

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMABAY
ELCLOS NO. E008 OF 2025 (OS)
IN THE MATTER OF THE LIMITATION OF ACTIONS ACT,
CHAPTER 22 LAWS OF KENYA
AND
IN THE MATTER OF: A CLAIM FOR ADVERSE POSSESSION
PURSUANT TO SECTION 38 OF THE LIMITATION OF
ACTIONS ACT
AND
IN THE MATTER OF: LR NO. WEST KASIPUL KONYANGO
KOKAL/1980
BETWEEN
JANE ADHIAMBO
OMWANDA.....PLAINTIFF
VERSUS
YUVINALIS NYAKUNDI OTARO.....
.....DEFENDANT

JUDGMENT

1. The plaintiff brought this suit by way of an originating summons dated 19 February 2025. She claimed that she was entitled to a portion measuring 0.05 hectares, being part of parcel number West Kasipul/Kokal/1980 by way of adverse

possession. She set forth the following issues for determination:

- 1. A declaration that the defendant's rights to recover the parcel of land known as parcel number West Kasipul/Konyango/Kokal/1980 measuring 0.05 hectares is barred under the Limitation of Actions Act, Chapter 22 Laws of Kenya and his title thereto extinguished on the grounds that the plaintiff herein has openly, peacefully and continuously being in occupation and possession of the said parcel of land for a period exceeding 12 years.**
- 2. There be an order that the plaintiff be registered as the proprietor of parcel number West Kasipul/Konyango Kokal/1980 measuring 0.05 hectares in place of the defendant who currently holds the title to the suit land.**
- 3. There be an order restraining the defendant, either by himself, agents, servants and all employees from interfering with the plaintiff's peaceful possession and occupation of the said portion of**

land measuring 0.05 hectares comprising of all that parcel of land West Kasipul/ Kanyongo Kokal/1980 in any manner whatsoever and/ or howsoever.

- 4. The deputy registrar and/ or the Executive officer of the Honorable Court be directed and ordered to execute the transfer instruments and all attendant documents to facilitate the transfer and registration of the personal land measuring 0.05 hectares comprising the parcel of land known as West Kasipul/ Konyango Kokal/1980 in favor of the plaintiff in the event of default by the defendant to execute the necessary transfer instruments.**
- 5. Costs of this originating summons be borne by the defendant.**
- 6. Such further and/ or orders be made as the court may deem fit and exist in the circumstances of the case.**

- 2.** The originating summons was based on nine grounds which were that the applicant has been in adverse possession of the portion measuring 0.5 hectares of that parcel of land of Number West Kasipul/Konyango Kokal/1980 over 12 years. The title of the parcel of land is a freehold interest and has been extinguished by the applicant's adverse possession thereof for a period of over 12 years. The suit land should be transferred and registered in the applicant's name as owner. The defendant has been privy to and/ or is aware of the plaintiff's rights over the portion of the suit land. The defendant's rights to recover the suit land have been extinguished by effluxion of time. The plaintiff's occupation over the portion of land has therefore been adverse to the interests of the defendant in respect of the property. The plaintiff has acquired prescriptive rights over the suit land. The plaintiff's interests over the portion of the suit land merits the registration. The right and/ or interests of the plaintiff are vindicated by Section 28 of the Land Registration Act, No 3 of 2012.
- 3.** The originating summons was supported by the plaintiff's own Affidavit sworn on 19th February 2025. In it she largely

repeated the contents of the grounds in support of the Originating Summons. She added that the respondent was the registered proprietor of the suit land. She annexed a copy of the certificate of official search and marked it JAO1. She added that she was married in 1990 when she found her husband using this suit property. From then they had been tilling the suit property to date peacefully and without interference.

4. Further, that immediately after occupational possession and use of the suit land, she began to develop it and planted some maize and beans. She annexed and marked the JAO2 photographs of her occupation and use of the property. She added that her occupation had been uninterrupted. Further, she deponed that she had been developing the same parcel of land since 1980. She added, she did the developments on it herself, and the defendant had never raised any complaints thereto. She prayed that the originating summons be allowed. She added that there had been no previous proceedings between her and the defendant over the same subject matter.
5. Upon service of the Summons to Ener Appearance, the defendant did not enter the Appearance or file a Defence or

response as required by law. Therefore, the suit proceeded by way of formal proof.

