

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ORIGINATING SUMMONS No. 117 OF 2018

**MERESA ATIENO AKELLO (Suing as the legal
representative
of the estate of TINGO NYAMATIKA).....
APPLICANT**

VERSUS

JOHN ITEMBE MUCHARIA.....

RESPONDENT

JUDGEMENT

1. By way of Originating Summons dated 10th September 2028 and amended through an Amended Originating Summons dated 01st February 2022 and filed the same date, the Applicant (Plaintiff) sought the determination of the following issues:

- a) Whether the applicant/ plaintiff has been in possession and occupation of 13 acres of a portion of BUKIRA/BUHIRINGERA/167 for over 12 years.**
- b) Whether the said possession and occupation has been open and known to the Respondent/ defendant for all that time.**
- c) Whether the applicant/plaintiff should be registered as proprietor for those 13 acres out of land BUKIRA/BUHIRINGERA/610.**
- d) Whether the plaintiff/applicant has grown sugarcane on the 13 acres of land parcel no. BUKIRA/BUHIRINGERA/610.**

CA. Whether the defendant /Respondent is responsible for the destruction of sugarcane valued at Kshs. 2,640,000.00.

CB. Whether the defendant should pay the plaintiff Kshs. 2,640,000.00 as damages being the value of the sugarcane destroyed as a result of the actions of the Respondent.

CC. Whether the Respondent should pay the costs of this summons.

2. The Respondent filed a replying affidavit sworn on 20th November 2018 in response to the Summons. He denied having sold the suit land to the Applicant and further, urged that the same was registered in the names of Marwa Mucharia, now deceased and Itembe Mucharia and later, in the joint names of the Respondent and Gatwi Marwa Mucharia. Further, that there was no proof that the Applicant had ever resided on the land. He deponed that the transaction to purchase the land was never completed and the sale agreement was irregular. He urged the court to strike out the Summons as the Land Parcel in the agreement was non-existent.
3. The applicant filed a Supplementary Affidavit sworn on 7th January 2021 (*sic*) but filed on 10th January 2022. This was following the filing of an application dated 21st December 2021 which was allowed by consent of the parties paving way for the filing of both the said Affidavit and the Amended Originating Summons. The Respondent would later file a

Further Affidavit in response to the Supplementary Affidavit and Amended Originating Summons as summarized below.

- 4.** In the Supplementary Affidavit the Applicant/ Plaintiff deponed that parcel LR No. BUKIRA/BUHIRINGERA/167 was registered in the name of Itembe Mucharia and the Respondent annexing a copy of the register marked as MAA-1. That the parcel has since been petitioned and the Respondent is the registered owner of BUKIRA/BUHIRINGERA/610 annexing and marking as MAA-2 a copy of the register. She deponed that in the year 2000 Joseph Tingo Nyamatiko purchased eleven (11) acres out of BUKIRA/BUHIRINGERA/167 from the Respondent for Kshs. 100,000/- annexing and marking as MAA-4 a copy of the sale agreements and further, that on 17th April 2001 he entered into an agreement to purchase 13 acres with the Respondent adding 2 acres. The total purchase price was Kshs. 120,000/-. She annexed and marked as MAA-5 the copy of said sale agreements and stated that she took possession of the land together with the deceased, annexing as MAA-6 copies of photographs in this regard. She deponed that after her husbands' death in 2006, she moved the animals to another parcel due to theft and began planting maize until 2013 when she decided to grow sugarcane.
- 5.** She further deponed that the deceased had also purchased 4 acres from the Respondents' brother, Simon Marwa Mucharia and the lands were attached thus resulting in 17 acres and she was allowed to use 1 acre to plant trees and 16 for sugarcane. She attached the agreement confirming the

same as MAA-7. She stated that she sub contracted the sugarcane to South Nyanza Sugar Company and annexed the agreement book confirming the same as MAA-8. When she went to harvest sugarcane in April 2020 the Respondent and his agents chased the harvesters away and as such the sugarcane has stayed on the land to date causing her immense loss. She annexed a photo of the sugarcane as MAA-9. She urged that she has not gotten anything from the sugarcane and sought to have the Respondents indemnify her for Kshs. 2,500,000/- annexing the statements showing the payments as MAA-10.

