



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Salim v Chifuka & 9 others (Environment and Land Case 207 of 2014)
[2026] KEELC 1197 (KLR) (26 February 2026) (Judgment)**

Neutral citation: [2026] KEELC 1197 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE 207 OF 2014
YM ANGIMA, J
FEBRUARY 26, 2026**

BETWEEN

MOHAMED ALI SALIM PLAINTIFF

AND

MWALIMU MWABAYA CHIFUKA 1ST DEFENDANT

PASTOR EZEKIEL AMBELE 2ND DEFENDANT

MARY MALILA 3RD DEFENDANT

JOYCE KANINI N'THINGU KANUI 4TH DEFENDANT

ROSEMARY 5TH DEFENDANT

LAVI MKUSI 6TH DEFENDANT

PETER 7TH DEFENDANT

BEATRICE MBINDYO 8TH DEFENDANT

ISAAC ALILA 9TH DEFENDANT

GEORGE 10TH DEFENDANT

JUDGMENT

A. Plaintiff's claim

1. By a plaint dated 06.07.2010 the plaintiff sued the defendants seeking the following relief;
 - a. A permanent injunctive order to restrain the defendant from entering into and remaining on and upon the plaintiff's property known as Plot No.2403/VI/MN or in any manner trespassing and/or committing wastage thereon.



- b. A mandatory injunction directed at each of the defendants to demolish and remove all of their structures erected and standing on and upon the plaintiff's property known as plot no. 2403/VI/MN and in default the plaintiff's to undertake the same at the cost and expense of the defendants.
 - c. Damages for trespass and loss suffered.
 - d. Costs of this suit and interest thereon and those of (c) above at the court rates.
2. The plaintiff pleaded that at all material times he was the registered proprietor of plot No. 2403/VI/MN (the suit property) located at Port Reitz within Mombasa County. He pleaded that the defendants had wrongfully encroached on the suit property and settled there as squatters thereby preventing him from using and enjoying quiet possession of the property.
 3. It was the plaintiff's case that the defendants had erected both permanent and semi-permanent structures on the suit property and that in spite of issuance of notices to vacate they had failed to vacate the suit property thereby rendering the suit necessary.

B. Response by the 2nd, 3rd, 7th and 9th defendants

4. The 2nd, 3rd, 7th and 9th defendants filed a defence and counter-claim dated 23.07.2010. By their defence they denied all the material allegations in the plaint and put the plaintiff to strict proof thereof. They denied the plaintiff's ownership of the suit property and that they had wrongfully encroached upon the suit property.
5. By their counter-claim, they pleaded that they had been in possession of the suit property since 1970 and had erected their dwelling houses thereon. They pleaded that they had consequently acquired adverse possession of the suit property and that the plaintiff was holding title thereto in trust for them.
6. As a result, they sought the following reliefs in their counter-claim;
 - a. As a declaration that the 2nd, 3rd, 7th and 9th defendants are entitled to be registered as proprietors of the land on the portions of which they occupy under adverse possession.
 - b. An alteration of the land register by registration of the 2nd, 3rd, 7th and 9th Defendants as proprietors of the land. An order that the said portion be registered forthwith.
 - c. Costs of the suit and the Counter claim.
 - d. Any other relief.

C. Response by the 4th and 8th defendants

7. The record shows that the 4th and 8th defendants filed a statement of defence and counter-claim dated 23.07.2010 and amended on 04.02.2025. They similarly denied all the material allegations contained in the plaint and put the plaintiff to strict proof thereof.
8. By their counter-claim, they conceded that the plaintiff was the registered owner of the suit property but contended that they had acquired adverse possession thereof since they had been in occupation thereof since they had been in occupation since 1972. They contended that for that reason the plaintiff was holding title to the suit property in trust for them.
9. As consequence, they sought the following reliefs in their counter-claim;



- a. A Declaration that the 4th and 8th defendants are entitled to be registered as proprietors of the land.
- b. Order of alteration of the land register by registration of the 4th and 8th defendants as proprietor of the land.
- c. Costs of the suit.
- d. Any other relief.

D. Response by the rest of the defendants

10. There is no indication on record of the 1st, 5th, 6th and 10th defendants having filed an appearance or defence to the action.

E. Plaintiff's rejoinder

11. The plaintiff filed a reply to defence and defence to counter-claim dated 30.04.2025 in response to the pleadings filed by the defendants who defended the suit. By his reply to defence, the plaintiff joined issue with the defendants on their defence.
12. By his defence to the counter-claim, the plaintiff denied that the defendants had acquired adverse possession of the suit property. He pleaded that the defendants were trespassers who entered the suit property unlawfully on 31.05.2001. He denied that he was holding the suit property in trust for the defendants and prayed for the dismissal of their defences and counter-claims.

