



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MILIMANI LAW COURT NAIROBI
ELCLOS E005 OF 2025

STANELY KIPIRUI ARAP KOECH.....
APPLICANT

-VERSUS-

RUTH MUTHONI.....1ST
RESPONDENT

CHRISTINE NJERI KIRAITHE.....2ND
RESPONDENT

JUDGEMENT

Background

1. The applicant has brought this suit by way of originating summons application dated 11th February 2025 seeking the following orders
 - a) A declaration that the respondent's title to all those parcel of land LR N0 147945 IR. N0 51414 has been extinguished in favour of the applicant by virtue of adverse possession pursuant to section 37 and 38 of the limitation of Actions Act cap 22 laws of Kenya having occupied the said land for more than 12 years preceding the filing of this suit
 - b) A declaration that the applicant is entitled to be registered as the owner of all that parcel LR N0 147945 IR. N0 51414 which the applicant has been in adverse possession since the year 2000 to date for more than 12 years immediately preceding the presentation of this suit and on which they have lived openly and continuously as of right and in adverse possession without any interruption from the respondents or their predecessors in the above title and that the respondent's title

to LR NO 147945 IR. NO 51414 has been extinguished in favour of the applicant under section 37 and 38 of the Limitations of Actions Act chapter 22 laws of Kenya.

- c) That the land registrar at Nairobi to delete the name of RUTH MUTHONI & CHRISTINE NJERI KIRAITHE, the respondents 'herein and register the names of the applicant herein in place thereof absolutely
 - a) An order of permanent injunction to be issued restraining the respondents either by themselves their employees, agents, servants, and/or assigns or any other person claiming through them from evicting the Applicant from the parcel of land referred to as LR NO 147945 IR. NO 51414 (herein referred to as the suit property) or from fencing the suit property or interfering with the applicant's quiet possession of the same or alienating, transferring, disposing and/or dealing with the suit property.
2. In his affidavit filed in support of the Originating Summons, the plaintiff/applicant stated as follows: That he is in possession and occupation of the suit property where he lives with his family since the year 2000, despite the respondents being the legally registered owners. That his occupation has been for the last 25 years uninterrupted for over 12 years where he resides with his family.
 3. The applicant served the respondents via substituted service on the 15th July 2025 by an advert in the local daily stemming from the orders issued by the court on the 12th July 2025. In support, the applicant has attached an affidavit of service dated 29th September 2025. Despite service by substituted service, the defendants/respondents have not entered appearance in the matter and the applicant seeks to have judgement entered.

Analysis and Determination

4. The record confirms that on 12th July 2025, the Plaintiff/applicant made an oral application for leave to serve the respondents through substituted service.

Order 5 Rule 17 of the Civil Procedure Rules provides for substituted service where the court is satisfied that the summons cannot be served personally unto the respondent. In the instance case, the applicant made an oral application in court for leave to serve the respondent by way of advertisement. The court did grant leave to the applicant, and service was effected through placing an advert in the star newspaper on the 15th July 2025 and filed a return of service. What is left is for the court to determine the application on merit.

5. Adverse possession is a statutory process of acquiring title to land by extinguishing the title of the registered owner, by the actual occupation of the land in a manner that is visible, open, notorious, exclusive, continuous and uninterrupted for a statutory period of 12 years. Adverse possession is based on facts, which must be asserted, pleaded and proved. The applicant must show the date that they took over possession on behalf of the beneficiaries, the nature of their possession, how long the possession has been, and whether the possession was open and undisturbed.

6. In the case of **Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] eKLR** the Court of Appeal held that, 'A person who claims adverse possession must inter alia show:

(a) on what date he came into possession.

(b) what was the nature of his possession?

(c) whether the fact of his possession was known to the other party.

(d) for how long his possession has continued, and (e) that the possession was open and undisturbed for the requisite 12 years.

7. On the 1st October 2025 the court directed that the Originating Summons be heard by way of oral evidence and listed the same for

hearing on 11th November 2025 .In his testimony, the plaintiff relied on his witness statement and list of documents both dated 8th October 2025 .He told the court that the suit property was in the name of the defendants and that he had been in exclusive uninterrupted possession of the suit property for over 25 years hence the need for the orders of adverse possession. The plaintiff closed his case and the court directed him to file submissions.