- 6.** She maintained that she has been in long continuous occupation of the land for over 20 years and that the occupation is an overriding interest. She urged the court to allow her application.
- 7.** The Respondent filed a Further Replying Affidavit sworn on the 08th February 2022 where he denied ever entering into a sale agreement and further, urged that the initial agreement of the year 2000 was cancelled and he refunded the purchase price of Kshs. 56,000/- further, that in 2013 the Applicant approached him to allow him to till the land and he allowed her out of goodwill. That she planted sugarcane on the land but it is untrue that she contracted South Nyanza Sugar Company in respect of the land. That she harvested sugarcane thrice and the last harvest was to be in 2017 and she neglected to do so. He urged that he had unlimited access to the land during her occupation and it was ridiculous that the Applicant was seeking compensation of

Kshs. 2,640,000/-. He urged the court to dismiss the application.

8. The matter then proceeded for hearing.

9. PW1 was **Meressa Atieno** who adopted her witness statement as evidence in chief. In it, she stated that Land parcel no. BUKIRA/BUHIRINGERA/167 was registered in the name of the Respondent owning a half share. That the said land parcel has since been partitioned and the Respondent is now the registered owner of land parcel no. BUKIRA/BUHIRINGERA /610. She stated that sometime in 2nd April 2000, the said Joseph Tingo Nyamatiko purchased 11 acres of LR NO. BUKIRA/BUHIRINGERA/167 from the Respondent at a price of Kshs. 100,000/- which was paid in 9 instalments. Further, that on 17th April, 2001, the deceased and the Respondent got in to a new agreement for purchase of 13 acres of land the Respondent having agreed to add the deceased additional 2 acres of land. As a result of the said agreement, the deceased and the Respondent entered in to a new agreement dated 17/4/2001 where the total purchase price was Kshs. 120,000.00 which was paid in three instalments. Subsequent to the said agreement the deceased and I then moved in to occupation of the said portion of the suit land planting trees on one acre of the said property. On the remaining portion of land they were rearing dairy cows and also reared goats and sheep and also grew maize on the portion of land. They even towed away the one tree that had already been felled by the people, thus necessitating filing of this suit.

10. As a result of the said actions, the sugarcane remained on the land to date and had now started drying up. As a result, she suffered immense loss which she wanted the Respondent to indemnify her for a sum of Kshs. 2,500,000.00 being the amount of money that she would have gotten had they allowed her to harvest the sugarcane. Further, that she has continued to be in occupation of the said parcel from the year 2001 to date. That for 20 years, she has enjoyed long, open, quiet, continuous and peaceful possession of the suit property in issue by virtue of the sale land agreement whose consideration was fully paid by her to the 1st Respondent. That the Respondents have not taken and/or commenced any precipitate action to defeat and/or interrupt the applicant's occupation.

11. During cross examination, she stated that she did not do any assessment of the land and that the land was to be subdivided and transferred later on, and was originally in the names of Marwa Mucharia and Itembe Mucharia. That the land parcel 610 was created in 2019 following sub division on 26th June 2019. She maintained that she was on the land and currently occupies 13 acres.

12. PW2 was Tingo Nyamatiko who adopted his witness statement as evidence in chief, was the father to Joseph Tingo Nyamatiko (deceased). He stated that sometime in the year 2000, the Respondent came to Joseph Tingo Nyamatiko in his presence and in company of his elder brother Marwa Mucharia stating that he wanted to sell his parcel of land LR NO. BUK1RA/BUH1R1NGERA/167. The deceased then moved

to occupy the said land in the year 2000 and started developing the same. In the same year, the deceased purchased 11 acres of land LR NO. BUKIRA/BUH1R1NGERA/167 from the Respondent. The following year 2001, his son informed him that the Respondent added him another 2 acres of land. He was present on the day that the surveyor came to create boundaries on the said parcel and later on, the deceased erected a fence after being shown their boundaries.

13. He stated that he knew the Respondent as well being that the he was his cousin and between 2002 and 2006, the deceased constructed mud houses and cattle structures and started animal farming. He also grew maize and banana in part of the land where he had purchased. The deceased also planted trees in a part of the said parcel of land. After his death sometime in 2006, people started stealing livestock and then the applicant took the cattle to another ranch. They also cut barbed wires, trees and towed them away in the absence of the applicant. That from the year 2007 or thereabouts, the applicant started cultivating maize on the said parcel of land leaving only the area where they had initially planted trees.

14. Sometime in 2013, he is aware that the applicant started cultivating and planting sugarcane on the said land and to date there is sugarcane on the said farm.

