

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**  
**ELC NO. E008 OF 2022**

MUIA NDIKU..... 1<sup>ST</sup> PLAINTIFF  
MAGDALENA WAYUA NDIKU..... 2<sup>ND</sup>  
PLAINTIFF

**-VERSUS-**

SALOME NDUNGE MULINGE..... DEFENDANT

**JUDGMENT**

**Introduction and Background**

1. The subject of the suits in this matter is a property known as R No. Makueni/Mubau/266 measuring 17.0 hectares which is equivalent to about 42 acres (suit property). The suit property was registered in the name of Ndiku Wambua on 2<sup>nd</sup> October, 1967 and a certificate of title was issued in his name on 29<sup>th</sup> January, 1976.
2. In or around early 1980's, Ndiku Wambua had pledged his title to Kenya Commercial Bank Limited (the bank) for a loan which was advanced to Makuli Company Limited (The Company). The company defaulted in repayment of the loan. The bank was forced to auction the suit property. The suit property was purchased by Joel Mulinge Malombe at an auction held on 28<sup>th</sup> June, 1982.
3. The purchaser Joel Mulinge Malombe (Malombe) proceeded to process title in his name which he obtained on 18<sup>th</sup> December, 1982. In 1983, Malombe filed a suit against Ndiku Wambua (Wambua) being Nairobi HCCC No. 4055 of 1983. This suit was fully heard and a judgment delivered on 26<sup>th</sup> March, 1985 whereby Malombe was declared as the sole registered owner of the suit property.
4. Wambua was ordered to vacate the suit property on or before 31<sup>st</sup> May, 1985. Wambua did not vacate the suit property as ordered. On 5<sup>th</sup> March, 1986 an eviction order was issued against Wambua but it would appear no

execution was carried out. Wambua died on 29<sup>th</sup> March, 2001. Malombe died on 7<sup>th</sup> March, 2012. His widow the defendant in this case obtained registration over the suit property on 27<sup>th</sup> August, 2020 through transmission.

5. By an amended plaint dated 18<sup>th</sup> April, 2023 the Plaintiffs sought the following reliefs against the Defendant:

- a. **A declaration that the Plaintiff and all the beneficiaries of the Estate of Ndiku Wambua Mutwii (deceased) are the lawful owners of the suit properties, to wit, land parcel number Makueni/Mubau/266 for all intent and purposes by way of adverse possession.**
- b. **An order directed at the Registrar of Land, Makueni to cancel the registration of land parcel number Makueni/Mubau/266 in favour of Defendant and the same be registered in the names of the estate of the deceased Ndiku Wambua Mutwii or in the names of the 1<sup>st</sup> Plaintiff and 2<sup>nd</sup> Plaintiff as administrator to the estate of the late Ndiku Wambua Mutwii pending succession cause of the late Ndiku Wambua Mutwii.**
- c. **A permanent injunction restraining the Defendant by herself, assigns, servants, and or agents or any other trespassing on, occupying, alienating, constructing, disposing, leasing out, transferring or registering or in any way whatsoever interfering with the Plaintiffs rights over land parcel number Makueni/Mubau/266.**
- d. **Any other relief that this honourable court thinks is just, fit and proper to grant.**
- e. **Cost of this suit together with interest at court rate.**

6. By an amended defence and counterclaim dated 24<sup>th</sup> July, 2023, the Defendant sought the following reliefs against the Plaintiffs:

- a. **An order for vacant possession of title No. Makueni/Mubau/266 in compliance with the judgment of 26<sup>th</sup> March, 1985 in NRB HCCC No. 4055/1983 Joel Mulinge Malombe vs Ndiku Wambua, lest an**

**eviction warrant do ensue for enforcement by and under the supervision of the OCS Makueni police station.**

**b. Additional mesne profits from January, 1987 upto date of delivery of vacant possession, calculated at a normal/modest Kshs,10,000 per hectare per year for the 17 hectare title No. Makueni/Mubau/226.**

**c. Costs and interests.**

### **Plaintiffs' Case**

7. The Plaintiffs' case was presented by Muia Ndiku and Christine Ndiku who are son and daughter of Wambua respectively. They stated that they were born and brought up on the suit property which they know as their only home. They stated that they had been staying peacefully on the suit property with Wambua, their other siblings as well as their mother who is advanced in age.
8. The two stated that their father who passed away on 28<sup>th</sup> March, 2001 was interred on the suit property. They have been carrying on farming activities on the suit property for over 50 years and that it is only in late 2021 that the Defendant threatened to evict them from the suit property. They stated that their father was in actual, continuous and notorious occupation of the suit property to the exclusion of all others since 1953.
9. The children of Wambua called their neighbours Peter Nzuiki Nguve and Kivaya Nyolo who stated that they had known that Wambua and his family had been living on the suit property peacefully for over 50 years and that Wambua was interred on the suit property.