8. The plaintiff submitted that he had satisfied the ingredients of adverse possession relying on the following cases Wambugu v Njuguna [1983] KLR 172, Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR, Kasuve v Mwaani Investments Ltd & Others [2004] KLR 184.

Analysis and Determination;

9. From the pleadings the following in my view are the issues arising for determination in this suit;
- i. Whether the plaintiff has proved his adverse possession claim in respect of the suit property.
 - ii. Whether the plaintiff is entitled to the reliefs sought against the defendant
 - iii. Who is liable for the costs of the suit?

In **Gabriel Mbui v Mukindia Maranya[1993] eKLR**, the court stated that a person claiming land by adverse possession must establish on a balance of probability the following elements;

- b) The person claiming land by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period.
- c) The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.

- d) The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied.
- e) The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable *animus possidendi*, that is to say occupation with clear intention of excluding the owner as well as other people.
- f) Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.
- g) The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land.
- h) The possession must be continuous uninterrupted, unbroken for the necessary statutory period.
- i) The rightful owner or paper title holder against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period
- j) The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.
- k) The land, or portion of the land adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. The absence of a plot or title number need not present any difficulty, nor should it be a bar to establishing a claim of adverse possession.

In **Wambugu v Njuguna [1983] KLR 172** the court stated as follows:

“First in order to acquire by the Statute of Limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title entails acts which are inconsistent with his enjoyment of the soil and for the purpose for which he intended to use it. The Limitation of Actions Act (Chapter 22) on adverse possession contemplated two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”

10. The burden was on the plaintiff to establish the elements of adverse possession set out above. On the issue of possession, it was not disputed that the plaintiff was in possession of the suit property as at the time of filing this suit. As stated, the defendants did not enter appearance nor did they tender evidence at the trial. The evidence that was tendered by the plaintiff as to when and how he entered the suit property was not controverted. The same applies to the evidence that he has constructed on the suit property as evidenced by the photographs attached to his bundle of documents. Even, in the absence of evidence from the defendant, the plaintiff still had a duty to prove his case. The plaintiff told the court in his oral testimony that took possession in 2000 and has remained there for over 25 years.

11. The plaintiff produced various documents in support of his claim including a letter from the chief confirming he knows him to be a resident on the suit property, certificate of title in the respondent's names, copy of his national identification card and

photographs showing a structure erected on the suit property. These documents do not however prove that the plaintiff's claim that he has been on the property since the year 1999.

12. Due to the foregoing, it is my finding that the plaintiff has failed to prove that he entered the suit property at the time he says he did. The plaintiff has also not demonstrated that for the duration of his occupation of the suit property, he intended to dispossess the registered owner thereof of the property. It cannot be said in the circumstances that the plaintiff's occupation of the suit property was with clear intention of excluding the registered owner from the property.

13. In addition to the foregoing, there is no evidence that the defendants were aware of the plaintiff's occupation of the suit property. According to the

plaintiff he was attacked by goons on instruction of the respondents and reported the same to the police station, but did not place any evidence before the court to back this up to actually prove that the defendant was aware of his occupation of the suit property.

In Samuel Kihamba v Mary Mbaisi [2015] eKLR the Court of Appeal stated that: *"Open and willing dispossession has been interpreted to mean that the owner has knowledge, whether actual or not, or a means of having that knowledge of the occupation of his or her property by the claimant."*

Having submitted as above, I will answer the first and second issues in the negative.

Final disposition

For the foregoing reasons, the originating summons application dated 11th February 2025 is not merited and dismissed with no order as to costs.

It is so ordered.

DATED, SIGNED and DELIVERED virtually at **NAIROBI** on this **25th** day
of

March, 2026.

MOHAMMED N. KULLOW
JUDGE

Judgment delivered in the presence of: -

N/A..... for the Applicant

N/A..... for the Respondents

Philomena W...... Court Assistant