

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT**  
**KAKAMEGA**  
**ELC CASE NO. 597 OF 2014**

**ANNAH CHEMTAI KIPTALAM**  
**GILBERT KIPKORIR KIPTALAM**  
**.....PLAINTIFFS**



**DAVID KIBET KIPTALAM**

**VERSUS**

**ABDUL GENEROID NABISWA.....**

**DEFENDANT**

**JUDGMENT**

**Introduction**

1. This suit was instituted in the High Court on 26<sup>th</sup> April 2012. Thereafter, the matter was transferred to this court. By way of an amended plaint dated 27<sup>th</sup> October 2023 the plaintiffs sought orders of eviction of the defendant from land parcel No. KAKAMEGA/SOY/479 (suit property); an order for exhumation of the body of the late Salome Inyangala Nabiswa from the suit property; a permanent injunction

restraining the defendant from entering or in any way interfering with the suit property and costs of the suit.

2. The plaintiffs averred that they were the joint registered proprietors of the suit property and that sometime in the year 2006, the defendant, without any colour of right, trespassed onto the suit property and constructed structures thereon. They contended that by reason of the defendant's continued occupation and acts of trespass, they had been denied quiet enjoyment of their property. That despite numerous demands requiring the defendant to vacate the land, he allegedly refused and/or neglected to do so, thereby necessitating the institution of the present suit.
3. The suit was opposed. The defendant filed an amended statement of defence and counterclaim dated 18<sup>th</sup> February 2025 wherein he denied the allegations of trespass and contended that although the plaintiffs are the registered proprietors of land parcel No. KAKAMEGA/SOY/479, his occupation of two (2) acres thereof was lawful and justified.
4. That he entered the suit property in the year 1993 after being allocated two acres by his late father, Charles Ukhebi

Nabiswa, who was the husband to the 1<sup>st</sup> plaintiff and father to the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs. The defendant maintained that he immediately took possession of the allocated portion, constructed his homestead thereon, and has resided on and utilized the said portion openly, peacefully and continuously for a period exceeding twelve years.

5. In the counterclaim, the defendant sought the following orders:

- i. A declaration that the plaintiff's rights over 2 acres out of L.R NO. KAKAMEGA/SOY/479 got extinguished by adverse possession upon expiry of twelve (12) years when the defendant was in possession.**
- ii. That there be an order of permanent injunction restraining the plaintiffs either by themselves, agents, servants and or employees from interfering with the defendant's peaceful possession and occupation of the 2 acres out of L.R. NO. KAKAMEGA/SOY/479 in any manner whatsoever and or however.**

- iii. That L.R NO. KAKAMEGA/SOY/479 be subdivided and a portion thereof measuring 2 acres be registered in the names of the applicant.**
- iv. An order that the respondents do sign all the relevant documents to facilitate transfer of 2 acres out of land parcel NO. KAKAMEGA/SOY/479 to the applicant and that in default, the Deputy Registrar of this Honorable Court to sign the same.**
- v. An order that the plaintiffs be condemned to pay costs of this suit.**

6. The plaintiffs filed a reply to the amended defence and counterclaim dated 6<sup>th</sup> March 2025 wherein they reiterated the contents of the amended plaint and contended that the defendant had not provided any documentary evidence to prove that his late father purchased the suit property or had any lawful interest therein.

7. Further that several disputes touching on the suit property had previously been litigated before the Land Disputes Tribunal and the Provincial Land Disputes Appeals Tribunal, both of which determined that the defendant had no lawful claim over the suit property. They maintained that they are the lawful registered proprietors of land parcel No.

**KAKAMEGA/SOY/479** and prayed for the court to dismiss the counterclaim with costs.

8. The suit proceeded to hearing by way of *viva voce* evidence. The plaintiffs called two witnesses in support of their case, whereas the defence failed to attend court on the hearing date, hence his case was closed without him tendering any evidence.

**Plaintiff's evidence.**

9. PW1 was Annah Chemtai Kiptalam, the 1<sup>st</sup> plaintiff. She adopted her witness statement dated 21<sup>st</sup> March 2012 as her evidence in chief and produced the documents contained in her list of documents filed on even date and further list of documents dated 6<sup>th</sup> March 2025; which included a copy of the green card, the title deed for the suit property, mutation form dated 16<sup>th</sup> February 1994 and proceedings from the Land Disputes Appeal Tribunal.
10. She testified that she, together with her sons, the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs, were the joint registered proprietors of land parcel L.R. KAKAMEGA/SOY/479. That she previously resided on the suit property with her late husband Erick

Kiptalam Kibenei until his death on 14<sup>th</sup> March 1979, after which she relocated to Kibagenge Farm in Trans Nzoia County.

