

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
E.L.C ORIGINATING SUMMONS NO. E029 OF 2025
**IN THE MATTER OF AN APPLICATION FOR ADVERSE
POSSESSION UNDER ORDER 37**

**RULE 7 (1) (2) READ WITH S. 38 OF THE LIMITATION OF
ACTIONS ACT CAP 21 AND THE REGISTERED LANDS ACT
CAP 300 LAWS OF KENYA AS READ WITH CHAPTER 5 S 60
(1) (a) OF THE CONSTITUTION OF KENYA 2010.**

BETWEEN

**SUSAN MWITA SAMWEL (Suing as Admin of the Estate of
MWITA SAMWEL MAITARIA (Deceased).....
APPLICANT**

VERSUS

**JOHN MWITA RIOBA.....
RESPONDENT**

JUDGMENT

Introduction

1. This suit commenced by way of Originating Summons brings out, albeit faintly, a glimpse of the intersection between justice as given in the conventional legal system and the traditional or alternative justice system (AJS). While, for reasons to be given when the court analyses the evidence of the said elders, the court is not basing its findings on the determination the elders acting in their cultural traditional justice system arrived at, I am

of the view that some of the traditional justice systems are swift and effective, hence good for use in our societies. The only conditions to be observed is that they need to respect human rights and be in line with both the constitution and the law, and should not be repugnant to justice and morality.

2. If the elders, for instance, test the truthfulness of willing disputants by asking or requiring each of them “*aruke hiyo kitu*”, interpreted, “he jumps the thing”, and he who is saying the truth survives but the liar faces the consequences prescribed (in advance), as was testified in the instant case, why should the outcome not be used or adopted as a settlement of the willing parties? It is a stark contrast to what this Court has often come across: witnesses who swear or affirm to say the truth and nothing but the truth, only for them to spew lies which can only be unearthed by extremely good cross examination. They do this for reason that many no longer treat an oath with the sacredness and importance attached to it because the consequences of departure from the truth are not immediately felt. It is sad!

Brief facts

3. The Plaintiff brought this originating summons dated 21st July 2025 by which she prayed for ORDERS:-

1. That this Honourable Court does declare that the Applicant has acquired adverse possession of all that land measuring 1 acre out of Land Parcel No. NYABASI/BOMERANI/352 being the portion that her late Husband Mwita Samwel Maitaria (deceased) purchased from the Respondent in the year 2004 and she has been in continuous, uninterrupted occupation and or possession of the said portion for over 12 years, that is to say since the year 2004.
2. That this Honourable Court be further pleased to order that Land Parcel No. NYABASI/BOMERANI/352 to be subdivided and that the portion measuring 1 ACRE be delineated, given a new number and be registered in the names of the Deceased herein MWITA SAMWEL MAITARIA and this Hon. Court do Order the Respondent to sign all necessary documents to facilitate the Registration of the Deceased herein MWITA SAMWEL MAITARIA as the owner of the 1 ACRE that was purchased in the year 2004. In the

alternative the Deputy Registrar of this Hon. Court do sign the necessary transfer documents to effect the registration of the Deceased herein MWITA SAMWEL MAITARIA as the registered owner of the 1 ACRE that was purchased in the year 2004 from the Respondent.

3. That this Honourable Court do issue a Permanent Injunction restraining the Respondent from interfering with the Applicant's enjoyment and quiet possession of the 1 acre that was Purchased by the Deceased herein Mwitā Samwel Maitaria in the year 2004 on land parcel No. NYABASI/BOMERANI/352 from the Respondent.
4. That this Honourable Court do issue an Order directing the Respondent to pay the Applicant Kshs. 115,900/= being the value of the Applicants crops that were destroyed by the Respondent on Land Parcel No. NYABASI/ BOMERANI/ 352 in the year 2018 plus Interest on the said amount at Courts Rates from the year 2018 to date.
5. Costs of this Originating Summons be borne by the Respondent.

6. Any other relief this Honourable Court may deem fit to grant in the circumstances.
- 4.** The Summons was based on the grounds that the Applicant has been in uninterrupted occupation of 1 ACRE of land parcel No. NYABASI/ BOMERANI/ 352 for over 12 years, that is to say since the year 2004; and that the occupation has been open and known by the Respondent.
- 5.** It was supported by the Affidavit sworn by Susan Mwita Samwel on 21st July 2025. She deposed that she was the lawful wife (*sic*) of SAMWEL MWITA MAITARIA. She annexed and marked SM 1 a copy of Affidavit of Marriage. She added that her husband died in the year 2019. She annexed and marked SM 2 a copy of Death Certificate. Further, she obtained Letters of Administration Ad Litem over the estate of her late husband. She annexed and marked SM 3 a copy of Letters of Administration Ad Litem.
- 6.** She deposed further that in the year 2004 her late husband bought 1 acre of land out of Land Parcel No. NYABASI/ BOMERANI/ 353 from the Respondent. She annexed and marked SM4 (a) and (b) copies of the sale of land Agreement.

