

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ELC E002 OF 2025

GEORGE OMOLO MATUNGA (Suing as a Personal & Legal Representative of the Estate of Matunga Kwach)

.....**PLAINTIFF**

VERSUS

PETER OCHIENG RABUT.....1ST
DEFENDANT

LAND REGISTRAR MIGORI.....2ND
DEFENDANT

HON. ATTORNEY GENERAL.....3RD
DEFENDANT

JUDGMENT

1. The Plaintiff sued the Defendants vide a Plaint dated 13th January, 2025 seeking the following reliefs:

a) A declaration that the Plaintiff has had actual use and occupation of LR NORTH SAKWA/KAKMASIA/621 peacefully and uninterrupted for a period of over 70 years hence entitled to the same by virtue of adverse possession.

b) An order of directing the 2nd Respondent to register LR NORTH SAKWA/KAKMASIA/621 in favour of the Plaintiff.

c) An order of permanent injunction restraining the 1st Defendant from any form of claim or interference with the Plaintiff's suit parcel.

d) Costs of this suit and interest at court rates.

2. The Plaintiff's case was that they (*sic*) have been in actual possession of LR NO. NORTH SAKWA/KAKMASIA/621 the suit parcel for over 80 years and that the same was ancestral land.
3. He stated that the 1st Defendant trespassed onto the suit parcel and the 2nd Defendant went further to register the suit land in his name.
4. In response, the 1st Defendants filed a Statement of Defence and Counterclaim dated 10th February, 2025. In it he denied the contents of the Plaint. He alleged having purchased the suit property.
5. He averred that prior to purchase of the suit property he, the 1st Defendant conducted due diligence. He further averred that the claim of adverse possession by the Plaintiff was a mere afterthought. He sought for the following prayers:

a) An order dismissing the Plaintiff's suit against the Defendant with costs.

b) A declaration do issue that the Defendant is the rightful owner and entitled to exclusive quiet and peaceful enjoyment of all that parcel of land known as NORTH SAKWA/KAKMASIA/621.

- c) A permanent injunction do issue restraining: the Plaintiff, his servants, agents, and any person(s) acting on his instructions/behalf, from howsoever trespassing, occupying, entering, fencing, breaking, demolishing, destroying, defacing, flattening, harassing, or in any way interfering with the ownership, quiet possession and occupation by the Defendant of all that parcel of land known as NORTH SAKWA/KAKMASIA/621.**
- d) The Plaintiff herein be directed to abate the nuisance by removing any structures that he may have erected on the suit property at costs, failure to which eviction shall issue.**
- e) An order directing the Officer Commanding Rongo Police Station or an officer of a similar rank at the nearest accessible Police Station to ensure enforcement of this Honourable Court's Orders during the eviction of the Plaintiff or should the defendants continue with any of their acts of trespass.**
- f) General damages for loss of profits, losses from the rescinded sale of the property, disturbance,**

loss of use, and quiet enjoyment by the Defendant of his private property NORTH SAKWA/KAKMASIA/621.

g) Costs of this suit and interests at the court's rates.

h) Any other relief that this honorable court shall find just and fit to grant.

Evidence

- 6.** To support his claim, the Plaintiff called one witnesses. Testifying as **PW1**, the Plaintiff relied on his statement dated 13th January, 2025 which he adopted as his evidence in chief. He testified that the land in issue LR North Sakwa/Kakmasia/621 was ancestral land where his parents had been buried and they (*sic*) had also been born there.
- 7. PW1** testified that they had lived on and cultivated the suit parcel for years. He further testified that he was unaware of any sale of the said parcel by his father to the 1st Defendant.
- 8.** He produced a copy of Grant dated 5th June, 2017 and a certificate of official search dated 10th January, 2025 as Pexh 1 and 2 respectively. He prayed that the court declares him as the owner of the suit property.

- 9.** Upon cross examination, PW1 confirmed that he had filed a claim for adverse possession but admitted that he had not availed a certified copy of the title deed. He stated that he had only attached a copy of the official search which showed that the registered owner was the 1st Defendant.
- 10.** He confirmed that he had no evidence that his father had been buried on the suit land. He admitted that he had no photos that showed he resided and cultivated on the suit property.
- 11.** PW1 stated that he learnt that the suit parcel had been registered in the 1st Defendant's name on 10th January, 2025. He also stated that they had buried about seven (7) of his kin members on the suit property but admitted that he had no documents to confirm.
- 12.** He stated that his father died in 1997 and that he filed a succession case in 2017 since he was not aware that the property belonged to his father's estate.
- 13.** He confirmed that his father was never registered as the owner of the suit parcel. He stated that he had sued the Defendant as he had illegally acquired the suit property.
- 14.** Upon re-examination, PW1 stated that he had filed the suit as the personal representative of the Estate of Matunga.

