (eKLR), on the elements of adverse possession that the Defendants ought to prove and submitted that the elements were proven.
31. The plaintiff submits that the evidence of burial of the Defendants' mother and grandmother was not corroborated, they submit that the 1st Report, D.Exhibit 5 was full of controversies and the maker and the same should not be relied on.
32. The plaintiffs further submit that the entry by the Defendants is unjustifiable and amounts to trespass and ought to be treated as such.
33. On the strength of the above the plaintiff prayed for the reliefs sought in the plaint to be granted against on Defendants.



Defendants Submissions

34. The Defendants did not frame and submit on any issues for determination but submitted generally on the case. The Defendant submits that the plaintiffs were born and raised on the suit property and have lived thereon for about 47 and 34 years; respectively hence their claim for adverse possession against the Defendants had crystalized.
35. The defendants place reliance in the decision in the case of Samuel Miki Waweru Vs. Jane Njeri Richu, as well as Peter Mbiriri Michuki Vs. Samuel Mugo Michuki, and submitted that they are entitled to 5.4 acres in Transmara/Shartuka/772 having identified the same in survey report (Dexhibit 5)
36. On the strength of the above submissions the Defendant prayed for dismissal of the suit and judgment be entered as prayed for in the counter-claim.

Issues for Determination

37. Arising from the pleadings, the evidence as adduced and the submissions and upon consideration of the applicable law, the court frames the following as issues for determination
 - i. Whether or not the plaintiff has proven proprietorship of the suit property.
 - ii. Whether or not the Defendants' defence and counter-claim of adverse possession should be upheld?
 - iii. What reliefs ought to issue.
 - iv. Who bears the costs of the suit?

Analysis and Determination

38. On the first issue, the plaintiff pleaded ownership of Transmara/Shartuka/772. She produced a copy of a title deed and a copy of official search in support of her claim of ownership. According to the Defendants they were born on the suit property and they denied trespass.
39. Section 24 of the *Land Registration Act*, confers absolute ownership to a person registered as a land owner while section 25, of the same Act grants proprietary rights to a registered owner, and under section 26 of the same Act, the certificate of title shall be held as conclusive evidence of ownership. The above sections provide as follows; -

“Section 24. Interest conferred by registration subject to this Act.

- a. The registration of a person as the proprietor of land shall vest in that person the absolute ownership of the land together with all rights and privileges belonging and appurtenant thereto, and
- b. The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidentals of the lease.

Section 25. Rights of a proprietor

1. The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of the court, shall not be liable to be defeated except as provided in this Act, and shall be held by the



proprietor, together with all privileges and appurtenances belonging thereto free from all other interests and claims whatsoever but subject.

- a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - b. to such liabilities, rights and interests as effect the same and are declared by section 28 not to requiring noting on the register, unless the contrary is expressed in the register.
2. Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject as a trustee.

Section 26. Certificate of title to be held as conclusive evidence of proprietorship.

1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except
 - a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
2. A certified copy of any registered instrument, signed by the Registrar and sealed with the seal of the Registrar shall be received in evidence in the same manner as the original.”

40. Having produced a copy of a title in her name as well as an official search under the hand of the Land Registrar, the plaintiff adduced evidence of her ownership of the suit land, entitling her to the rights and privileges of a registered owner.

41. Her entitlement to the suit land could only be challenged under section 26(1)(a) or (b) of the [Land Registration Act](#) which provides as follows;

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme” but the Defendants did not plead fraud by the



Plaintiff in acquisition of the suit property and led no evidence to exceptions of absolute ownership conferred by a registration and a certificate of title.

42. The Defendants did not impeach the Plaintiff's title under section 26(1) and (b) of the [Land Registration Act](#) but based their claim under Adverse possession.
43. Accordingly, the court finds in answer to issue number 1 that the plaintiff proved ownership to the suit property Transmara/Shartuka/772.
44. Turning to issue number 2 as to whether the Defence and counter-claim should be upheld; the defence and counter-claim is based on adverse possession.
45. The elements to be proven in respect of adverse possession matters were summarised by the Court of Appeal in its recent decision in the case of Andafu Vs. Akhuoya (Civil Appeal 70 of 2019) 2025 KECA 714 KLR where the court at paragraphs 33 and 34 of the said division held as follows; -
 - “ 33. Courts on the other hand have judicially developed the elements which must be satisfied before a claimant can succeed in an action for adverse possession, the leading cases from this court in this regard include Titus Mutuku Kasuve Vs. Mwaani Investments Limited and 4 Others 2024 eKLR, Titus Kigori Munyi Vs. Peteru Mburu Kimani Civil Appeal No. 28/14, and Karuntuli Ranj Mumkinya 2013 eKLR,
 34. The principles distilled from these cases are that in order to establish a claim of adverse possession, the possession must be;
 - a. Adverse to the interests of the owner meaning that the claimant is in possession as owner in contradistinction to holding in recognition of or subordination to the true owner or to a recognised superior claim of another.
 - b. Actual as opposed to constructive possession where the test is in the degree of actual use and enjoyment of the parcel involved by the claimant or his agent, tenant or licence.
 - c. Open and notorious, meaning the possession must be open and conspicuous to the common observer so that the owner or his agent on visiting the land might readily see that the owners right are being invaded. Differently put the possession must be manifest to the community.
 - d. Without force – meaning that the possession and occupation must have been aliened peacefully not through actual or threatened violence.
 - e. Exclusive, meaning that the possession must be of such exclusive character that it will operate as an outser of the owner of the legal title. Differently put the claimant must demonstrate that she wholly excludes the owner from possession for the required period.
 - f. Continuous and uninterrupted for the period of 12 years – meaning that the owner did not enter the property under