15. In cross examination, he stated that Joseph Nyamatiko purchased 7 acres and he was a witness when the sale agreement was made. Further, that parcel

BUKIRA/BUHIRINGERA/167 was bought by his son and they reared cattle on it until later on the wife to Joseph planted maize and sugarcane. She also built a house on the land.

16. PW3 was Zachariah Kerario who adopted his witness statement as evidence in chief. In it, he stated that he saw the plaintiff together with her late husband work in the said parcel of land since 2002. That they cultivated maize, sugarcane and animals and planted trees. Sometime in April 2020, while on his way to a funeral, he reached LR NO. BUKIRA/BUHIRINGERA/610, he found the Respondent and his sons carrying pangas and they wanted to beat up the plaintiff. He inquired on what the problem was and the Respondent and his sons said that they do not want the plaintiff on that parcel of land. He found out that the plaintiff wanted to clear way for harvesting sugarcane by cutting trees that were on the way but the Respondent and his sons did not want her to do so. The Respondent and his sons categorically stated in his presence that the plaintiff will never harvest the sugarcane on the land and if she dares then they will cut her in to pieces and that if she valued her life she should leave that place never to come back. He then left the place with the plaintiff.

17. In cross examination he stated that in 2002 he saw Meresa, the Applicant and her mother using the land and they had planted sugarcane on it.

18. PW4 was Naftali Nyamahanga Rioba who stated that he bought land next to the applicant and her husbands' land. He stated that he knew the applicant who was the wife of

Joseph Tingo Nyamatiko. That he also purchased 7 acres of LR NO, BUKIRA/BUHIRINGERA/167 from the Respondent at Kshs.18, 000.00 per acre. That between 2002 and 2000, Joseph Tingo Nyamatiko constructed mud houses and cattle structures and started animal farming. He also grew maize and banana in part of the land where he had purchased. Additionally, that he also planted trees in a part of the said parcel of land.

19. He stated that after the death of NYAMATIKO in 2006, people started stealing livestock and then the applicant took the cattle to another ranch. They also cut barbed wires, trees and towed them away in the absence of the applicant. From the year 2007 or thereabouts, the applicant started cultivating maize on the said parcel of land leaving only the area where they had initially planted trees. Sometime in 2013, the applicant started cultivating and planting sugarcane on the said land and to date there is sugarcane on the said farm. Further, that the said land has now been partitioned and the land belonging to the Respondent is LR NO. BUKIRA/BUHIRINGERA/610. That he constructed his house in the parcel LR NO. BUKIRA/BUHIRINGERA/167, the 7 acres he had lived on the land for about 19 years.

20. DW1 was **John Itembe Mucharia**, who testified that sometime in 2000, one Tingo Nyatingo Nyamatiko (deceased) approached him with a view to buying land from him. The land he intended to purchase was jointly registered in his name and the name of Marwa Mucharia. That they agreed on 11 acres and he received part payment of Kshs.

56,000. The balance of Kshs. 44,000 remained outstanding. In the process, Marwa Mucharia, the joint registered holder objected to the sale and said that he had no authority to sell the land which they jointly owned. The sale deal was cancelled and he refunded the purchase price of Kshs. 56,000 to Tingo Nyamatiko Tingo who then did not take occupation of the land sold. Sometime in 2013, the Applicant requested that she cultivates sugarcane on his land which he obliged, given that they were related. She planted her crop sometime in 2014 and harvested twice. When he needed his land back, he informed her that she needed to vacate the land.

21. He stated that at the end of 2017, instead of vacating, she proceeded to court to file this suit. He denied ever being shown the agreement and did not remember appearing before Kerario Marwa Advocate to sign a sale of land agreement. That 12 years have not elapsed since the plaintiff started cultivating on his land. That the plaintiff has refused to harvest her overgrown cane in order for her to lay claim over the land.

22. In cross examination, he stated that he never sold land to Tingo Nyamatiko and further, that the Applicant had leased land from him but he did not have the agreement. That he gave her 3 acres and she encroached on 8 acres.

23. DW2 was Joseph Mwiri Itembe who testified that in 2014, Meresa Akello Tingo came to his father and requested that she grows sugarcane on his father's land jointly owned with his uncle Marwa Mucharia. That Meresa Akello Tingo

gave him a casual job of clearing the land and uprooting stumps. She ordered for a tractor to plough the same which was done. That the sugarcane was planted in the same year 2014 and she has harvested twice and a third harvest is still in the shamba. That she has refused to harvest the third harvest. He further stated that it is not true that Meresa Akello Tingo has been on his father's land for over 12 years.