### **Defendant's Case**

10. The Defendant testified that her late husband, Malombe purchased the suit property in a public auction. He later processed title in his name. In 1983, Malombe filed a suit against Wambua and judgment was delivered in his

favour. His efforts to have Wambua and his family vacate the suit property were futile.

11. The Defendant stated that she tried to offer a portion of the suit property to the family of Wambua but they refused and instead moved to court and filed this suit. She stated that the Plaintiffs' suit is an abuse of the court process and is res judicata and that the Plaintiffs are seeking to appeal the decision of the court given in 1985. She prayed that the Plaintiffs' suit be dismissed with costs and her counterclaim be allowed with costs.

12. The Defendant called John Matata Matolo who stated on how Malombe told him about a property which was up for auction. As he was staying with Malombe in Nairobi, he accompanied Malombe to the location of the suit property and thereafter to the venue of the auction at Machakos where Malombe was declared the highest bidder. Malombe obtained title in his name. He brought a suit against Wambua which was decided in his favour. He stated that Malombe never got to enter the suit property.

### **Parties submissions**

13. The parties were directed to put in written submissions. The Plaintiffs filed their submissions dated 1<sup>st</sup> September, 2025. The Defendant filed her submissions dated 14<sup>th</sup> November, 2025.

### **Plaintiffs' Submissions**

14. In the Plaintiffs' submissions dated 1<sup>st</sup> September 2025, Counsel identified four issues for determination namely: -

- a. *Whether the Plaintiffs have locus standi to institute the suit of adverse possession on their own behalf and that of the deceased;*
- b. *Whether the suit amounts to sub judice or res judicata;*
- c. *Whether the deceased and the Plaintiffs have the right to claim adverse possession against the Defendant; and*
- d. *Whether the Plaintiffs are trespassers on the suit land and whether they are in continued contempt of court orders and barred by public policy*

*from founding, maintaining and seeking to benefit from a cause of action premised on their own illegalities.*

15. Submitting on the first issue, Counsel contended that the Plaintiffs obtained a limited grant ad litem in Makueni CMMISC Cause No. E018 of 2022 on 1<sup>st</sup> March, 2022. As a result, it was submitted that the Plaintiffs as legal representatives of the estate of the deceased have the locus standi to initiate a claim on behalf of the estate.
16. Submitting on the second issue, Counsel contended that the present suit is neither *sub judice* or *res judicata* as per Sections 6 and 7 of the Civil Procedure Act respectively. Counsel argued that the issues raised in the former suit (Nairobi HCCC No. 4055 of 1983) are totally different from those in the present suit. Counsel asserted that in the former suit, the primary issue between the Plaintiff, Joel Mulinge, and the Defendant, Ndiku Wambua, was the legality of the sale of Parcel No. MAKUENI/MUBAU/266. In the present suit, the Plaintiffs base their claim on adverse possession which was not one of the issues in the former suit.
17. It was further submitted that no evidence of an existing case between the parties herein over the same issues had been presented to sustain a claim of the matter being *sub judice*.
18. On the third issue, it was argued that the Plaintiffs and the estate of the deceased had been in open, continuous, exclusive and uninterrupted possession of the suit property since the year 1953. That the period of occupation being more than 12 years, a claim of adverse possession had been established against the registered owner of the suit property. Reliance was placed upon the decision of the court in **Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR** to buttress the above submission.
19. On the fourth issue, Counsel submitted that even though a judgment was obtained by the Defendant's deceased husband in 1985 for vacant possession, mesne profits and costs of the suit, they failed to enforce the said judgment within the statutory period of twelve (12) years. Counsel argued

that if a judgment was not enforced within the statutory limitation of 12 years, the rights of the decree-holder became extinguished as stipulated in Section 17 of the Limitation of Actions Act. Reliance was placed on the case of **M'Ikiara M'rinkanya & Another v Gilbert Kabeere M'mbijiwe [2007] eKLR** to support the submission.

