



**Fenesi (Suing as herself and as a Representative of the Estate of Abdalla Salim Fenesi) v Kariuki & another (Environmental and Land Originating Summons 013 of 2023) [2025] KEELC 5852 (KLR) (28 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5852 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 013 OF 2023**

**LL NAIKUNI, J  
JULY 28, 2025**

**BETWEEN**

**RIZIKI ABDALLA FENESI ..... APPLICANT  
SUING AS HERSELF AND AS A REPRESENTATIVE OF THE ESTATE OF  
ABDALLA SALIM FENESI**

**AND**

**VERONICA NGENDO KARIUKI ..... 1<sup>ST</sup> RESPONDENT  
THOMAS KILONZO MUTEKI ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**I. Preliminaries**

1. The Judgment before this Honourable Court regards the Originating summons dated 6<sup>th</sup> December 2023 and filed in court on 20<sup>th</sup> December 2023. It was instituted by Riziki Abdalla Fenesi the Plaintiff/Applicant herein against Veronica Ngendo Kariuki and Thomas Kilonzo Mutemi the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents herein.
2. The service of the Originating summons and the Summons to Enter Appearance upon the Defendant was effected through substituted means pursuant to the leave of Court granted on 26<sup>th</sup> July 2024. An advertisement was published in one of the local dailies with a wide national circulation – “The Standard Newspaper” on Wednesday June 25<sup>th</sup> 2024. A six (6) Paragraphed Affidavit of Service dated 13<sup>th</sup> June 2024 attaching an extract of the advertisement was filed to that effect. The Respondent did not however file any response to the suit despite service.
3. Subsequently, on 6<sup>th</sup> February 2025 the court pursuant to the provisions of Order 10 Rules 4,9 and 10 of the Civil Procedure Rules 2010, set down the matter for formal proof with directions that all



witnesses adduce evidence physically through “Viva Voce”. The land surveyor was allowed to adduce evidence and to produce his land survey report by virtual means.

## II. The Plaintiff/Applicant’s case

4. The Plaintiff claimed to be entitled to the ownership of the Parcel no Kwale/Diani Settlement Scheme/196 subdivided into Kwale/Diani Settlement Scheme 855, 856, 857, 858 and 859 by virtue of acquiring a title through the doctrine of land adverse possession. (Hereinafter referred to as “The Suit Land”)
5. The Plaintiff/Applicant sought for the following orders before court:-
  - a. The Applicant herein be declared the rightful owner of the suit properties Kwale/Diani Settlement Scheme/196 subdivided into Kwale/Diani Settlement Scheme 855, 856, 857, 858 and 859 by adverse possession.
  - b. An order do issue to the registrar of Land Kwale to strike out the name of the respondents from the register and subsequently enter the names of the applicant as the sole proprietor of the suit property Kwale/Diani Settlement Scheme/196 subdivided into Kwale/Diani Settlement Scheme 855, 856, 857, 858 and 859.
  - c. A permanent injunction do issue restraining the respondents whether by themselves, their servants, representatives, agents and/or assigns howsoever from dealing with, entering in, obstructing any activities on, interfering with the Applicant’s agents and or representatives subdividing, demolishing any structures on selling, alienating, occupying and/or in any other way interfering with the suit properties
  - d. That costs of this suit be provided for.
6. The suit was premised on the 17 Paragraphed supporting affidavit of Riziki Abdalla Fenesi sworn on 6<sup>th</sup> December 2024 with five (5) annexures marked as “RAF- 1 to 6” where the Plaintiff averred that: -
  - a. Her late father Abdalla Salim Fenesi had been in occupation and possession of the suit property before the demarcation of the property known as Kwale/Diani Settlement Scheme/196 subdivided into Kwale/Diani Settlement Scheme 855, 856, 857, 858 and 859 in the year 1977 upto and until his demise in 2001
  - b. The deponent stated that she was born on the suit properties and took over the same as her own. That she currently runs small businesses on the properties and has planted some trees on the same.
  - c. Her occupation of the suit properties was corroborated by the occupation survey report of 2006 where the officials from the Ministry of Land confirm that they found the deponent together with her family in occupation of the suit property.
  - d. It was deposed further that through a search the Applicant learnt that the 1<sup>st</sup> Respondent herein made an entry into the green card of the suit property as owners through a lease from the government in the year 1996
  - e. The Applicant stated that having been in occupation of her land since her birth and that her late father was an original occupant of the suit properties and that the same has never been sold or transferred to any other person.