circumstances showing her intention to assert dominion against the adverse user for at least twelve years....”

46. The court shall now analyse whether the elements of adverse possession as set out in the above decision were proved by the Defendants.
47. It is also imperative to note that the Defendants’/Plaintiffs in the counter-claim called one witness D.W.2, who produced a report (Dexhibit 5) on their occupation of 5.4 acres within Transmara/Shartuka/722. Although Dexhibit 5 was produced in evidence, the exercise leading to the preparation of this particular survey report, did not involve the plaintiff and/or the area chief and as the report was only prepared for the benefit of the Defendants and was contradictory leading to oral amendments during trial, the court rejects the opinion expressed in the said report due to the contradictions and the oral amendments made thereto. Indeed, the survey report was prepared by an Assistant Surveyor, an expert to an extent but the court is not bound to accept the same as was held in *Elizabeth Kamene Ndolo Vs. George Matata Ndolo (1996) KECA 209*, where the Court of Appeal held inter alia, “we agree, entitled to proper and careful consideration, the evidence being that of experts, but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether it believes the expert and give reasons for its decision. A court cannot simply say because this is the evidence of an expert I believe it...”
48. The DW1 had testified that his mother and grandmother had been buried on the suit property in 2006 as prove of their occupation and possession for purpose of time in their adverse possession claim. Noting that the counter-claimers claim to have been born in the suit land and their occupation is 47 years and 33 years respectively, time for purposes of adverse possession could only run from time of registration of the parcel in 2000 or from 2006 when the plaintiff’s mother and grandmother died, assuming that the mother and grandmother had permission from the plaintiff to stay on the suit land and calculated from either 2000 to 2006, by the time of filing the suit 12 years would have crystallised, but no evidence was lead on this front.
49. The onus was on the plaintiff in the counter-claim to call evidence to support his claim by evidence and to proof the elements of adverse possession as is required under section 107 of *Evidence Act*, which provided; -
- “(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of acts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.” So did the counter-claimers proof the elements of adverse possession.
50. Turning to the elements of adverse possession as set out in *Andafu Vs. Akohoya*.
- On time
- i. As noted at paragraph 48 above time for adverse possession being 12 years had crystalized if the counter-claimer had evidence on their entry on the suit property but they did not.
51. On open and notoriety occupation, the counter-claimer did not call evidence from a neighbour and/or the chief and/or a member of the community to testify that they were occupying the 5.4 acres and that their mother and grandmother were actually buried thereon so as to proof open and notorious



occupation, and since the D exhibit 5 was found to have no evidential value, this element was not proven.

52. It follows thus the plaintiff in the counter-claim did not prove the elements of adverse possession specifically the element of open and notorious occupation as required, and the court shall not inquire whether the other elements of adverse possession have been proven.
53. Thus, the Defence and counter-claim as pleaded were not supported by evidence and did not meet the threshold for adverse possession and their defence and counter-claim cannot thus be upheld and issue number 2 is answered in the negative.
54. On issue number 3, the plaintiff has proven proprietorship of Transmara/Shartuka/722 and the Defence and counter-claim having failed. It follows that judgment must be entered for the plaintiff having proven her case.
55. The court takes note of the survey and ground reports filed by the District surveyor and Land Registrar, dated 25.07.2025 filed pursuant to a court order once the court deemed D exhibit No. 5 to be contradictory and deficient which shows that parcel No. Transmara/Shartuka/722 was displaced on the map sheet No. 3.

Disposition

- i. Accordingly, judgment be and is hereby entered for the plaintiff for the reliefs sought in the Plaint dated 4th June 2024 being prayers (i), (ii) (iii) and (iv) thereof, the prayer for special damages is hereby declined.
 - ii. The Land Registrar and Sub-county Surveyor, Transmara East, West and South to amend the RIM of Shartuka registration section, so as to reflect the correct position of Transmara/Shartuka/772 on the ground in accordance with their reports dated 25.07.2025.
56. There shall be no orders of costs in relation to this suit.
57. Judgment accordingly.

DATED AT KILGORIS 26TH DAY OF JANUARY 2026

HON. M.N. MWANYALE

JUDGE

In the presence of

CA – Sylvia/Sandra/Clara

Mr. Bigogo for Defendant

Mr. Nyaata for Plaintiff