- 15.** That marked the close of the Plaintiff's case.
- 16. DW1**, the 1st Defendant referred to his written witness statement dated 10th February, 2025 which he adopted as his evidence in chief. He also relied on his list of documents dated 10th February, 2025 which documents were produced as Dexhts 1 to 13.
- 17.** He was referred to Dexh 8 Green card which he confirmed did not have Matunga Kwach's name. He testified that he had bought the land from Nelly Okwiri in 2011 and had been in occupation since then.
- 18.** He testified that no one had ever claimed the land. He further testified that he sold the land on 23rd August, 2024 for Kshs. 3,500,000 which transaction was stopped as a result of the present suit. It was his testimony that he had started the process of refund of the money. He urged that the court award him damages and that he be permitted to use the land as the owner.
- 19.** Upon cross examination, DW1 he stated that he had been in occupation of the land. He had planted onions and sugarcane on it. He further stated that the land was bare and had no homestead on it.

- 20.** He confirmed that Mary Okwiri sold to him the land through an agent. He admitted that he had not gone to the Land Control Board to obtain consent. But he added that he was in possession of the land.
- 21.** Upon being referred to Dexh 8, the green card, he confirmed that entry number 4 was made on 14th June, 2011 in his favour. He stated that it showed that the mode of transfer was “RL7”. He admitted that the same did not show that the transfer was made to him. He denied that the form showed that Nelly died and that the Plaintiff succeeded her.
- 22.** On re-examination DW1 stated that the original owner was Stephen Okwiri. He was referred to Dexh 7 the transfer of which he stated that it showed the transfer was made by the personal representative of the estate of Stephen Okwiri.
- 23.** He stated that he paid the purchase price and had since been in occupation. He clarified to the court that at the time the land was sold, it had not been surveyed.
- 24.** That marked the close of the Defence case.

Plaintiff’s submissions

- 25.** Counsel for the Plaintiff vide his submissions dated 30th July, 2025 gave a summary of the evidence and identified one sole issue for determination. Whether the Plaintiff has been in

peaceful, uninterrupted use, possession and occupation of the subject parcel and whether he is entitled to the prayers sought.

26. It was his submission that the Plaintiff was born on the suit parcel and that his children and grandchildren still live on the suit property.

27. He further submits that the Plaintiff and his larger family have no other home.

28. In conclusion, he urged the court to grant them the orders as sought in the Plaint.

1st defendant's submissions

29. Counsel for the 1st Defendant filed his submissions dated 18th November, 2025 where he identified two issues for determination, whether the Plaintiff has met the threshold for adverse possession claims and if not, what order should the court should make.

30. On the first issue, while submitting in the negative, he argued that the documents adduced by the Plaintiff fell short of the statutory requirements for a person to lodge adverse possession claims. He submitted that the Plaintiff did not produce a certified extract of the title to the suit property.

31. He relied on the case of ***Wilson Kazungu Katana & 101 others V Salim Abdalla Bakshwein & Another [2015] eKLR, Jane Ghati Mwita V Robert Matinde Moronge [2020] eKLR and David Kimalel Birir V Sammy Kiprotich Tangus & another [2020] eKLR.***

32. He further relied on **Order 37, rule 7** of the **Civil Procedure Rules** and submitted that there was no evidence of occupation of the suit property adduced by the Plaintiff. He added that the Plaintiff did not call any witness to support his claims of occupation. He cited the case of ***Mtana Lewa V Kahindi Ngala Mwangandi [2015] eKLR***

33. It was counsel's submission that a claim for adverse possession could not be raised over ancestral property as alleged by the Plaintiff who alleged that the suit property was ancestral land. He relied on the case of ***Haro Yonda Juaje V Sadaka Dzengo Mbauro & Kenya Commercial Bank (2014) eKLR.***

34. Counsel submitted that by the Plaintiff's own admission that he discovered that the property was registered in the 1st Defendant's name on 10th, January, 2025 defeats his claim of adverse possession. He submitted that no element of adverse possession had been proved.

- 35.** He further submitted that the Plaintiff alleged fraud on the Defendants but failed to plead he same. He relied on the case of ***Vijay Morjaria V Nansingh Madhusingh Darbar & another [2000] Eklr***
- 36.** He submitted that the claim by the Plaintiff is mixed as it claims adverse possession and fraud at the same time. Counsel argued that one cannot sustain a claim of adverse possession and impeachment of a title within the same claim.
- 37.** On the second issue, counsel relied on **Section 26 of the Land Registration Act**, and submitted that the 1st Defendant should be declared as the absolute and indefeasible owner of the suit property.
- 38.** He submitted that the Plaintiff's father was never registered as the owner of the suit property as evidenced from the green card. He submitted that the suit was defective and urged the court to dismiss it with costs.