- f. According to the deponent, it was shocking to establish that the suit property had been subdivided and sold by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent as all her life she had never seen even a surveyor on the property conducting a sub division.
- g. The possession of the Applicant had been for over 12 years and the suit land had been open, continuous and uninterrupted and thus adverse to the titles of the Respondents.
- h. The rights of the Respondents over the property have been extinguished by effluxion of time and hence this suit.

### **III. Hearing and Evidence**

7. On 6<sup>th</sup> February 2025, the Plaintiff called her first witness PW - 1 who testified in Court as follows:

#### **A. Examination in Chief of PW - 1 by Mr. Makowade Advocate.**

8. PW – 1 was sworn and testified in Kiswahili language. He identified herself as Riziki Abdalla Fenesi. She was a holder of the Kenyan National Identity card bearing all the details as noted by Court. She stated that she worked at a restaurant as a Cook. She lived at a place called Mokwani at Ukunda of the County of Kwale. That she was before court for the suit property Kwale/Diani Settlement Scheme/196 sub - divided into Kwale/Diani Settlement Scheme 855, 856, 857 858 and 859.
9. The witness stated that her father called Abdalla Salim Fenesi. He had been in occupation of the suit property from the year 1977. That when her late father passed on in the year 2001 he was buried on the land. Upon his death, she took over the land. She listed her siblings being Mwanaisha Abdalla Fenesi (deceased) and Mwanajuma Abdalla Fenesi were all born on the land. They all occupied the suit property. That before the demise of their father, he had planted cassava, mangoes and oranges on the suit property and had constructed a semi-permanent house. The semi-permanent house was however demolished and a permanent house was put up.
10. The witness further stated that the land measures 5 Acres and that their occupation of the suit property has been continuous and uninterrupted for all this time. That from the records the land is now registered in the name of Veronica Kariuki as per 3<sup>rd</sup> September, 1992 have gotten the land from the settlement scheme on 10<sup>th</sup> March, 1992. That the plaintiff and her family have however been in occupation of the land for 47 years. They had a neighbour called Ali Omari and the location Chief who would testify.
11. She urged the Court to grant the orders as sought.

#### **B. Examination in Chief of PW - 2 by Mr. Makowade Advocate.**

12. PW – 2 was sworn and testified in English language. He identified himself as Njenga Wainaina. He was a Land Surveyor. He stated his registration details as noted by Court. He also stated that he was the director of a surveying company trading in the name and style of “Surv Print Tech Limited”. That he had prepared a report dated 3<sup>rd</sup> February 2025 over the suit property herein Diani/Kwale Settlement Scheme/196 which was subsequently sub - divided into the following parcels of land - Kwale/Diani Settlement Scheme 855, 856, 857, 858 and 859 measuring 1.7 Ha or 4.2 acres. That the exercise was to confirm the ground status.
13. It was his evidence that he had moved round the suit property and identified the beacons. That the land had clear demarcated boundaries and had a wall that assisted them a lot in identifying the land. That the land is located from Ukunda to Kona Ya Musa junction. There were some incomplete structures. It



was bushy and distinct to the other parcels of land around it. The geographical coordinates are formed. That the parcel was picked with a GNS and GPS MAP 645. The methodology used was IPC beacons. That the land had partial occupation which was on the southern side and the rest of the area was bushy with some canopy trees and covered with mostly indigenous trees.

14. In conclusion the land was partially occupied but an access road to it.

### **C. Examination in Chief of PW - 3 by Mr. Makowade Advocate.**

15. PW – 3 was sworn and testified in English language. He was called Suleiman Yusuf Mwadzoyo. He was the area Assistant Chief for Gombato Sub – location and of Diani Location of the County of Kwale. He stated that the Plaintiff was known to him as the owner of Kwale/Diani Settlement Scheme/196. He referred to his letter dated 24<sup>th</sup> March, 2025. That the property initially belonged to the Plaintiff's father one Abdalla Salim Fenesi who was born on the land. That they had lived on the suit property carrying out farming. After he passed on he was buried on the land. That the property had boundaries and permanent houses therein. That the plaintiff had been in occupation of the suit property from the year 1977. This was the year the demarcation exercise of the area started. He also stated that the Applicant was known to him as the daughter of the deceased and had also been in occupation of the suit property.
16. The witness stated that the Respondents were not known to him and he had never heard of any land dispute over the suit property for the 40 years. Ordinarily, all such land disputes were lodged in his offices. He testified that the land belonged to the late Abdalla Salim Fenesi.

### **IV. Submissions**

17. On 3<sup>rd</sup> June 2025 the Honourable Court upon the closure of the case by the Plaintiff in the presence of counsel, court gave directions on the disposition of the originating summons dated 6<sup>th</sup> December 2023 by way of written submission. A date for Judgement was set for 28<sup>th</sup> July 2025.