She added that her husband immediately entered into occupation of the 1 acre and planted crops on the entire and started farming thereon. He continued farming and planting crops on the one acre up to the year 2018 when he fell seriously ill. During that in she was constantly by his side in various hospitals. It was then the Respondent took advantage of their absence and destroyed their crops valued at Kshs. 115,900/= . She annexed and marked SM 5 a copy of the Report by the Ward Agricultural Extension Officer, Nyabasi West Ward. It was to show the crop damage.

- 7.** Further, prior to the actions of the Respondent of damaging our crops in the year 2018, she and her late husband were in open, continuous and un interrupted occupation of the 1 Acre they had purchased. That was over 12 years, from the year 2004 up to 2018.
- 8.** She added that in the year 2020 after the death of husband the Respondent started taking advantage of her status as a widow and started harassing and intimidating her to vacate from his land. He claimed that he had leased the land to her late husband and wanted her to vacate.

9. Further, after the Respondent threatened to evict her from the one acre she went to her Advocates who wrote to him a Demand Letter instructing him to cease from interfering with her land. She annexed and marked SM 6 a copy of the Demand Letter. The Respondent still persisted in issuing threats. She then reported that incident to the Area Chief and Assistant Chief. The Chief asked the Respondent to stop his cruel and illegal activities. She annexed and marked SM 7 a copy of Letter from the Assistant Chief of Nyaitara Sub Location. Further, she went ahead and took the Respondent to our Clan Elders. The Respondent agreed before the Clan elders that he, indeed, had sold the one acre to her late husband. However, he was still adamant that he wanted her to vacate so that he could resale the land to someone else. She annexed and marked SM 8 a copy of Letter from the Secretary Council of Elders. Again, when he insisted on evicting her she reported him to the Police. He was arrested and Charged and Convicted in KEHANCHA SPM CRM CASE NO. E542 OF 2022. She annexed marked SM 8 is a copy of the Judgment. She added that the Respondent started

threatening and harassing her in the year 2020 since she was now a widow.

10. She deposed further that she had been advised by her counsel that as a result of her continuous and uninterrupted occupation on suit property for a period exceeding 12 years, she had acquired it by way of adverse possession. She prayed to be declared to have acquired the one acre by adverse possession.

Evidence

11. The plaintiff testified as PW1. She adopted the deposition in her Affidavit sworn on 21st July 2025. This evidence has been given in the previous paragraphs immediate above.

12. In support of her claim She also produced, in evidence, the originals of the following ten documents, listed her List of Documents dated 21st July 2025, except the Report of the Ward Agricultural Officer which was a copy. The documents were tendered as exhibits as follows:

1. **PExhibit** Affidavit of Marriage
2. **PExhibit** Death Certificate
3. **PExhibit** Letters of Administration Ad Litem

4. **PExhibit** Sale of Land Agreement dated 12.2.2004
 5. **PExhibit** Sale of Land Agreement dated 8.3.2004
 6. **PExhibit** Certificate of Official Search for L.R. NO. NYABASI/ BOMERANI/ 353
 7. **PExhibit** A copy of the Report by Ward Agricultural Extension Officer dated 22.3.2022
 8. **PExhibit** Demand Letter
 9. **PExhibit** Letter from the Assistant chief dated 6.4.2022
 10. **PExhibit** Letter from the Secretary Council of Elders dated 12.9.2023.
- 13.** In her oral testimony, the applicant stated that she stated that her late husband had bought the land in 2004. She stated that when her husband fell ill, in 2018, the Defendant who had sold the land to them chased her and her children from the land. She started following up the issue with the elders and the Administration, including the Area Chief and even the traditional elders. The Defendant admitted to selling the land to her but asked her to give him time to put her back into occupation, but it has taken a while hence she decided to sue. She stated that she had resided on the land for over 13 years

since 2004 when they bought it before the defendant began to attempt to take it in 2017. She left the land in 2018.

14. PW1 testified further that before she sued, she Resorted resolving the by alternative justice system through to the administration and be traditional or cultural processes she added that she first raised the complaint before the Area Chief and the District Officer before whom the Defendant denied ever selling the land to her husband. Then she raised it before the “*Wazee wa kimila ya kinyumbani*”, that is to say, “the community elders who usually administer oaths.” She stated that in their system of seeking the truth, they usually summon the disputants and ask them to deny or accept the fact in issue at the “oath” of a curse if one denies the truth. She added that the Elders summoned both her and the defendant.