Analysis and determination

- 39.** Having carefully considered the pleadings, evidence, and rival submissions by the parties, I am of the view that the following issues arise for determination:

a) Whether the Plaintiff has proved his case.

b) Whether the 1st Defendant's Defence and Counterclaim is merited.

c) Who should bear the costs of the suit?

40. This Court now proceeds to determine the issues sequentially.

a) Whether the Plaintiff has proved his case.

41. The Plaintiff claims that he has been in occupation of land parcel LR NO. NORTH SAKWA/KAKMASIA/621 the suit parcel, for over 80 years and thus acquired it by virtue of adverse possession. He also claims that the suit property was ancestral land.

42. Upon cross examination, PW1 admitted that he did not have a copy of the title but the official search document which showed that the 1st Defendant was the registered owner.

43. He testified that as a family they had been living on the suit parcel and that most of his kins had been buried on the said land. He however admitted that he did not have documentary evidence in form of photos or names of the kins.

44. The 1st Defendant on the other hand contends that the Plaintiff's claim of adverse possession was an afterthought as

he failed to produce a certified extract of the title to the suit property.

45. He testified that he had bought the suit parcel from Nelly Okwiri the legal administrator of the estate of Stephen Okwiri (deceased). He produced a copy of the sale agreement dated 20th May, 2011.

46. During cross examination, DW1 admitted that entry number 4 in the green card did not show that the transfer was made to him.

47. Section 107 of the Evidence Act provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”

48. Further, **Section 109 of Act** refers to the burden of proof of a particular fact and states that:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.”

1. First and foremost, this court needs to disabuse many people's imagination, and the 1st Defendant herein for that matter, that failure to produce an extract of title in a claim for adverse possession is fatal to all such claims. In **Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another (supra)**, the Court of Appeal held that:

The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of Githu v Ndele [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them. It is exactly for this reason, perhaps that there was a mandatory requirement under the old Civil Procedure Act and the rules made thereunder that when taking out an O. S. anchored on adverse

possession that an extract of the title to the subject land be annexed to the application.

2. In **Sarah Kimani v John Wanyoike Gerald (supra)**, the court determined that:

The purpose of annexing an extract of the title is to ascertain who the title holder is, and when the title holder acquired rights over the said land. It provides a means to the court to ascertain the existence and proprietorship of the suit land. See Symon Gatutu & 587 others v E.A. Portland Cement (2011) eKLR. It is therefore not a technicality as submitted by the Plaintiff, but a mandatory requirement in a claim of adverse possession (emphasis added).

3. It is clear that the purpose of providing a certified copy of the extract of title is to ascertain the ownership of the land. Thus, is an official search sufficient in the instant case to prove ownership? This question was addressed by the Court of Appeal in **Johnson Kinyua v Simon Gitura Rumuri, Civil Appeal no. 265 of 2005**. The court held that:

On our part, we have weighed the submissions made on behalf of the parties. Concerning the

effect of failure to annex an extract of title we are of the view that nothing turns on this as the disputed land is registered under the Registered Land Act and a search certificate under the Registered Land Act duly signed by the Registrar constitutes evidence of the entries set out in the certificate. Thus section 36(2) of the Registered Land Act provides:

“Any person may require an official search in respect of any parcel, and shall be entitled to receive particulars of the subsisting entries in the register relating thereto and certified copies of any documents or of the registry map or of any plan filed in the registry.”

Concerning the same point section 37(2) of the Registered Land Act states:

“Every document purporting to be signed by a Registrar shall, in all proceedings be presumed to have been so signed until the contrary is proved.”

In our view reference to certified extracts in Order 37 refers to titles under the other

systems of land registration and not to Registered Land Act type of registration. Under the latter system of registration, we think a search certificate meets the requirements of the relevant law.

49. Thus, given the above decisions, for the present case the certificate of official search was sufficient. I now move to the crux of the matter. It is not in dispute that the Plaintiff claimed that he acquired the suit property adversely. It is trite law that he who alleges must prove and therefore, the burden of proof to prove ownership was on him to successfully discharge it.

50. In the case of ***Ndiema Samburi Soti V Elvis Kimtai Chepkeses [2010] KECA 68 (KLR)*** the court held as follows:

“All this indicate that the appellant was in possession of the land with the consent of the deceased. A person who occupies land with the consent of the owner cannot be said to be in adverse possession as in reality he has not dispossessed the owner and the possession is not illegal”

51. It is this court's view that the Plaintiff's evidence was marred with inconsistencies since he failed to prove the ingredients to sustain a claim of adverse possession. He also contradicted himself by claiming that the suit land was ancestral land which is usually inherited by the family.

52. In the circumstance, it is this court's view that the Plaintiff failed to prove his case on a balance of probabilities and is therefore not entitled to the prayers sought in his plaint.

b) Whether the 1st Defendant's Defence and Counterclaim is merited.

