

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT KAPSABET
ELC CASE NO. E003 OF 2022 (OS)

ELZEBA JEPKEMBOI KOSSIO.....1ST
PLAINTIFF/APPLICANT

SALLY JEPCHIRCHIR.....2ND
PLAINTIFF/APPLICANT

-VERSUS-

NABURUKI ARAP TUM.....
DEFENDANT/RESPONDENT

JUDGMENT

1) By an originating summons dated 22nd January 2022 commenced under, inter alia, sections 17, 30 and 38 of Limitation of Actions Act Chapter 22 Laws of Kenya and Order 37 Rules 7 and 8 of the Civil Procedure Rules, 2010, the applicants/plaintiffs through Kipkosgei Choge and Company Advocates, sued the respondent/defendant for the following orders;

a) That this Honourable Court declares that the proprietor's interest in the of parcel of land

reference number **NANDI/SIGOT/38** (The suit land herein), be extinguished.

- b) That on declaration of the proprietor's interests as extinguished, his name, successors in title, administrators or whomsoever claiming through him that may be and or may have been registered as its proprietor, be removed, deleted from the register and the applicants be registered as the proprietors of the whole of the suit land in place of the present proprietor and or administrators and or successors in title, they having acquiring ownership thereof by way of adverse possession.
- c) That the Honourable Court be pleased to order and direct that the suit land be vested on the applicants.
- d) That the Defendant/Respondent be ordered to pay costs to the Plaintiffs/Applicants in this case.

2) The foundation of the originating summons is the plaintiffs/applicants' affidavits sworn on even date and the accompanying copy of the register marked as 'E.I.K.1' annexed to the 1st applicant's affidavit. Also, the

application is based on four grounds set out on the face of the same and they include;

a) That the Plaintiffs/Applicants are in possession and occupation of the whole of the suit land.

b) That their possession and occupation of the whole of the suit land has been for a period of more than 12 years.

c) That their occupation has been continues, uninterrupted, open and notorious and adverse to the Defendant/Respondent since.

d) That the Plaintiffs/ Applicants has developed the land and has always used the same as his.

3) The respondent/defendant was duly served by way of substituted service as disclosed by the affidavit of service sworn on 8th March 2024.

4) No doubt, the defendant had an option to respond to the application by filing requisite papers but opted otherwise; see **Ogada-vs-Mollin (2009) KLR 920.**

5) On 22nd October 2025, the court directed that the hearing of the originating summons treated as a plaint under **Order 37 Rule 19 of the Civil Procedure Rules 2010,** be heard by formal proof.

6) In her evidence, the 1st plaintiff (PW1) stated that the 2nd plaintiff is her sister with whom she lives on the suit land. PW1 relied on, inter alia, her statement dated 22nd January 2022, her National Identity card Number 3254027 (PExhibit 1), the 2nd plaintiff's National Identity Card No. 10540990 (PExhibit 2), a copy of certificate of official search (PExhibit 3a), a copy of payment receipt (PExhibit 3b) and a copy of register (PExhibit 3c) in respect of the suit land as part of her evidence.

7) In the submissions dated 3rd December 2025, learned counsel for the plaintiffs gave background of the matter including the occupation of the suit land and the orders sought in the originating summons. Counsel submitted that the plaintiff have been in continuous possession of the suit land in excess of 12 years as revealed in the plaintiffs' evidence inclusive of PExhibits 3a, 3b and 3c and that they are entitled to the orders on the face of the pleadings herein. Counsel cited, inter alia, **section 38 of the Limitation of Actions Act Chapter 22 Laws of Kenya, the case of Ahadi vs CJE (2019) KLR and Bency Chundra vs Kally Prosonno (1878) 4 Cal 1327**

at p 329 and Gathi Mawngi & 4 others vs Joseph Mwai Kabiru & 4 others (2005) KLR, to fortify the submissions.

8) It is trite law that issues for determination in a suit arise either out of the pleadings or as framed by the parties for determination; see **Great Lakes Transport Company (U) Ltd=vs-Kenya Revenue Authority....2009 KLR**

9) I have duly considered the parties' respective pleadings, the plaintiffs' evidence and the.....written submissions. So, the issues for determination are condensed to whether the plaintiffs have met the threshold to entitle them to the orders set out on the face of the originating summons and as noted in the case of **Wilson Kazungu Katana and 101 others-vs-Salim Abdalla Bakshein and another (2015) eKLR,** that adverse possession dictates thus;

- a) The parcel of land in dispute must be registered in the name of a person other than the applicant,
- b) The applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner,
- c) The applicant must be in that occupation for a period in excess of twelve years having dispossessed the owner or

there having been discontinuance of possession by the owner.

10) Further, it must be born in mind that the applicant must show that such possession was without the permission of the owner; see **Richard Wefwafwa Songoi -vs- Ben Munyitwa Songoi (2020) eKLR.**

11) It is worth to note that the plaintiffs claim is for the suit land measuring approximately Two Decimal Zero Two Hectares (2.02 Ha) in area as revealed in PExhibits 3a and 3c. As such, the plaintiff's claim is over a definite portion of land as held in **Muthuita -vs- Wanoë & 2 others (2008) 1KLR (G&F) 1024.**

12) On the first ingredient, it is disclosed at paragraph 3 of the plaintiffs' affidavit in support of the Originating Summons. Further, PExhibits 3a and 3c reinforce that position.

13) In respect of the second and third ingredients, the grounds on the face of the originating summon and paragraphs 7 to 10 of the supporting affidavit show the plaintiffs' possession of the suit land. PW1 firmly stated that the 2nd plaintiff and herself have lived on the suit land since 1964 without any interruption hence, dispossessed the defendant thereby.

14) In **Black's Law Dictionary 10th Edition at page 1352,** the term 'Notorious possession' is defined thus; *'Possession or control that is evident to others; possession of property that because it is generally known by people in the area where the property is located, gives rise to the*

presumption that the actual owner has notice of it. Notorious possession is one element of adverse possession-Also termed open possession.....'

15) On the evidential burden of proof in a case, the Supreme Court of Kenya pronounced itself as follows in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 Others (2017) eKLR:**

"...Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced..."

16) It is settled law that the burden is always on the parties bringing the suit to prove their case on a balance of probabilities. This burden is not lessened even if the case is heard by way of formal proof; see **Kirugi & another-vs-Kabiya & 3 others (1987) eKLR.**

17) In the premises, the plaintiffs' case is steadfast, cogent and has been established all the requisite elements of adverse possession claim against the defendant as held in a long range of authorities including **Wilson Kazungu Katana, Bency, Mwangi cases (supra)** and **Godfrey Shimonya and 3 others-vs-Mary**

Anyango Ameka and another (2018) eKLR on a balance of probabilities.

18) Accordingly, judgment is hereby entered for the plaintiffs against the defendant for orders (a) (b) (c) and (d) sought in the originating summons as stated at paragraph 1 (a) to (d) hereinabove.

19) It is important to note that this judgment was not delivered on 28th January 2026 as earlier scheduled since I was attending Judges' training on Alternative Justice (AJS) and requisite notice issued to the parties accordingly.

20) It is so ordered.

Dated and Delivered at Kapsabet this 23rd day of March 2026.

HON. G.M.A ONG'ONDO

JUDGE

In the presence of;

- a) Mr. Kipkosgei Choge learned counsel for the plaintiffs
- b) Walter - Court Assistant