F. Trial of the action

13. At the trial hereof, the plaintiff testified on his own behalf as the sole witness. He adopted that contents of his witness statement filed on 14.12.2011 as his evidence in chief and produced the documents in his respective list and further list of documents as exhibits.
14. The record shows that the defendants who defended the suit called 4 witnesses and closed their respective cases. Among the defendants who testified at the trial were the 2nd, 3rd and 4th defendants. The defence witnesses similarly adopted the contents of their respective statements as their evidence in chief and produced the documents in their lists of documents as exhibits in a bid to demonstrate their claim for adverse possession.

G. Directions on submissions

15. Upon conclusion of the hearing the parties were given timelines within which to file and exchange their respective submissions. The record shows that the plaintiff filed submissions dated 12.01.2025 whereas the 2nd, 3rd, 7th and 9th defendants filed submissions dated 16.01.2026. The rest of the defendants had not filed any submissions by the time of preparation of the judgment.

H. Issues for determination

16. The court has perused the pleadings, evidence and documents on record. The court is of the view that the following are the key issues which arise for determination herein;
 - a. Whether the plaintiff has proved his claim against the defendants.
 - b. Whether the defendants have proved their counter-claim against the plaintiff.
 - c. Whether the plaintiff is entitled to the reliefs sought in the suit.



- d. Whether the defendants are entitled to the reliefs sought in their counter-claim.
- e. Who shall bear costs of the action.

I. Analysis and determination

Whether the plaintiff has proved his claim against the defendants

17. The court has considered the material and submissions on record on this issue. There is no doubt that the plaintiff is the registered proprietor of the suit property. The plaintiff tendered documentary evidence to demonstrate his ownership and the defendants even conceded in their respective statements of defence that the plaintiff was the registered owner. The defendants, however, contended that they had acquired adverse possession of the suit property due to longevity of occupation and their activities on the suit property.
18. The court is thus of the view that as the registered proprietor of the suit property the plaintiff is entitled to immediate possession thereof and to enjoy all the rights which come with such ownership unless the defendants are able to demonstrate their claim for adverse possession.
19. Although the defendants who defended the suit filed a counter-claim for adverse possession, the material on record shows that only the 2nd, 4th and 8th defendants attended court to prosecute their counter-claim. The rest of the defendants did not attend court for hearing hence they were not cross-examined on their counter-claim.
20. The elements of adverse possession were summarized in the case of *Kasuve vs Mwaani Investments Ltd & 4 Others* [2004] 1 KLR 184 as follows;

“....and in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, *Wanja vs Sakwa No.2* [1984] KLR 284. A title by adverse possession can be acquired under the *Limitation of Actions Act* for part of the land....”
21. Similarly, in the case of *Chevron (K) Limited –vs- Harrison Charo Wa Shutu* [2016] eKLR it was held, inter alia, that:

“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.”
22. The plaintiff’s evidence was that he bought the suit property in 2000 from her aunt at a time when it was just vacant and bushy. He denied that any of the defendants entered the property in the 1970s. He denied that there were 20 houses on the property. He did not, however, state the year when the



- defendants allegedly entered the suit property either in his pleadings or evidence in chief. In paragraph 4 of the pleadings, he simply pleaded that the defendants were served with notices to vacate the suit property “since 31.05.2001”.
23. The court has noted from the evidence of the 4th defendant Joyce Nthungu that she claimed to have entered the suit property in 1970. Her evidence was supported by that of her daughter who testified as DW-2. Her evidence was that she entered the suit property with her mother when she was about 6 years of age and that she was now 59 years old and that she was still residing there.
 24. The court has perused the letter dated 31.05.2001 from the inspectorate department of the defunct Municipal Council of Mombasa (the council). It was a general notice addressed to all squatters on plot No. 2403/VI/MN asking them to demolish their structures from the suit property for having constructed them without approval from the council and the consent of the plot owner.
 25. The material on record also shows that subsequent surveys by the plaintiff’s surveyor showed that both permanent and semi-permanent structures existed on the suit property one of which included a church. The material on record further shows that upon the plaintiff’s complaint or instigation the council issued individual notices to the defendants calling for removal of the structures on the suit property in 2008. It would appear the notices went unheeded thereby forcing the plaintiff to file the instant suit in 2014.
 26. The court is satisfied on a balance of probabilities that the 4th defendant entered the suit property in the 1970’s and resided there with her family. The court believes the evidence of both the 4th defendant and her daughter (DW2) that the latter is still in occupation. The court found both DW1 and DW2 to be credible witnesses. The plaintiff’s own documents indicate that there already permanent and semi-permanent houses on the suit property as far back as May 2001. Permanent houses are not constructed overnight. It normally takes time to construct them. The court is unable to believe the plaintiff’s claim that the suit property was vacant in 2000 when he bought it and that the defendants houses appeared suddenly within one year of purchase.
 27. The court also believes the evidence of the 8th defendant, Beatrice Mbidyo, that she entered the suit property around 1972. It was her evidence that she had 3 children who were all born on the suit property and that the eldest was about 39 years old. The court believes her evidence as she appeared to be a candid and truthful witness.
 28. The court is satisfied on the basis of the material on record that the 4th and 8th defendants were not in possession with the consent of the owner. The court is satisfied that they have always been in open, continuous and exclusive possession of their portions and there is no indication that their possession has ever been interrupted. The court takes the view that the giving of a notice to vacate does not constitute interruption of possession in the legal sense.
 29. In the case of *Githu vs Ndeete* [1984] KLR 776 at page 780, it was held, inter alia, that;