24. In cross examination, he stated that the Applicant entered the land in 2014 and that his father had never sold the land.

25. DW3 was **Pius Itembe** who adopted his witness statement as evidence in chief. In cross examination he stated that he knew the Applicant and her husband and that the Respondent wanted to sell land to the Applicant but they never entered into an agreement. That they exchanged money in 4 instalments and John entered the land before he died and thereafter, his wife continued living on the land.

26. The parties were directed to file submissions on the Application. The Applicant filed submissions through the firm of Messrs. Apondi & Company Advocates whereas the Defendant filed submissions through the firm of Messrs. Abisai & Company Advocates.

Applicants' submissions

27. Learned counsel for the Applicant cited the decision of the Court of Appeal in the case of Mtana Lewa v Kahindi Ngala Mwagandi [2015] eKLR and in the case of Munyaka Kuna Company Limited -Vs- Bernado Vicezo De Masi (The Administrator of the Estate of Domenico De Masi (Deceased) (2018) eKLR on adverse possession. With regards to the

acreage of the land, the Applicant produced two sale of land agreements dated 2nd April 2000 and another dated 17th April 2001 which showed that the land parcel which she occupied was 13 acres. Further, that the plaintiff testified that she was in occupation of land parcel no. BUKIRA/BUHIRINGERA/610 from the year 2000 and the same was continuous. She testified that she used the suit property for various activities. The applicant's testimony was corroborated by the testimony of PW2 who was the father in law to the plaintiff and whom DW1 confirmed that he was the cousin and further stated that he had no reason to lie to the honourable court. The testimony of the applicant was further corroborated by the testimony of PW3 & PW4. This therefore means that the applicant proved that she has been in occupation continuously for a period of more than 12 years and it is not in dispute that she is still in occupation of the suit property.

28. Counsel urged that even though the Respondent claims that he never sold the suit parcel, he has not produced any expert report showing that the agreements were forged by the plaintiff, it is surprising that he produced the same documents as his exhibits before this court. Even though the Respondent further claims that he had given the plaintiff permission to use the said land, there is no document produced in this court to show that there was such. The defendant was well aware that the plaintiff was in the suit parcel and he did not deny the said fact. The testimony of DW1, DW2 & DW3 were conflicting as they were not

consistent as to when the plaintiff allegedly came in to occupation, DW1 denied that the applicant never got in to occupation after the purchase of the suit property. DW3 however stated that upon purchase of the suit property, the deceased/applicant got in to occupation of the suit property.

29. On the flipside on the issue of occupation PW1 -PW4 were consistent in their testimonies as to when the applicant got in to occupation and how he has been using the suit property. The defendant admitted that he has not filed any case to interrupt the occupation of the plaintiff of the suit parcel and this goes ahead to prove that the occupation of the applicant has been continuous and uninterrupted. Counsel urged that the plaintiff/applicant has proved her case on a balance of probabilities and the prayers as per the originating summons ought to be allowed.

30. Counsel cited Section 27 of the Civil Procedure Act and the case of Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd Nyeri High Court Judicial Review Application No. 6 of 2014 Mativo J on the issue of costs.

Defendants' submissions

31. Learned counsel for the defendants submitted that to succeed, a claimant must prove; Actual, exclusive possession, Nec nee vi, nee clam, nec precario (without force, secrecy, or permission), Continuous possession for a minimum of 12 years, That the possession is inconsistent with and adverse to the rights of the true or registered owner. Further, that he sought to rely on the following

precedents; *Mtana Lewa v Kahindi Ngala Mwagandi* [2015] eKLR; *Kasuve v Mwaani Investments Ltd* [2004] 1 KLR 184; *Mbugua Njuguna v Elijah Mburu Wanyoike* [2001] eKLR; *Wambugu v Njuguna* [1983] KLR 172 and urged that the burden of proof was entirely on the claimant.