6. PW1 testified orally and adopted the Affidavit in support of the Summons and her written witness Statement. Both documents largely repeated the contents of the Affidavit in support of the Originating Summons and the and the grounds in support of it. These have been summarized above. This Court therefore need not rehash the same.
7. She produced the original of the Certificate of Official Search of the suit land as PExhibit 1. She also produced PExhibit 2 s set of two photographs to evidence her occupation of the land she marked them as plaintiff's PExhibit No. 2(a) and (b). She also produced a certificate of electronic evidence dated 19th February 2025 as PExhibit 3. Then she closed both her case and that of the Defendant.
8. She filed submissions which this Court has carefully considered.
9. I have carefully considered the Originating Summons, the law and submissions of the plaintiffs. The only issue herein is whether the plaintiff has satisfied on a balance of probabilities

the requirements of adverse possession as to entitle her to the reliefs sought, and who to bear the costs of this suit.

All the Plaintiff was required to do was to prove then in terms of Section 107 of the Evidence Act that she has been in continuous or uninterrupted, open possession of the land and without the permission of the owner. This court therefore proceeds to determine 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.

The law on adverse possession is governed by Section 38(1) of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya, as read with Sections 7, 13 and 17 of the Act. 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.

1. 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.”

2. The Act makes a further provision for adverse possession at **Section 13** as follows:

“ (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.”

3. 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.”

4. From the promulgation of the 2010 Constitution, the Environment and Land Court was established. Therefore, a reference to the High Court in the above provision is 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.

5. 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.

- 6.** Therefore, for a claim of adverse possession to succeed certain conditions 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)* 1 Ch.19, 21.

7. This court thus needs to know whether the plaintiff has tendered evidence to prove the *nec vi, nec clam, nec precario* principle. In **Abdulkhal 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 1st 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 1st and 2nd 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.”

8. Of the Claimant herein, having adopted documentary produced as Exhibit 1, 2(a) and (b), and 3 being the Certificate of official Search, two photographs evidencing occupation of the land, and a Certificate of Electronic Evidence, she stated further that she was married in the year 1980 and found her husband using the same property namely West Kaspul/Konyango Kokal/1980. Further, she has been tilling that land, including planting maize to date without any interference. She also stated that she has been in possession and use of the land all along and has developed it. She added that the parcel of land measures approximately 0.05 ha. That she had put up the development on the land herself and she has been in occupation thereof for a period more than 12 years continuously. She added that the defendant's title had since been extinguished by effluxion of time. She prayed for the reliefs sought.

9. I have carefully analyzed the plaintiff's evidence as the law applies to it. I find that the Plaintiff has proved her case on a balance of probabilities. I therefore enter judgment in her favour as against the defendant as follows:

a) A declaration be and is hereby issued that the defendant's rights to recover the parcel of land known as parcel number West Kasipul/Konyango/Kokal/1980 measuring 0.05 hectares is barred under the Limitation of Actions Act, Chapter 22 Laws of Kenya and his title thereto extinguished on the grounds that the plaintiff herein has openly, peacefully and continuously being in occupation and possession of the said parcel of land for a period exceeding 12 years.

b) There is hereby issued an order that the plaintiff be registered as the proprietor of parcel number West Kasipul/Konyango Kokal/1980 measuring 0.05 hectares in place of the defendant who currently holds the title to the suit land.

- c) There is hereby issued an order restraining the defendant, either by himself, agents, servants and all employees from interfering with the plaintiff's peaceful possession and occupation of the said portion of land measuring 0.05 hectares comprising of all that parcel of land West Kasipul/ Kanyongo Kokal/1980 in any manner whatsoever and/ or howsoever.**
- d) The Defendant is directed to execute, in thirty (30) days, all transfer documents to facilitate the registration of the Plaintiff as the owner of the land parcel, in default, the Deputy Registrar of this Honorable Court be directed and ordered to execute the transfer instruments and all attendant documents to facilitate the transfer and registration of the personal land measuring 0.05 hectares comprising the parcel of land known as West Kasipul/ Konyango Kokal/1980 in favor of the plaintiff in the event of default by the**

defendant to execute the necessary transfer instruments.

5. Since the Originating Summons was undefended, there shall be no order as to costs.

10. Orders accordingly.

Judgment dated, signed and delivered virtually via the Teams Platform the 6th day of February 2026.

HON. DR. IUR NYAGAKA

JUDGE

From 08:45 AM, in the presence of

Omuthee Advocate for the Applicant

No appearance for the Respondents