



**Wainaina v Katsivo (Enviromental and Land Originating Summons
E069 of 2024) [2026] KEELC 572 (KLR) (5 February 2026) (Judgment)**

Neutral citation: [2026] KEELC 572 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E069 OF 2024
MN KULLOW, J
FEBRUARY 5, 2026
IN THE MATTER OF SECTIONS 37 & 38 OF THE LIMITATION OF ACTIONS
ACT
(CHAPTER 22 LAWS OF KENYA)
AND
IN THE MATTER OF LAND REFERENCE NUMBER 12672/7**

BETWEEN

PETER WANYOIKE WAINAINA PLAINTIFF

AND

MELANIE NYAMBURA KATSIVO DEFENDANT

JUDGMENT

1. The Plaintiff moved this Court by way of an Originating Summons dated 14th November 2024, brought pursuant to Article 40 and 159 of *the Constitution* of Kenya, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Sections 37 and 38 of the *Limitation of Actions Act*, Order 37 Rule 7 of the Civil Procedure Rules, and all other enabling provisions of the law, seeking reliefs founded on adverse possession in respect of Land Reference Number 12672/7 within Nairobi County.
2. In the said Originating Summons, the Plaintiff sought the following orders verbatim:
 - a. That leave be granted to the Plaintiff to serve all the court processes in this cause upon the Respondent by way of substituted service through the daily newspapers circulating nationwide;



- b. That a declaration be and is hereby made that the Plaintiff is absolutely entitled by way of adverse possession to all the residual period in the leasehold title for all that property known as Land Reference Number 12672/7 within Nairobi County;
 - c. That a declaration be and is hereby made that the Defendant's rights to title in the leasehold property known as Land Reference Number 12672/7 has extinguished in favour of the Plaintiff under Sections 37 and 38 of the *Limitation of Actions Act*;
 - d. That an order be and is hereby made allowing the Deputy Registrar of this Court to sign all such transfer forms and such necessary documents to help the Plaintiff be registered as the sole owner of the residual period in the leasehold title of the property known as Land Reference Number 12672/7 within Nairobi County;
 - e. That there be no orders as to costs.
3. The Originating Summons was premised on the grounds that the Plaintiff has been in actual, open, continuous, exclusive and uninterrupted possession of the suit property known as Land Reference Number 12672/7 for a period exceeding twelve (12) years, during which time neither the Defendant nor any person claiming under her has asserted ownership rights or taken any steps to dispossess him. It was further contended that the Plaintiff and his family have made the suit property their permanent home, exercised full control over it, maintained it, and substantially improved it, thereby clearly demonstrating an intention to possess the land as of right and not by permission of the Defendant.
 4. In support of the claim, the Plaintiff swore a supporting affidavit in which he deponed that he has resided on the suit property together with his family for over twelve (12) years; that his possession has been peaceful, open and without interruption; that the Defendant has never at any time asserted her proprietary rights or sought to evict him; and that he has continuously taken care of and developed the property. The Plaintiff further exhibited a copy of the Certificate of Title showing the Defendant as the registered proprietor of the leasehold interest and averred that by operation of law, the Defendant's rights have been extinguished in his favour.

Service of Process and Procedural History

5. The Originating Summons dated 14th November 2024 was filed together with an application of even date seeking, inter alia, leave to effect substituted service upon the Defendant on the ground that the Plaintiff had been unable to physically trace her whereabouts.
6. Upon considering the said application, this Court on 19th November 2024 granted leave for substituted service to be effected through publication in a daily newspaper circulating nationwide.
7. Pursuant to the said directions, substituted service was duly effected on 6th December 2024, as later confirmed by the Affidavit of Service sworn on 22nd January 2025 by Josephat Kutekha Khatikwi, a licensed court process server.
8. Thereafter, the Plaintiff filed a Further Affidavit sworn on 14th February 2025, annexing a certified extract of the register confirming that the Defendant remained the registered proprietor of Land Reference Number 12672/7.

Response by the Defendant

9. Despite proper service having been effected, the Defendant neither entered appearance nor filed any replying affidavit or defence to the Originating Summons.



10. The Defendant also failed to attend court or participate in the proceedings in any manner.

Hearing of the Suit

9. The matter thereafter proceeded for hearing. The Plaintiff adopted his affidavits on record as his evidence in chief. Upon the close of the oral hearing, the Court directed the Plaintiff to file written submissions, which were duly filed and are on record.

Issues for Determination

9. The Court has carefully read and considered the pleadings, the evidence adduced, the submissions and authorities cited by the parties, as well as the relevant provisions of the law. The Court finds that the following issues arise for determination:
 - a. Whether the Plaintiff has met the threshold for the grant of orders based on adverse possession.
 - b. Whether the Plaintiff is entitled to the reliefs sought.
 - c. Who should bear the costs of the suit.