15. Further, that during the sitting with the elders, both she and the Defendant were given the “thing” to hold. When he was required to jump over the “thing” he refused. Later, he agreed that he sold the land to her husband. Then the Elders wrote a Report dated 12th September 2023 which she presented as P. Exhibit 10. It was written by the Secretary to the Elders

Council. She sought to rely on in evidence. At the close of her case and that of the Defendant, the Plaintiff did not wish to submit on the evidence tendered hence the matter was fixed for judgment.

16. The Plaintiff closed her case. She did not submit.

Issues, analysis and determination

17. This court considered the pleadings in this originating the evidence that us tendered and it is of the view that the issue for determination is basically whether the plaintiff has proved her case on a balance of probabilities. Attendant to it is who to bear the costs of the Originating Summons.

18. 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 a party claiming the land proves the elements thereof. These elements are stipulated in the Limitation of Actions Act.

19. Section 7 of the 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.”

20. 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.”

21. 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.”

22. These provisions have been expounded by a number of authorities. The first one this Court wishes to be 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.

23. 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.

24. This court thus needs to know whether the plaintiff has tendered evidence to prove the *nec vi, nec clam, nec precario* principle. In **Abdulkhall 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.”*

25. From the clear analysis of the evidence produced, as exhibits, **PExhibit 1** the Affidavit of Marriage, **PExhibit 2** the Death Certificate, **PExhibit 3** the Letters of Administration Ad

Litem, **PExhibit 4** the Sale of Land Agreement dated 12.2.2004, **PExhibit 5** the Sale of Land Agreement dated 8.3.2004, **PExhibit 6** the Certificate of Official Search for L.R. NO. NYABASI/ BOMERANI/ 353, **PExhibit 7** a copy of the Report by Ward Agricultural Extension Officer dated 22.3.2022, **PExhibit a** Demand Letter, **PExhibit** a Letter from the Assistant chief dated 6.4.2022, it is clear to me that the Plaintiff has proved the case on a balance of probabilities.

26. For as many years as sixteen years, that is to say from the year 2004 to the year 2016, the title of the Defendant got extinguished for the reason that he was not in possession of the suit and hence could not, by virtue of Section 7 as read with 13 of the Limitation of Actions Act. Thus, whether the Defendant reentered the land or not he did not have any rights over the same. His rights over the land had been extinguished hence he did not merit to get back. Besides, as soon as he tried to reenter it without the permission of the Plaintiff she presented the complaint to the various authorities, and he has since not peacefully reentered it. it cannot therefore be said

that the plaintiff and her husband lost the land by virtue of reentry of the Defendant as he did not.

27. The evidence of PW1 that her late husband bought the land in 2004 and she and him occupied the same until he fell ill, in 2018, and the Defendant chased her and her children from the land. She followed up the issue with the elders and the Administration, including the Area Chief and even the traditional elders.

28. I will not rely on the elder's decision which was produced as **PExhibit** Letter from the Secretary Council of Elders dated 12.9.2023. this is because it is not disclosed in evidence that the proceedings respected human rights, dignity and the law.

29. Regarding the claim for the crops destroyed, this court is of the view that the claim is coming too late in the day, past the limitation of time. It is therefore rejected.

30. The upshot is that the Plaintiff has proved his case on a balance of probabilities. This court therefore enters judgment for the Plaintiff against the Defendant as follows:

a) That this Honourable Court hereby declares that the Applicant has acquired adverse possession of all that

land measuring 1 acre out of Land Parcel No. NYABASI/ BOMERANI/352 being the portion that her late Husband Mwita Samwel Maitaria (deceased) purchased from the Respondent in the year 2004.

b) That this Honourable Court be further orders that Land Parcel No. NYABASI/BOMERANI/352 to be subdivided, and that the portion measuring 1 ACRE or thereabouts that the Plaintiff and her husband occupied since the year 2004 surveyed and measured at the cost of the Plaintiff herein, delineated, and given a new number, and be registered in the names of the deceased herein SUAN MWITA SAMWEL.

c) The Defendant to execute within 30 days the transfer documents and the mutation form upon the land being surveyed, to facilitate the registration of the SUSAN MWITA SAWEL as owner of the 1 ACRE, in default of which the Deputy Registrar of this Court to sign them in that behalf.

d)That this Honourable Court hereby issues a Permanent Injunction restraining the Respondent, his agents, servants, assigns and anyone claiming through him, from interfering with the Applicant's enjoyment and quiet possession of the 1 acre or thereabouts.

e)The costs of this Originating Summons be borne by the Respondent.

31. Orders accordingly.

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

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

From 12:27 PM, in the presence of,

Achola Adv. holding brief for the Plaintiff

No. Appearance for Defendant