“...time ceases to run under the *Limitation of Actions Act* either when the owner asserts his rights or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land; see *Cheshire’s Modern Law of Real Property*, 11th Edition at page 894. In my view, the giving of a notice to quit cannot be an effective assertion of right for the purpose of stopping the running of time under the *Limitation of Actions Act*....”
 30. The court is, however, not satisfied that the 2nd defendant has a valid counter claim for adverse possession for at least two reasons. First, he denied at the trial that his church was erected on the suit



property and contended that it was in an adjacent council workshop. It would thus follow that one cannot claim adverse possession of land of which he is not in occupation. Second, it was his evidence during cross-examination that the church entered the land in 1999 or 2000. It would thus follow that by the time the instant suit was filed in 2010 the statutory minimum period of 12 years had not expired.

31. As indicated before, the 2nd, 3rd, 7th and 9th defendants did not testify at the trial in support of their counter-claim. The court finds that their counter-claim has not been proved on a balance of probabilities as required by law. The mere fact that the successful defendants mentioned some of them as being their neighbours would not be sufficient to prove all the element of adverse possession in relation to them.

Whether the defendants have proved their counter-claim against the plaintiff

32. As indicated before, the court is satisfied that the 4th and 8th defendants have proved their counter-claim against the plaintiff on a balance of probabilities. However, the rest of the defendants who defended the suit have not established their counter-claim for adverse possession for reasons given in the judgment.

Whether the plaintiff is entitled to the reliefs sought in the suit

33. The court has found and held that the plaintiff has demonstrated his claim of ownership of the suit property. The court has found that the plaintiff is entitled to immediate possession and enjoyment of the suit property save as against the defendants who have established their counter-claim for adverse possession. The court has also found that only the 4th and 8th defendants have proved their counter-claim against the plaintiff. As such, the plaintiff is entitled to the reliefs sought as against the rest of the defendants.
34. The court has noted that one of the reliefs the plaintiff sought was a permanent injunction to restrain the defendants from entering, remaining or trespassing upon the suit property. The court is of the view that the unsuccessful defendants have already committed all those acts and they are still in possession. A restraining injunction would be ineffectual in redressing a violation which has already taken place. It cannot undo what has already been done because it looks into the future and not the past. See *Mwakaki Investments Co. Ltd vs David Gikaria & 3 Others* [2021] eKLR. As a result, the court is not inclined to issue the permanent injunction sought.
35. The court is, however, inclined to grant the mandatory injunction sought directing the unsuccessful defendants to remove their structures from the suit property and to restore the portions of the property they occupy to the plaintiff. The court has noted that the plaintiff did not seek an eviction order against the defendants. The court is of the view that a demolition order without an accompanying eviction order would may not conclusively determine the dispute.
36. The court takes the view that there would be no need to require the plaintiff to initiate fresh proceedings for an eviction order based on the same cause of action. It would be contrary to the overriding objective of the *Civil Procedure Act* to prolong the litigation beyond the instant action. As was held in *Gulam Maria Noordin v Charo Karisa* [2005]eKLR a court may grant such a remedy in order to render substantive justice in appropriate cases.
37. The plaintiff also sought general damages for trespass to land against the defendants. In his written submissions, the plaintiff sought a sum of Kshs.5,000,000/= as general damages. The court agrees with the plaintiff's submission that trespass to land is a tort which is actionable per se. The land owner need not prove to have suffered any particular loss or damage in order to be awarded damages.



