

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VIHIGA

ELC (OS) CASE NO. E010 OF 2025

IN THE MATTER OF THE LAND REGISTRATION ACT, 2012

AND

**IN THE MATTER OF SECTIONS 7, 17 AND 38 OF THE LIMITATION OF
ACTIONS ACT**

AND

**IN THE MATTER OF AN APPLICATION FOR ACQUISITION OF TITLE BY
ADVERSE POSSESSION OF THE PARCEL OF LAND KNOWN AS N.
MARAGOLI/GAVUDIA/537**

BETWEEN

TIRAS MUSUSI NAFAS.....PLAINTIFF/APPLICANT

VERSUS

SAMSON AVUDANYA KEBONDO.....DEFENDANT/RESPONDENT

JUDGMENT

Vide the Originating Summons dated 19th May 2025 the plaintiff who claims proprietary interest by way of adverse possession in the whole of land number N. MARAGOLI/GAVUDIA/537 sought the grant of the following relief against the respondent: -

- 1) A declaration be issued that the applicant has been in adverse possession of the whole of parcel of land number N. MARAGOLI/GAVUDIA/537 for a period of more than 12 years.
- 2) A declaration be issued that the applicant has acquired title to 0.8 Ha comprised in land title number N. MARAGOLI/GAVUDIA/537.
- 3) An order be issued that the respondent holds the title to the parcel number N. MARAGOLI/ GAVUDIA/537 in trust for the applicant.
- 4) An order that land parcel number N. MARAGOLI/GAVUDIA/537 be transferred to the applicant/plaintiff and that the applicant/plaintiff be registered as the owner of the land parcel number N. MARAGOLI/GAVUDIA/537.
- 5) An order that the respondent do execute all transfer documents in favour of the applicant and in event of default the Deputy Registrar of the court do execute the same documents.

The Plaintiff's case

The plaintiff's case as shown in the Originating Summons is that he has been in constant and exclusive occupation, use and possession of land parcel known as N. MARAGOLI/GAVUDIA/537 (hereinafter called the suit land) since the year 2005 to date without interruption for a period of over 12 years and acquired the said parcel of land by adverse possession.

That the applicant has lived on the suit land together with his family since 1993 when he established his home thereon and started to cultivate the rest of the land.

That the respondent holds the suit land in trust for the plaintiff by operation of law. That the plaintiff has been exercising all the rights of ownership over the suit land without any interference from the respondent, that he has built permanent structures thereon which has taken more than 12 years. That in the premises the respondent's proprietary interests in the land have been extinguished by operation

of the law and that the respondent is now holding the land in trust for the applicant/plaintiff. That it is equitable that a portion of the suit land now be registered in the name of the applicant by virtue of his continuous, peaceful, exclusive and uninterrupted occupation of the same for a period totaling 12 years.

There was no response to the Originating summons. Affidavit of Service sworn by Julius Otieno Raminya, who describes himself as a court process server, on 18th June 2025 shows that the respondent was on 18th June 2025 served personally with the Originating Summons and the accompanying documents. The respondent filed no response. Further, Affidavit of Service by the same deponent sworn on 7th October 2025 shows that on 26th September 2025 the respondent was personally served with hearing notice for 13th October 2025. A copy of the hearing notice dated 9th September 2025 is attached to the Affidavit of Service. The respondent did not attend court.

The matter therefore proceeded without the participation of the respondent. The plaintiff testified as PW1. He adopted the contents of his Supporting Affidavit sworn on 19/5/2025 as his evidence in chief. He had deposed to in the Supporting Affidavit that in November 1976 his father by the name of Nafasi Mususi Ligaye (deceased) bought the suit land from one Isaac Igunda and paid the agreed purchase price in full.

That thereafter the seller refused to transfer the sold land to the plaintiff's father prompting the said father to file a suit at Nairobi. That his father had taken possession of the land immediately after purchase and started cultivating it until the year 1993 when he died when the plaintiff went and established his home on the suit land by building a permanent structure which is his house where he lives together with his family and he is cultivating the remainder of the land.