20. Concluding his submissions, Counsel asserted that the Plaintiffs cannot be held to be in contempt of court orders which have been extinguished in accordance with Section 4 (4) of the Limitation of Actions Act. Counsel urged the court to allow the orders sought in the suit with costs against the Defendant.

### **Defendant's submissions**

21. In the Defendant's submissions dated 14<sup>th</sup> November 2025, Counsel identified four issues for determination namely: -

- a. *Whether the suit is res judicata;*
- b. *Whether the Plaintiffs are entitled to the prayers sought in the amended plaint;*
- c. *Whether the Defendant is entitled to the prayers sought in the counterclaim; and*
- d. *Who should bear the costs of the suit.*

22. On the first issue, it was submitted that the present suit is *res judicata* on account of **Nairobi HCCC No. 4055 of 1983 Joel Mulinge Malombe v Ndiku Wambua**. Counsel contended that the Defendant had demonstrated that there was a subsisting judgment against the estate of the Ndiku Wambua (Deceased) which barred him from entering or remaining upon the land known as Makueni/Mubau/266 after the 31<sup>st</sup> day of May, 1985. That no appeal was preferred against the judgment or the orders therein set aside.

23. Counsel contended that the judgment of the court delivered in 1985 created an indefeasible right in favour of the late Defendant's husband against the estate of the deceased. Urging the court to declare the present suit as *res*

*judicata*, Counsel relied on the decision of **E.T. v Attorney General & another [2012] KEHC 5506 (KLR)** to support his submission.

24. Submitting on the second issue, Counsel contended that the amendment to the initial plaint was done in bad faith and to defeat the ends of justice. That the claim of adverse possession cannot stand since it was an afterthought founded upon disobedience of a court judgment.

25. Counsel further submitted that the Plaintiffs had not based their claim of adverse possession upon the mandatory procedure provided for under Order 37 Rule 7 of the Civil Procedure Rules. It was argued that the Plaintiffs had not filed an originating summons and the required affidavit in support. Hence a claim of adverse possession cannot be considered within the amended plaint. To buttress this submission, reliance was placed upon the case of **Kosgei v Mugun [2025] KECA 1507 (KLR)**.

26. Submitting on the third issue, Counsel contended that the Plaintiffs had failed to comply with the judgment of the court delivered in 1985 restraining them from entering upon or remaining in the suit property. That the failure to comply with court orders amounted to contempt of court which has denied the Defendant from the fruits of the judgment of court. On the aspect of disobedience of court orders by the Plaintiffs, Counsel cited the decision of the Court of Appeal in **Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others [2018] eKLR**.

27. Lastly, it was submitted that the Defendant had proved her counterclaim against the Plaintiffs seeking orders for vacant possession and mesne profits since January 1987 up to date. Counsel urged the court to award costs of the suit and the counterclaim to the Defendant.

### **Analysis and Determination**

28. I have carefully considered the evidence adduced by the Plaintiffs and that of the Defendants regarding their respective claims. I have also considered the submissions by the parties. The issues which arise for determination are

firstly whether the Defendant can bring a fresh suit seeking to enforce a judgment which is statute barred. The second issue is whether the Plaintiffs can bring a claim for adverse possession based on a judgment against them which has become stale. The third issue is whether the Plaintiffs have locus standi to bring a suit on behalf of the estate of Wambua and on their own behalf. The fourth issue is whether the Plaintiffs' suit is res judicata.

**Whether the Defendant can bring a fresh suit seeking to enforce a judgment which is statute barred**

29. There was a judgment delivered in favour of Malombe the Defendant's husband on the 26<sup>th</sup> March, 1985. Wambua was ordered to vacate the suit property on or before 31<sup>st</sup> May, 1985. Wambua did not vacate the suit property by 31<sup>st</sup> May, 1985 as ordered. An eviction order was given against him on 5<sup>th</sup> March, 1986 but he was not evicted.

30. Section 4(4) of the Law of Limitation of Actions Act provides as follows:

**“An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due”.**

31. A judgment must be executed within 12 years of its delivery. If no execution is done within 12 years, the judgment becomes stale and is of no benefit to the decree holder. This was the holding in the case of **Danson Murithi Ayub –vs- Evanson Mithamo Muroko** where the judge quoted the decision of the Court of Appeal in **M'ikira M'rinkanya & Another –vs- Gilbert Kabeere M'mbijiwe (2007) eKLR (Supra)**.

32. The judgment of 26<sup>th</sup> March, 1985 having become stale and of no use to the decree holder after 12 years, the Defendant could not file an amended suit by way of counterclaim in 2023 seeking to evict the Plaintiffs or recover additional mesme profits.