38. In the case of Kamoye vs Tipango & 2 Others (Environment & Land Case E011 of 2023) (2024) KEELC 4227 (KLR) (14 May 2024) (Judgment) the award of general damages was considered as follows;

“ 17. On the issue of general damages for trespass, the issue that arises is the measure of it. In the case of Philip Ayaya Aluchio v Crispinus Ngayo [2014] eKLR, it was held as follows:

“The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage? It has been held that the measure of damages for trespass is the difference in the value of the plaintiff’s property immediately after the trespass or the costs of restoration, whichever is less See Hostler – VS – Green Park Development Co. 986 S. W 2d 500 (No. App. 1999).”

18. In the case of Duncan Nderitu Ndegwa v KP & LC Limited & Another (2013) eKLR, P. Nyamweya, J held that: -

“...once a trespass to land is established it is actionable per se, and indeed no proof of damage is necessary for the court to award general damages. This court accordingly awards an amount of Kshs 100,000/= as compensation of the infringement of the Plaintiff’s right to use and enjoy the suit property occasioned by the 1st and 2nd Defendants trespass”

19. From the evidence on record, there is nothing that can be used to enable this court determine the actual damage and/or measure of the damage or loss that the plaintiff suffered for him to be compensated for the loss. However, in relying on the above authorities, I find the plaintiff has suffered damages as a result of the defendants’ unlawful acts of trespass and award him Kshs. 200,000/= as general damages.”

39. Bearing in mind the small size or portion of the suit property the defendants may be occupying and the period of their occupation the court is of the view that a sum of Kshs. 200,000/= as general damages shall adequately compensate the plaintiff for violation of his property rights.

Whether the defendants are entitled to the reliefs sought in the counter-claim

40. The court has already found and held that only the 4th and 8th defendants have proved their counter-claim for adverse possession. It would therefore follow that they are entitled to some reliefs but not in the form and manner sought by them. The 4th and 8th defendant are not entitled to the entire suit property hence they cannot be registered as proprietors directly. They are only entitled to the specific portions on which they have built and occupied. Some form of sub-division would have to be undertaken to excise their portions from the suit property before such sub-divisions could become registrable. The court shall, therefore, frame appropriate remedies for that purpose.

Who shall bear costs of the action

41. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason,



directs otherwise. See Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287. In view of the fact that the plaintiff has partly succeeded and the defendants have also partly succeeded on the counter-claim, the court is of the opinion that each party should bear his own costs of both the suit and counter-claim.

J. Conclusion and disposal orders

42. The upshot of the foregoing is that the court finds that the plaintiff has proved his claim as against the 1st, 2nd, 3rd, 5th, 6th, 7th, 9th and 10th defendants only. The court also finds that the 4th and 8th defendants have proved their counter-claim for adverse possession to the required standard. As a consequence, the court makes the following disposal orders;
- a. Judgment be and is hereby entered for the plaintiff against the 1st, 2nd, 3rd, 5th, 6th, 7th, 9th and 10th defendants in the following terms;
 - i. A mandatory injunction is hereby granted directing the defendants to demolish and remove their structures standing on plot No. 2403/VI/MN within 60 days from the date hereof in default of which the plaintiff shall undertake the exercise all the defendants' cost.
 - ii. The defendants shall give vacant possession of the portions of the suit property they occupy within 60 days from the date hereof in default of which they shall be forcibly evicted.
 - iii. The plaintiff is hereby awarded general damages of Kshs. 200,000/= for trespass to land.
 - b. The plaintiff's claim against the 4th and 8th defendants is hereby dismissed.
 - c. Judgment be and is hereby entered for the 4th and 8th defendants on their counter-claim in the following terms;
 - i. A declaration is hereby made that the 4th and 8th defendants have acquired the respective portions they occupy on plot no. 2403/VI/MN on account of the doctrine of adverse possession.
 - ii. The county surveyor Mombasa shall cause the portions occupied by the 4th and 8th defendants on plot no. 2403/VI/MN to be excised therefrom at the latter's cost and expense.
 - iii. That upon the said excision the land registrar shall cause the 4th and 8th defendants to be registered as proprietors of their respective portions.
 - iv. The plaintiff shall sign all the necessary forms, documents and instruments to facilitate the said excision and registration in default of which the Deputy Registrar of the court shall do so on his behalf.
 - d. Each party shall bear his own costs of the suit and counter-claim.

It is so decided.

JUDGMENT DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 26TH DAY OF FEBRUARY, 2026.

.....



Y. M. ANGIMA

JUDGE

In the presence

Gillian Court Assistant

Mr. Otieno for the plaintiff

Mr. Akanga for the 2nd, 3rd, 7th and 9th defendants

No appearance for the 1st, 5th, 6th and 10th defendants