- 32.** Counsel urged that there was no proof of entry or possession in 2001 as there was no evidence tendered that placed the Plaintiff on the land in 2001. He cited section 107 and 109 of the Evidence Act, urging that the burden lies on the Plaintiff to prove this date of entry.
- 33.** Counsel urged that the plaintiff claims she cultivated maize on the alleged 13 acres from 2001 onwards and that no photographs of cultivation, documentary evidence, witnesses, agricultural records or maps or survey showing the cultivated area. He cited the decision of the Court of Appeal in *Kiarie v Kinuthia* (1986] KLR 403 in this regard.
- 34.** Counsel urged that there was insufficient evidence of tree planting, that the Plaintiff relies on photos of trees allegedly planted on 1 acre. He submitted that the photos lack the certificate required under section 106B of the Evidence Act, thus they are inadmissible. He urged the court to disregard the said photographs. Further, that if admitted, planting a few trees on 1 acre does not amount to taking possession of 13 acres and neither do they prove location.
- 35.** Counsel submitted that the sugarcane planting in 2013 interrupts time and that the only evidence showing the Plaintiffs involvement with the land is the sugarcane is in contract with a milling company, South Nyanza Sugar

Company Limited, in 2013. The evidence corroborated by all the witnesses and the parties is that the Plaintiff planted sugarcane in 2013. The Contract produced proved this position that was not disputed by the Defence. As a matter of fact, the Plaintiff admitted that she could not remain in occupation after her husband died in 2006 thus, she left the land and returned in 2013. This supports the Defence position that the occupation did not start in 2001, 2013 is the earliest proven date of use. He urged that as the suit was filed on 24th September 2018 vide Originating Summons dated 10th September 2018, meaning only 5 years had lapsed. He cited *Mbira v Gachuhi* (2002) 1 EALR 137, and urged that the plaintiff's claim was time barred.

36. Counsel urged that no survey report confirming occupation and cited the case of *Wanyoike Gathure v Beverly* (1995) eKLR, where the Court held that lack of survey evidence defeats a claim where acreage is disputed. A claimant cannot be declared owner of land they cannot identify with precision.

37. Counsel urged that possession must be exclusive and the plaintiff did not prove exclusivity. He additionally cited *Kweyu vs Omutut* [1990] KLR 709 held that adverse possession must exclude the true owner. Since the Defendant was in occupation, the Plaintiffs claim collapses. He urged the court to dismiss the Application.

Analysis and Determination

38. The issues that arise for determination are;

1) Whether the Applicant acquired BUKIRA/BUHIRINGIRA/167 by way of Adverse Possession

2) Whether the Applicant is entitled to compensation for the harvested sugarcane

39. This court sets out to determine the issues sequentially.

a) Whether the Applicant acquired BUKIRA/BUHIRINGIRA/167 by way of Adverse Possession

40. The doctrine of adverse possession in Kenya is founded under Limitation of Actions Act. Section 7 of the said Act places a bar on actions to recover land after 12 years from the date on which the right accrued as follows;

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.”

41. Further section 13 of the same Act, provides that adverse possession is the exception to this limitation:

1) A right of action to recover land does not 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 Section 9, 10, 11, and 12 a right of action to recover land accrues on a certain date and no person is in adverse 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 a fresh 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”.

42. Section 17 goes on to provide as follows:

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”.

43. Finally, Section 38(1) and (2) states that:

“(1) 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.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

44. The doctrine of adverse possession was aptly defined in **Mtana Lewa - v- Kahindi Ngala Mwangandi (2015) eKLR** where the Court of Appeal held that: -

“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 of 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.”

45. The principles in order to establish a claim of adverse possession, the possession must be:

a) Adverse to the interests of the owner - meaning that the claimant is in possession as owner in contradistinction to holding in recognition of or

subordination to the true owner or to a recognized superior claim of another;

- b) Actual - as opposed to constructive possession where the test is the degree of the actual use and enjoyment of the parcel of land involved by the claimant or his agent, tenant or licensee;**
- c) Open and notorious - meaning that the possession must be open and conspicuous to the common observer so that the owner or his agent on visiting the land might readily see that the owner's rights are being invaded. Differently put, the possession must be manifest to the community;**
- d) Without force - meaning that the possession and occupation must have been achieved peaceably not through actual or threatened violence;**
- e) Exclusive - meaning that the possession must be of such exclusive character that it will operate as an ouster of the owner of the legal title. Differently put, the claimant must demonstrate that she wholly excluded the owner from possession for the required period;**
- f) Continuous and uninterrupted for the period of twelve years - meaning that the title owner did not re-enter the property under circumstances showing her intention to assert dominion against the adverse user for at least twelve years.**

See Joseph Ndafu Njurukani & 2 Others vs. Emily Naliaka Barasa, Kisumu Civil Appeal No. 149 of

2022; Titus Mutuku Kasuve (Supra); Titus Kigoro Munyi (Supra); Wambugu vs. Njuguna (supra) and Karuntimi Raiji (supra).