**Whether the Plaintiffs can bring a suit for adverse possession based on a judgment which has become stale**

33. There is no contention that a judgment in favour of Malombe was delivered on 26<sup>th</sup> March, 1985. As at 26<sup>th</sup> March, 1997, the judgment had become stale and could not be executed. Wambua and his family continued to be on the suit property peacefully thereafter until his demise on 29<sup>th</sup> March, 2001. Malombe obtained his title on 24<sup>th</sup> December, 1982. The judgment which Malombe obtained on 26<sup>th</sup> March, 1985 became of no benefit to him as at 26<sup>th</sup> March, 1997. As at 29<sup>th</sup> March, 2001, Wambua had been on the suit property for four years from the time the judgement against him became stale. He had therefore not been in adverse possession for the statutory period of 12 years.

34. The Plaintiffs remained peacefully on the suit property from 26<sup>th</sup> March, 1997 until 26<sup>th</sup> March, 2009 when they acquired the suit property by way of adverse possession. As at 26<sup>th</sup> March, 2009, Malombe's title had been extinguished. There is no evidence of any attempt by Malombe to interfere with the possession of the Plaintiffs between 26<sup>th</sup> March, 1997 and 26<sup>th</sup> March, 2009.

35. In the case of **Ngala and 31 others –vs- Estate of Abdulla Mohamed Khalifan & 3 others (2025) KEELC Makori J** relied on the case of **Gabriel Mbui –vs- Mukindia Maranya (1993) eKLR** where it was held as follows:

**“It is possible to define ‘adverse possession’ more fully, as the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner of that land, the true**

**owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owner's enjoyment of the land for the purpose for which the owner intended to use it".**

36. There is no evidence that between 26<sup>th</sup> March, 1997 and 26<sup>th</sup> March, 2009, Malombe who was then alive made any attempt to remove the Plaintiffs from the suit property. In fact it would appear he had given up on the suit property. It is the Defendant who upon being registered as owner of the suit property by way of transmission attempted to threaten the Plaintiffs with eviction through self help. As at this time, Malombe's title had been extinguished by operation of law.

37. The Plaintiffs did not acknowledge Malombe's title at any given time. They denied ever going to the National Land Commission or any administration office over the suit property. This being the case and coupled with the fact that they brought their suit after the decree had become stale, they have acquired the title by adverse possession and the Defendant cannot accuse them of holding the land in contempt of any court order. If there were any court orders in favour of the Malombe or the Defendant, these orders became stale as at 26<sup>th</sup> March, 1997.

**Whether the Plaintiffs have locus to bring this suit on behalf of the estate of Wambua and on their own behalf**

38. While dealing with the second issue, I found that Wambua had not been on the land for 12 years with effect from the time the judgment against him became stale. The Plaintiffs cannot therefore claim on behalf the estate of Malombe but can claim on their own behalf having been in quiet possession until 26<sup>th</sup> March, 2009 when Malombe's title was extinguished. The Plaintiffs are therefore perfectly in order to claim adverse possession on their own behalf.

**Whether the Plaintiffs' suit is res judicata**

39.This is a unique case. The law of limitation prohibits execution of a judgment after expiry of 12 years. The law also prohibits filing of fresh suit seeking to execute a stale judgment. However in appropriate proceedings brought after a stale judgment, a party is allowed to file proceedings for adverse possession as in this case as long as one is able to prove the elements necessary to acquire land through adverse possession.

40.The judgment in favour of Malombe having become stale and unexecutable, this gave the Plaintiffs a new lease of life to bring a claim for adverse possession. It cannot therefore be argued that this suit is res judicata. I therefore find that this suit is not res judicata.

**Disposition**

41.It is clear from the above analysis that the Defendant’s counterclaim is a non starter. It is dismissed with no order as to costs given the unique circumstances of this case. On the other hand, I find that the Plaintiffs have proved their case against the Defendants on a balance of probabilities. I therefore allow the Plaintiffs’ claim in terms of prayers (b)(c) and (d). Each party shall bear their own costs because of the unique nature of this case.

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**HON. E. O. OBAGA**

**JUDGE**

**JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 26<sup>TH</sup> DAY OF FEBRUARY, 2026.**

**IN THE PRESENCE OF:**

Mr. Munyasya for Defendant.

Mr. Odero for Mr. Mutua Makau for Plaintiff.

Court assistant Steve Musyoki