### **V. The Written Submissions by the Applicants**

18. The Law firm of Messrs. OG Makowade Advocates for the Plaintiff filed her Written Submissions dated 22<sup>nd</sup> April 2025. Mr. Kowade Advocate commenced his submissions by stating that the suit was brought before court by Originating Summons dated 6<sup>th</sup> December 2023, seeking a declaration that the Applicant had acquired title to land parcel Kwale/Diani Settlement Scheme 196 (later on sub - divided into Plots 855, 856, 857, 858, and 859) by way of land adverse possession, having been in open, exclusive, peaceful, and uninterrupted occupation for over 45 years.
19. It was submitted that upon filing the suit, the Applicant called three witnesses who testified by way of adducing “Viva Voce” evidence before this Honourable Court. The Learned Counsel averred that the Applicant, now over 60 years old, was born and raised on the suit land where her late father Abdalla Salim Fenesi lived from the years 1970s until his death in the year 2001.
20. That the applicant had continued in uninterrupted occupation since then and an occupational survey conducted in the year 2006 by the Ministry of Lands confirmed their residence since the year 1977. That a ground report dated February 2025 by a Government Surveyor confirmed the following information: The land measures approximately 1.7 hectares; Boundaries are clearly defined on the ground and in the Survey Map; There are permanent developments including homes, trees, and cultivated fields; The land is fully occupied by the Applicant, with no evidence of any other occupant.



21. The court was referred to the testimony of the Area Chief, who testified in person and confirmed that he was born and raised in the locality in the early 1960s, has known the Applicant's family his entire life, and that the Applicant has always lived on the land in peaceful and uninterrupted possession. No objection or dispute had ever been raised before his office.
22. Learned Counsel posited that the Applicant's claim was anchored under the *Limitation of Actions Act* (Cap 22):- Section 7 bars actions to recover land after 12 years;- Section 13(1) defines adverse possession;- Section 38(1) allows a person to apply to be registered as owner upon satisfying adverse possession requirements.
23. That the Applicant's case met the threshold established over the adverse possession doctrine in the cases of "Mtana Lewa – Versus - Kahindi Ngala Mwangandi [2015] eKLR; Mombasa Teachers Co - operative Savings & Credit Society Limited – Versus - Robert Muhambi Katana [2018] eKLR; "Kimani Ruchine – Versus - Swift Rutherford [1980] KLR 10".
24. And lastly, the Counsel referred Court to the case of: "Gachuma Gacheru – Versus - Maina Kabuchwa [2016] eKLR" – where the Court of Appeal held that:
 

"It is trite that a change of ownership does not interrupt adverse possession, and that a registered owner's title is subject to overriding interests, including rights acquired by adverse possession."
25. According to the Counsel, the Applicant had proven:
  - a. Actual Possession: Continuous occupation and development since childhood;
  - b. Open and Notorious Use: Her presence and land use was visible and known in the community;
  - c. Exclusive Possession: There was no other claimant or occupant;
  - d. Non-Permissive Use: No license or consent from the Respondents;
  - e. Continuity: Uninterrupted occupation exceeding 12 years;
  - f. Adversity to Title Owner: Respondents had never asserted possession since their registration.
26. On the fraudulent entry on the green card, it was submitted that the Applicant discovered that the 1<sup>st</sup> Respondent was registered in the year 1996 and later transferred Plot 859 to the 2<sup>nd</sup> Respondent. These actions were taken without the Applicant's knowledge, participation, or interruption of her possession, and were therefore fraudulent and of no legal consequence to her acquired rights. Further that the Respondents' failure to enter appearance had proven adverse possession.
27. The Applicant prayed for an order directing the Deputy Registrar to execute all necessary documents to effect transfer of title in favour of the Applicant within seven (7) days from the date of Judgment. Thus, the Applicant urged Court to allow all the prayers as sought in the originating summons.

## V. Analysis and Determination

28. I have carefully read and considered all the filed pleadings herein, the evidence adduced by the witnesses summoned by the Plaintiff, the written submissions, the myriad of cases cited herein by the said party, the relevant provisions of *the Constitution* of Kenya, 2010 and statues.



29. This Honourable Court will still examine the facts of the case and in order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has three [3] issues for its determination. These are: -
- a. Whether the Plaintiff had acquired the title by way of adverse possession as required by Law?
  - b. Whether the parties herein were entitled to the reliefs sought.
  - c. Who will bear the Costs of originating summons?