53. Section 26(1) of the Land Registration Act provides that:

"...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
b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

54. The 1st Defendant produced a title in his name claiming he had lawfully acquired the suit property by virtue of sale. It is this court's, humble view that under Section 107 and 109 of the Evidence Act, the onus was on him to prove this claim, and this being a civil claim the standard of proof was on a balance of probabilities.

55. From the testimony and evidence adduced is not in dispute that the 1st Defendant's basis for this claim is that there was a purchase of the suit property arising from an owner thereof by way of transmission following succession proceedings. It was also not in dispute that the property belonged to Stephen Okwiri (then) deceased, that is to say, as at the time of the alleged sale.

56. Evidence was led by the said 1st Defendant that he purchased the suit parcel from Nelly Okwiri (deceased), the wife of Stephen Okwiri (deceased). He produced a copy of the sale agreement dated 20th May, 2011 Dexh 2 between

Nelly Okwiri and himself. He also produced a transfer form executed by both of them and dated 9th June, 2011, DExh 7. The Green card of the suit land showed that, indeed, the transfer to him was by virtue of a transmission, through an entry preceding that registration being indicated as “RL7”, which was confirmed as an entry that flows from a transmission after succession proceedings are undertaken.

57. He testified that Nelly Okwiri (deceased) was the personal representative of the estate of Stephen Okwiri. He produced a copy of the Kenya Gazette Notice dated 9th March, 2001 Dexh 9.

58. It is this court’s view that the gazette notice confirmed that Nelly Okwiri (deceased) applied for letters of administration thus a personal representative of the deceased estate.

59. In addition, the green card produced Dexh 8 which confirmed under entry number 4 that the transfer from Nelly Okwiri (deceased) to the 1st Defendant was effected.

60. In the case of ***Dina Management Limited V County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023)*** the Supreme Court cited with approval the case of ***Munyu***

Maina V Hiram Gathiha Maina [2013] KECA, where it held as follows:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.” [Emphasis mine]

61. It is not in dispute that the 1st Defendant produced a sale agreement, transfer form and a copy of the title deed, and the authenticity of the same having not been impugned, they go to show in evidence that indeed he participated in a transaction that led to him being registered as owner of the suit land. Thus, he had proved how he acquired the suit property.

62. The Defendant raised, in the Counterclaim a relief for general damages for loss of profits, losses from the rescinded

sale of the property, disturbance, loss of use, and quiet enjoyment by the Defendant of his private property NORTH SAKWA/KAKMASIA/621. This court outrightly rejects the same for reasons that the Defendant did not provide any evidence that he was a business person and that the parcel of land was a commodity for sale for purposes of profit. In any event, there was no evidence that there was a contract relating to the property, that had been rescinded. In any event, even if there was one that could have been rescinded, there would be no nexus between the creation of the contract, its rescission and the Plaintiff herein.

63. Consequently, it is this court's view that the 1st Defendant proved his case on a balance of probabilities and therefore the Counterclaim is merited.

64. The upshot is that there is no merit in the plaintiff's claim but the counterclaim is merited. Therefore, this court dismisses the Plaintiff's suit and allows the 1st Defendant's counterclaim as prayed. The Plaintiff shall bear the costs of the suit and those of the Counterclaim. Consequently, this court enters judgment for the Defendant against the Plaintiff's as follows:

a) The Plaintiff's suit is dismissed.

- b)** A declaration be and is hereby issued that the Defendant is the rightful owner and entitled to exclusive quiet and peaceful enjoyment of all that parcel of land known as NORTH SAKWA/KAKMASIA/621.
- c)** A permanent injunction is hereby issued restraining the Plaintiff, his servants, agents, and any person(s) acting on his instructions/behalf, from howsoever trespassing, occupying, entering, fencing, breaking, demolishing, destroying, defacing, flattening, harassing, or in any way interfering with the ownership, quiet possession and occupation by the Defendant of all that parcel of land known as NORTH SAKWA/KAKMASIA/621.
- d)** The Plaintiff herein be directed to abate the nuisance by removing any structures that he may have erected on the suit property at his costs, within sixty (60) days, failure of which an eviction shall issue, at his cost.
- e)** The Officer Commanding, Rongo Police Station is directed to provide security during in the event of the eviction (above), in the enforcement of this Honourable Court' decree.

f) The Plaintiff to bear the costs of this suit and of the Counterclaim, together with interest thereon at the court's rates.

65. Orders accordingly.

Judgment dated, signed and delivered virtually via the Teams Platform this 26th February 2026.

**HON. DR. IUR F. NYAGAKA
JUDGE**

From 12:53, PM in the presence,

Owaka Advocate for the Plaintiff

Ochieng Advocate for the Respondent