11. She informed court that in the year 2006 the defendant unlawfully entered the suit property and constructed structures thereon without their consent. She further stated that the defendant has never purchased any portion of the suit property and that neither he nor his late father has any lawful claim over the same.

12. On cross examination, she stated that her deceased husband passed on in 1979 and denied ever being in a relationship with the defendant's father. That she left the suit property together with her children, following the death of the deceased. That it was then, that the defendant occupied the land in 2006. She denied signing the mutation forms and stated that they were using the remaining 4 acres of the suit property.

13. PW2 was David Kibet Kiptalam, the 3<sup>rd</sup> plaintiff. He adopted his witness statement dated 21<sup>st</sup> March 2012 as his evidence in chief. He testified that the 1<sup>st</sup> plaintiff was his

biological mother and that together with his brother (2<sup>nd</sup> plaintiff), they were the registered proprietors of the suit property.

14. She added that the defendant unlawfully entered and occupied the suit property in the year 2006 without their consent. He further testified that the defendant had no lawful claim over the suit land and that the plaintiffs had previously pursued the matter before the Land Disputes Tribunal which determined that the defendant had no rights over the land and ordered him to vacate.

15. On cross examination, PW2 denied that the defendant's father was his step father. That the defendant encroached the suit property in 2006 and placed reliance on the tribunal proceedings as his evidence. On re-examination, he stated that the defendant's mother was buried on the suit property, despite them obtaining an injunction to stop the said burial. That marked the close of the plaintiffs' case.

16. The defendant together with his counsel having failed to attend court on the date fixed for defence hearing, the defence case was marked closed on 17<sup>th</sup> June 2025. Parties

were directed to file submissions in support of their respective cases. On record are submissions filed by the plaintiffs dated 26<sup>th</sup> June 2025. No submissions were filed by the defendant.

**Plaintiffs' submissions.**

17. The plaintiffs isolated three issues for determination, namely:

- i. Whether the defendant's late father was a purchaser for value of the suit property and whether he had capacity to allocate two (2) acres thereof to the defendant;**
- ii. Whether the defendant has acquired title to two (2) acres of the suit land by adverse possession;**
- iii. Whether the plaintiffs are entitled to the reliefs sought in the amended plaint.**

18. On the first issue, counsel for the plaintiffs submitted that the defendant failed to prove that his late father purchased any portion of the suit property. They argued that the burden of proving such a claim lay squarely on the defendant pursuant to **Sections 107 and 109 of the Evidence Act, Cap 80 Laws of Kenya**, which provides that

he who alleges must prove. In support of this proposition, reliance was placed on **Maria Ciabaitaru M'mairanyi & Others v Blue Shield Insurance Company Limited [2005] 1 EA 280**, where the court held that the burden of proof lies upon the party who asserts the existence of a particular fact and wishes the court to believe in its existence.

19. It was further contended for the plaintiffs that the defendant did not produce any documentary evidence demonstrating that his late father purchased the alleged two (2) acres from the plaintiffs or their predecessor in title. Consequently, it was submitted that the defendant's claim that his father allocated him the said portion had no legal basis since the deceased had no capacity to allocate land he did not own.

20. On the second issue, counsel argued that the defendant had not satisfied the legal requirements for acquisition of land through adverse possession. They argued that adverse possession must be proved by demonstrating that the occupation was open, notorious, continuous, exclusive and hostile to the title of the true owner for a period of at least

twelve years as provided under **Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya.**

21. Reliance was placed on the Court of Appeal decision in **Wambugu v Njuguna [1983] KLR 172**, and **Mbira v Gachuhi [2002] 1 EA 137**, for the proposition that for adverse possession to succeed, the claimant must demonstrate that the possession was inconsistent with the title of the true owner and that time does not run where the occupation is by permission of the owner. Counsel submitted that a person claiming land by adverse possession must prove not only exclusive possession but also that such occupation is inconsistent with the title of the true owner.

22. It was counsel's submission that the defendant's claim of adverse possession could not stand, since the plaintiffs had consistently challenged the defendant's occupation of the suit property, and had pursued the matter by suing the defendant at the Kakamega Provincial Land Tribunal which ordered the defendant to vacate the land. That the decision was further upheld on appeal on 26<sup>th</sup> March 2010 by the Kakamega Provincial Land Disputes Appeal Tribunal thus

the defendant's occupation could not be deemed as peaceful or adverse.

23. Counsel maintained that since the defendant had failed to prove either purchase of the suit land by his father or acquisition of title by adverse possession, they prayed that the amended plaint be allowed as prayed and that the defendant's counterclaim be dismissed with costs.

**Analysis and determination.**

24. The court has duly considered pleadings, evidence and submissions. The issues that arise for the court's determination are whether the plaintiffs have demonstrated that the defendant's occupation of the suit property was unlawful and whether the plaintiffs deserve the orders sought in the plaint.