**Issue No. a). Whether the Plaintiff had acquired the title by way of adverse possession as required by Law**

30. It is noted that the Defendants did not participate in the suit despite service being effected on them. However, the Applicant does not escape the burden and standard of proof which they have to satisfy and discharge in accordance with the law in order for her claim to succeed. This Court has a duty to interrogate and evaluate uncontroverted evidence in order to determine whether the applicant is entitled to the prayers sought.
31. The provision of Section 107(1) of the *Evidence Act*, Cap. 80 provides thus:-
- “Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
32. While Section 108 provides:-
- “The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”
33. And Section 109 provides:-
- “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 for by law that the proof of that fact shall lie on any particular person.”
34. The court in the case of “Evans Nyakwana – Versus - Cleophas Bwana Ongaro (2015) eKLR” where it was held that:
- “As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden...is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as section 108 of the *Evidence Act* provides the burden lies on that person who would fail if no evidence at all were given as either side.”
35. The doctrine of Land adverse possession in Kenya is embodied under the provision of Sections 7, 13, 17 and 38 of the *Limitation of Actions Act*, (Cap 22) in these terms:



Section 7:- “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 is first accrued to some person through whom he claims, to that person”.

36. Section 13 of the Act is in these terms:

“(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession)”

37. Section 17 of the said Act stipulates that upon the expiry of the period (12 years) prescribed by the Act for a person to bring an action to recover land, the title of that person to the land stands extinguished.

38. On the other hand, Section 38 of the Act allows a claimant to apply to Court for orders of adverse possession and 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, 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 proprietor of the land.”

39. The Land Law Textbook 15<sup>th</sup> Edition by Gordon Henry defines adverse possession as possession inconsistent with the title of the true owner. It is stated that acquisition of title by adverse possession is among the aspects of the law of limitation of actions and which provides that no action shall be brought to recover land after expiration of 12 years from the date on which the right of action accrued.

40. The Court of Appeal enumerated some of the factors which a person claiming adverse possession must show in the case of:- “Richard Wefwafwa Songoi – Versus - Ben Munyifwa Songoi [2020] eKLR”. These are: - the date he came into possession; the nature of the possession; whether the fact of his possession was known to the other party; how long his dispossession had continued; and that the possession was open and undisturbed for the requisite 12 years.

41. Similarly, in the case of “Chevron (K) Limited – Versus - 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 the case of “Littledale – Versus - Liverpool College (1900)1 Ch.19, 21.”

#### **ISSUE No. b). Whether the parties herein were entitled to the reliefs sought.**

42. Under this sub – tile, the Honourable Court will endeavour to deduce whether the parties were entitled to the relief sought. It is the Applicant’s case that she has been in possession of the suit property herein from the year 1977. That the land initially belonged to her late father Abdalla Salim Fenesi. That as a family they had farmed on the land since time immemorial as evidenced by the many coconut and



mango trees together with the residential houses built thereon. She stated that other than herself, the land was occupied by her siblings together with their families.