Analysis and Determination

Issue (a): Whether the Plaintiff has met the threshold for the grant of orders based on adverse possession

9. The burden of establishing the Court to ascertaining whether a claim for adverse possession has been established lies with the Applicant. This Court concurs with the sentiments of Justice Kuloba J. (as he then was) in Nairobi Civil Appeal No. 283 of 1990, Gabriel Mbui v Mukindia Maranya [1993] eKLR, where the Court held: “The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown.”
10. The principle of adverse possession is well settled under the *Limitation of Actions Act*, Section 7 of the said Act places a bar on actions to recover land after twelve (12) years from the date on which the right accrued. Further, Section 13 of the same Act provides that adverse possession is the exception to this limitation: “(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)”
11. Further, Section 38 of the Act provides that: “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... he may apply to the High Court for an order that he be registered as the proprietor...”.
12. The principle of adverse possession was further elaborated in Wambugu v Njuguna [1983] KLR 172, where the Court held that: “In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it.....”
13. And further that: “The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period...”



14. The Court of Appeal in *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR held: “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...”
15. Finally, in *Mbira v Gachuhi* (2002) 1 EALR 137, the Court stated: “...a person who seeks to acquire title to land by the method of adverse possession... must prove non permissive or non-consensual actual, open, notorious, exclusive and adverse use...”
16. Applying the foregoing principles to the present case, the Court finds that the Plaintiff has discharged the burden of proof placed upon him. The uncontroverted evidence demonstrates that the Plaintiff took possession of the suit property in the year 2008 following the Defendant’s voluntary vacating thereof and has remained in actual, open, exclusive and continuous occupation together with his family for a period exceeding twelve (12) years prior to the institution of these proceedings.
17. Throughout this entire period, neither the Defendant nor any person claiming under her asserted proprietary rights over the suit property, demanded possession, commenced recovery proceedings, or in any manner interrupted the Plaintiff’s occupation. The Plaintiff’s possession was therefore adverse to the Defendant’s title and inconsistent with her ownership rights.
18. The Plaintiff further demonstrated ownership-type control over the suit property by maintaining, developing and preserving the same as his home, conduct clearly indicative of occupation as of right and not by permission. In addition, the Plaintiff produced documentary evidence confirming that the Defendant remains the registered proprietor of the suit property, thereby complying with the procedural requirements under Order 37 Rule 7 of the Civil Procedure Rules.
19. Notably, despite proper service having been effected through substituted service, the Defendant failed to enter appearance, file any response or tender evidence in rebuttal. The Plaintiff’s evidence therefore stands unchallenged and this Court has no reason to doubt its credibility.
20. The Court is accordingly satisfied that the Plaintiff’s possession of the suit property was peaceful, open, notorious, exclusive, continuous and without the consent of the Defendant for a period well in excess of the statutory twelve (12) years. By operation of Sections 7 and 17 of the *Limitation of Actions Act*, the Defendant’s title to the suit property was extinguished, and the Plaintiff’s rights thereto crystallised. The Court therefore finds in favour of the Plaintiff on this issue.

Issue (b): Whether the Plaintiff is entitled to the reliefs sought

9. Having found that the Plaintiff has established his claim for adverse possession over Land Reference Number 12672/7, it follows that the Defendant’s proprietary rights thereto were extinguished by operation of law.
10. Pursuant to Section 38 of the *Limitation of Actions Act*, this Court is empowered to order that a person who has acquired land by adverse possession be registered as proprietor in place of the registered owner whose interest has been extinguished.
11. The Plaintiff is therefore entitled to the declarations sought in the Originating Summons and to an order directing registration of the residual leasehold interest in his name.

Final Orders

9. Accordingly, judgment is hereby entered for the Plaintiff in the following terms:



- a. A declaration is hereby issued that the Plaintiff has acquired the residual period of the leasehold title over Land Reference Number 12672/7 within Nairobi County by way of adverse possession;
- b. A declaration is hereby issued that the Defendant's title and proprietary rights over the said property have been extinguished pursuant to Sections 37 and 38 of the *Limitation of Actions Act*;
- c. An order is hereby issued directing the Defendant to execute all necessary transfer documents to facilitate registration of the Plaintiff as proprietor of the residual leasehold interest, and in default thereof, the Deputy Registrar of this Court is authorised to execute the same on her behalf;
- d. The Plaintiff shall be registered as the sole proprietor of the residual period of the leasehold title over Land Reference Number 12672/7;
- e. Each party shall bear their own costs of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON 5TH DAY OF FEBRUARY, 2026.

MOHAMMED N. KULLOW

JUDGE

Judgment delivered in the presence of: -

Mr. L:ubullola holding brief for Karanja for the Plaintiff

No appearance for the Defendant

Philomena W. Court Assistant