25. It is not in dispute that the plaintiffs are the registered proprietors of the suit property. Section 26 of the Land Registration Act provide for indefeasibility of title as follows;

**“Certificate of title to be held as conclusive evidence of proprietorship**

**(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—**

**(a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**(b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

26. Therefore, registration of land vests in the owner, absolute and indefeasible rights unless it is shown that the same was acquired through fraud, misrepresentation, want of proper procedure, illegality or corruption. In the instant case, the legality of the plaintiffs’ acquisition of the suit property was not challenged. In his defence the defendant raised the counterclaim of adverse possession. Thus, the

defendant alleged adverse possession as justification for his occupation of the suit property.

27. Adverse possession is where a trespasser occupies land belonging to another person openly, exclusively, adversely, as of right and without the permission of the owner, for a continuous period of 12 years.

28. Provisions in the Limitation of Actions Act provide the basis for a claim for land under the doctrine of adverse possession. Section 7 of the Limitation of Actions Act bars a person from bringing a suit for claim of land after twelve years, and provides as follows;

**“An action may not be brought by any person to recover land after the end of 12 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.”**

Section 13 provides as follows;

**(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), and,**

**whereunder Section 9, 10, 11 and 12 of this Act 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 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) of this Act, the land in reversion is taken to be adverse possession of the land.”**

Section 17 states 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.”**

Section 38 (1) and (2) provides 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 of the 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.”**

29. The rationale for adverse possession was stated in the case of **Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR** where the Court of Appeal cited with approval the case of **Adnam v Earl of Sandwich (1877) 2 QB 485** where it was held as follows;

**“The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened**

**enjoyment or immunity to which they have in some sense been tacit parties.”**

30. In *Mtana Lewa vs. Kahindi Ngala Mwangandi [2015] eKLR*, the court described adverse possession in the following terms;

**“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 Possession is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act, which is in these 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.”**

31. The principles of establishing adverse possession are now well settled. In the case of **Mbira vs. Gachuhi [2002] IEALR 137**, the court held as follows;

**“.....a person who seeks to acquire title to land by the method of Adverse Possession for the applicable Statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and Adverse use by him or those under whom he claims for the statutory prescribed period without interruption.”**

32. Therefore, the defendant was obligated to demonstrate that he had occupied the suit property openly, exclusively, adversely and as of right and continuously for a period of 12 years without the plaintiffs’ permission. In the instant matter, the defendant did not present any evidence and therefore his defence and counterclaim, remain mere allegations.

33. The plaintiffs demonstrated that the defendant entered the suit property in 2006. Hence the 12-year period had not

lapsed as of 2012 when this suit was filed. Therefore, the defendant's counterclaim for adverse possession was not proved.

34. The plaintiffs having demonstrated title whose legality is not in contention, are entitled to enjoy the use thereof without interference by third parties including the defendant. Therefore, the plaintiffs' interests and rights are protected against interference by the defendant respectively under sections 24 and 25 of the Land Registration Act which provide for interests of absolute ownership which are conferred by registration and rights of registered proprietors which cannot be defeated and which are free from other interests, unless as provided in law. On that basis, the plaintiffs are entitled to quiet enjoyment of the suit property. Therefore, the plaintiffs deserve orders of eviction and permanent injunction as sought in the amended plaint.

35. Although in their amended plaint, the plaintiffs sought exhumation of the body of the late Salome Inyangala Nabiswa, nothing was pleaded in regard to the said deceased person and no evidence was presented by the

plaintiffs in that regard. The court was not told who the person was, why their body was buried on the suit property and why their body ought to be exhumed from the suit property.

36. It is trite that he who alleges must prove. As no pleading or evidence was availed in regard to the prayer for exhumation of the body of the late Salome Inyangala Nabiswa, the same is declined.

37. In the premises, I am satisfied that the plaintiffs have proved their claim against the defendant to the required standard and I therefore enter judgment for the plaintiffs against the defendant as follows;

**a) The defendant is ordered to vacate parcel No. Kakamega/Soy/479 in 90 days of this judgment and in default, eviction orders to issue.**

**b) A permanent injunction is hereby issued restraining the defendant from entering land parcel No. Kakamega/Soy/479. This order shall take effect upon the lapse of 90 days from the date of this judgment.**

**c) The costs of the suit are awarded to the plaintiffs and shall be borne by the defendant.**

38. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA  
IN OPEN COURT/VIRTUALLY THROUGH  
MICROSOFT TEAMS VIDEO CONFERENCING  
PLATFORM THIS 11<sup>TH</sup> DAY OF MARCH, 2026**

**A. NYUKURI  
JUDGE**

**In the presence of;**

Ms Chepkwony holding brief for Mr. Okara for the  
plaintiffs

Mr. Siro holding brief for Mr. Getanda for the defendant

Court Assistant: Delphine.