43. The court has had the chance to peruse the survey report dated 3<sup>rd</sup> February 2025 as carried out by PW - 2. The contents of the same indicate that the land was under occupation at the time of survey. Further that the same had clear boundaries and beacons that separates its corners from the adjacent parcel. Also that the parcel had a wall and that it was occupied on one side while the other side had indigenous trees and crops. Thus, the issue of occupation is proved.
44. The next port of call is whether the occupation been continuous and uninterrupted? According to the evidence of PW - 3 the Area Chief, the deceased's family had been in occupation of the suit property since the year 1977. He would know this as it was the time the demarcation of the area commenced. This was part of his evidence before court and was further stated in the letter dated 24<sup>th</sup> March 2025 addressed to the ELC Court Kwale. According to him, the Plaintiff who was a daughter to the late Abdalla Salim Fenesi has been in occupation of the suit property together with the rest of her family members. The aspect of continuous occupation of the applicant herein with her family has thus in my view been sufficiently demonstrated.
45. On the aspect of whether the open and continuous occupation of the suit property has been interrupted. I have perused the Certificate of official search presented before court by the Applicant. This documentary evidence indicates that the suit property was registered in the 1<sup>st</sup> Respondents name in the year 1992. There has been no indication that the occupation and use was at any given point interrupted by any party and specifically the Respondents. It is trite that the filing of a suit asserting rights over land stops time from running in adverse possession. No evidence has been tendered before court suggesting in any way that the Applicant's occupation of the suit property was ever contested by the Respondent in court. The mandatory provisions of Order 37 Rule 7 of the Civil Procedure Rules requires that an application for adverse possession be accompanied with a title deed extract. Does the failure to producing the title deed invalidate the adverse possession claim?
46. The Applicant has relied on the green card for the suit property as listed in the list of documents dated 6<sup>th</sup> December 2023. I have perused the said green card and the same includes information indicating the land was registered in the name of the Settlement Fund Trustee on 10<sup>th</sup> March 1992. Thereafter the 1<sup>st</sup> Respondent's names appear to have been registered on 3<sup>rd</sup> September 1992. It is noteworthy that the land was initially registered under the repealed Registered Land Act which is now governed by The Land Act, 2012. The land was then registered under the government of Kenya after transfer of change of user on 15<sup>th</sup> April 1993 and the same was again leased to the 1<sup>st</sup> Respondent vide a lease dated 5<sup>th</sup> February 1993 but the land was registered on 13<sup>th</sup> April 1993.
47. In my opinion the green card forms cogent evidence as to the current status on ownership of the land. The same having not be challenged, I find it that the ownership of the suit property has been established as being in the name of the 1<sup>st</sup> Respondent. It was the evidence of the Applicant that the Respondents have never been in use and occupation of the suit property. That she is unknown to them. Indeed, according to the evidence by the PW – 3, ordinarily as the area Chief, all land disputes were lodged at his offices. No such complain was ever reported to him by either the Respondent or any other person whatsoever.
48. The court has further noted the contents to the survey report “RAF - 4” by Japheth Kamwara the Land Surveyor from the office of the Division of Land adjudication and settlement office (DLASO) which it finds valuable. It contents were that the land was occupied and it had both cash crops, maize and cashew nuts. Further that the coconut and mango trees had been grown years back and there were structures erected thereon. The report is dated 9<sup>th</sup> June 2023.



49. From this evidence it is confirmed that the Applicant's occupation of the suit property has been to the exclusion of all others including the true owner out of possession of that land. For these reason, the Applicant's claim for adverse possession succeeds as prayed.

**ISSUE No. c). Who will bear the costs of the originating summons?**

50. It is now trite law that the issue of costs is at the discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The Black Law Dictionary defines cost to means:

“ the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.

51. The provision of Section 27 ( 1 ) of the Civil Procedure Act, Cap. 21 holds that costs follow the event. By event it means the result or out come of the legal action.

52. Although the Applicant has successfully established her case, but taking that the Respondents never entered appearance or defend their claim, there shall be no orders as to costs.

**VI. Conclusion and Disposition**

53. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court finds that the Plaintiff has established her case against the Defendant herein. Before making my final orders, I note that on 8<sup>th</sup> April 2025 before closure of the Plaintiff's case, Counsel on record sought that the orders sought be amended to include the prayer that should the Plaintiff be successful their pleadings to read;

“ The land registrar directed to have the land registered in the name of the Plaintiff”

54. The Honourable Court is of the view that the Applicant should formally move Court seeking for the above execution relief. Thus, in the meantime, the Honourable Court proceeds to make the following specific orders: -

- a. That Judgement be and is hereby entered in favour of the Plaintiff/Applicant in accordance with the Originating Summons dated 6<sup>th</sup> December 2023.
- b. That the Applicant herein be declared the rightful owner of the suit properties Kwale/Diani Settlement Scheme/196 subdivided into Kwale/Diani Settlement Scheme 855, 856, 857, 858 and 859 by Land Adverse possession.
- c. That an order is hereby issued to the Land Registrar of Land Kwale to strike out the name of the Respondent from the register and subsequently enter the names of the Applicant as the sole proprietor of the suit property Kwale/Diani Settlement Scheme/196 subdivided into Kwale/Diani Settlement Scheme 855, 856, 857, 858 and 859.
- d. That a permanent injunction do issue restraining the Respondent whether by himself, his servants, representatives, agents and/or assigns howsoever from dealing with, entering in, obstructing any activities on, interfering with the Applicant's agents and or representatives subdividing, demolishing any structures on selling, alienating, occupying and/or in any other was interfering with the suit property
- e. That there shall be no orders as to costs.



It Is Ordered Accordingly.

**JUDGEMENT DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS,  
SIGNED AND DATED AT Kwale THIS 28<sup>TH</sup> DAY OF JULY 2025**

.....

**HON. MR. JUSTICE L.L NAIKUNI,  
ENVIRONMENT & LAND COURT**

AT

Kwale

Ruling delivered in the presence of: -

Mr. Daniel Disii, the Court Assistant.

Mr. Kowade Advocate for the Plaintiff/Applicant.

No appearance for the Defendant/Respondent.