- 46.** The applicants' basis to the claim for the suit land is that her deceased husband, Joseph Tingo purchased portions of the suit land from the Respondent over a period of time. From the year 2000 and 2001, a total of 13 acres was purchased from the Respondent. From the evidence on record, it is clear that there was some agreement for purchase of the suit land as alleged. However, testifying as DW1, the Respondent contended that there was a sale agreed upon but due to a dispute with the joint registered holder, Marwa Mucharia, the sale was cancelled and the deposit purchase price repaid. It is on this basis that he contends that the land was never sold to the applicants' husband. Interestingly, he concedes that she took possession of the land under an alleged lease between himself and the applicant which he never produced. The Applicant produced photographs as evidence of the occupation. of the said land.
- 47.** PW2 corroborated the Applicants' testimony with regards to the purchase and occupation of the suit land. His evidence as to the activities on the land was cogent and corroborated that of the applicant. All the claimants' witnesses evidence lent credence to the evidence of the Applicant.
- 48.** The Applicant entered into the suit land in they year 2000 as per the impugned sale agreement. From the evidence on record, the existence of the sale agreement is not disputed. With this sale agreement being the basis of the applicant and

her deceased husbands' occupation of the suit land was at the time of the agreement. It follows that the time began to run in the year 2000. The possession was adverse to that of the Applicant and further, it was actual as per the admission of the Respondent. Additionally, the occupation was open and notorious as she had even established a house on the property and planted crops.

49. It is my considered view that the Applicant has proved that she has acquired title to the suit land by way of adverse possession, to the exclusion of the Respondent.

b) Whether the Applicant is entitled to compensation for the harvested sugarcane

50. The Applicant sought orders for compensation of the sugarcane she had planted on her land. The nature of this prayer is that of special damages. It is trite law that he who alleges must prove this position is succinctly captured in Sections 107, 109 and 112 of the Evidence Act. Section 107 provides as follows:

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

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

51. Sections 109 and 112 of the same Act states as follows:

“ 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe

in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

52. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in **Mumbi M'Nabea vs David M. Wachira [2016] eKLR** stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

...The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the Evidence Act, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act

recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

53. It is trite law that special damages must be specifically pleaded and strictly proved. This was the position acknowledged by the Court of Appeal in **David Bagine v Martin Bundi [1997] eKLR** in which the Court of Appeal reasoned thus:

“It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a Sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) 1KAR 681 at page 684:

“... special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Part Hotel Limited [1948] 64 TLR 177 thus;

“Plaintiffs must understand that if they bring actions for damages, it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, ‘this is what I have lost, I ask you to give me these damages, ‘They have to prove it.”

54. While I do note that the Applicant urged that she had sub contracted the land to South Nyanza Sugar Company, there

was no evidence tendered that she had undergone a loss of Kshs. 2,640,000/= or 2,500,000/- or less due to the actions of the Respondent.

55. The upshot of the foregoing is that the Applicant's Application succeeds to the following extent;

1) The Applicant has acquired 13 acres out of the parcel of land known as Bukira/Buhiringera/167 by way of adverse possession

2) The national surveyor in charge of the Migori County and the Land Registrar in charge of the County or Registry the suit land falls under are hereby ordered to demarcate, at the cost of the Applicant, the said approximately said approximately 13 acres or thereabouts and register them in the name of the Applicant, and rectify the register by issuing the applicant with a title deed in her favour to that effect.

3) The Respondent is ordered to execute within thirty (30) days of preparation and presentation instruments of transfer thereof including mutation forms accordingly, in favour of the claimant, upon presentation of the same, in default the Deputy Registrar of this Court to execute the same in that behalf.

4) Each party shall bear its own costs.

56. It is so ordered.

Judgment dated, signed and delivered virtually via the Teams Platform this 16th day of March 2026.

**HON. DR. IUR NYAGAKA
JUDGE**

In the presence of,

Mr. Owino holding brief for Abisai for Respondent

Ms. Apondi for Applicant