That the respondent is the current registered owner of the land. That the plaintiff has stayed on the land without interruption, exercising all the rights of ownership

over the parcel. That the respondent's proprietary rights have become extinguished. The plaintiff produced documents as exhibits in support of his case inclusive of a copy of land sale agreement with the translation thereof into English language, copy of court order dated 27/11/1986, certificate of official search dated 17th March 2025 and photographs.

The plaintiff called 2 witnesses.

PW2, one Nathaniel Mususi, relied on the contents of his witness statement as his evidence in chief as did PW3. Both witnesses stated that the plaintiff resides on and cultivates the suit land. That the plaintiff has planted trees and bananas on the land.

Counsel for the plaintiff filed submissions on the case. Counsel relied on the case of *Richard Wefwafwa –vs Ben Munyiwa Songoi (2020) eKLR* and submitted that adverse possession contemplates two concepts as held in *Wambugu vs Njuguna (1983) KLR* namely; possession and discontinuance of possession.

Counsel submitted that the defendant has never taken any step to enter the suit land and/or assert his rights as the owner while the plaintiff has been in open, notorious possession of suit parcel of land to the knowledge of the defendant since the year 1993.

That time started running against the defendant's title from the time the plaintiff occupied the suit land. Counsel urged the court to allow the suit.

Issues for determination

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

Analysis and determination

The uncontroverted evidence placed before court is that the suit land parcel No. N MARAGOLI/GAVUDIA/537 belongs to the respondent. The certificate of official search dated 17/3/2025 in respect thereof produced as exhibit shows that the land was registered in the name of the respondent on 3/9/1985 and land certificate issued to him on the same date.

Further, the evidence produced through the testimony of the applicant, PW2 and PW3 is that the applicant entered the land in the year 1993 established his home thereon where he resides to date with his family and where he cultivates and has planted trees and bananas.

The applicant testified that the occupation was with the knowledge but without the permission of the respondent. That the occupation has been actual, open, continuous and uninterrupted for a period in excess of 12 years. The photographs produced show the developments /activities carried out by the applicant on the suit land.

I find that the applicant's entry onto the suit land and his occupation thereof is adverse to the interest and title of the respondent who is the registered owner thereof.

I further find that under the provisions of section 17 of the Limitation of Actions Act, the respondent's title to the suit property has become extinguished.

Hence the respondent is holding the title in trust for the applicant and that the said title is subject to the overriding interest held by the applicant in terms of section 28 (h) of the Land Registration Act. Section 28 (h) of the Land Registration Act makes rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription an overriding interest to which registered land is subject. It provides as follows:

‘Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted in the register-

- a.
- b.
- c.
- d.
- e.
- f.
- g.
- h. Rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.

I find that the applicant has proved his case on a balance of probabilities and hereby enter judgement in his favour for

- i. A declaration that the applicant has acquired title by adverse possession to land parcel number N. MARAGOLI/GAVUDIA/537.
- ii. A declaration that the respondent’s title to land title number N. MARAGOLI/GAVUDIA/537 has become extinguished and that the respondent now holds the title to the parcel number N. MARAGOLI/GAVUDIA/537 in trust for the applicant.
- iii. An order for transfer of land parcel number N. MARAGOLI/GAVUDIA/537 to the applicant by the respondent forthwith in default of which the Deputy Registrar of the court to execute the all documents and instruments necessary so as to effect the transfer and registration of the suit land in favour of the applicant.
- iv. Each party to bear own costs of the suit.

Orders accordingly.

Judgement dated and signed at Vihiga, delivered virtually this 12th day of February 2026.

**E. ASATI,
JUDGE.**

In the presence of:

Ajevi--Court Assistant.

Otieno for the Applicant

N/A for the Respondent.