

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ELCOS NO. E002 OF 2023

MUKENYI MUNGUTI KITIKA1ST
APPLICANT
EDWIN MUTIE MUEMA2ND APPLICANT

-VERSUS-

BENSON MUTHOKA KIMEU
.....RESPONDENT

JUDGMENT

1. The Applicants filed the above suit vide the Originating Summons dated 11th May, 2023 claiming to be entitled to ownership of 1.57 acres of land Parcel No. NZAUI/NZIU/236 by adverse possession. In addition, the following orders were sought: -

- 1) **THAT pending the hearing and determination of this suit, this Honourable Court be pleased to issue orders of injunction restraining the Respondent by themselves, their servants, agents, proxies and/or persons exercising authority from them from inhibiting, alienation, dealing, disposing, trespassing and/or in any other manner interfering with the Plaintiff's quiet use, occupation and or possession of an area measuring 1.57 acres of the suit property.**
- 2) **THAT the Honourable Court be pleased to declare the personal representatives of MUNGUTI KITIKA (Mukenyi Munguti Kitika and Edwin Mutie Muema) who are the Applicants to have acquired the title by adverse possession of over twelve (12) years for their**

occupation of the suit premises NZAUI/NZIU/236 in a portion measuring 1.57 acres.

3) THAT the registration of BENSON MUTHOKA KIMEU as the proprietor of all that land known as NZAUI/NZIU/236 be cancelled forthwith and the land registrar do rectify the register to enter the name of the Applicants as registered proprietors for a portion measuring 1.57 acres in place of the Respondents or anyone deriving title from them.

4) Costs of this application be provided by the Respondent.

2. Opposing the originating summons, the Respondent filed a replying affidavit sworn by himself on 22nd November, 2024. He averred that the Applicants claim of use and occupation of the suit property is on the basis of purchase and not adverse possession. He added that the portion sold to the late Munguti Kitika is less than 1.5 acres and that any attempts to transfer the land to the Applicants has been frustrated by them as they want more land than what was sold.
3. At the hearing of the Applicants' case, PW1 Edwin Mutie Muema adopted his averments in the supporting affidavit sworn by himself on 11th May, 2023 in support of the originating summons. He further produced the Exhibits annexed to the supporting affidavit as PEX 1 – 4 respectively.
4. It was PW1's case that he has been using the portion of the suit property being claimed since it was sold by Benson Muthoka Kimeu to his grandfather in 1989.
5. On cross-examination by Ms. Ngumbau, PW1 reiterated that the suit property was purchased by his grandfather. He added that he was not present when his grandfather purchased the land. PW1 averred that they measured the size of the

land in 2023 together with his mother but the Respondent was absent from the exercise. He refuted the accusation that they had refused to contribute money for processing of title when they approached the Respondent.

6. PW2, Joseph Mutinda Kisululu adopted his statement dated 31/10/2025 as his evidence in chief. He averred that the late Munguti Kitika was his uncle. It was his testimony that the suit land is being utilized by the members of his uncle's family.
7. In cross-examination, PW2 averred that he was not present when his uncle purchased the land. He maintained that he knows the boundaries of the land. He stated that he was not present when the land was measured by the surveyor.
8. PW3, Justus Mutuku Mulwa adopted his statement dated 31/10/2025 as his evidence in chief. He stated that he was the Village elder, lower Kiteini Village. It was his testimony that the family of Kitika has been using the land since 1989 and that no one has ever claimed it from them.
9. In cross-examination, PW3 averred that he was not present when the land was sold to Kitika adding that he did not know the size of the land.
10. PW4, Joseph Mutaki Mbule adopted his statement dated 31/10/2025 as his evidence in chief. He averred that he is a neighbour to the Applicants and that the Kitika family have been using the whole land that they purchased.
11. On cross-examination by Ms. Ngumbau, PW4 stated that he was not present when the land was purchased adding that he did not know the size of the land.
12. Two witnesses testified in support of the Respondent's case. DW1, Benson Muthoka Kimeu, adopted his averments in the replying affidavit sworn on 22/11/2024 as his evidence in chief. He averred that the suit property was sold by his father to Munguti Kitika in 1989 and that he witnessed the sale. It was his testimony that he had not refused to transfer the portion of land that was

purchased by the Kitika family and that he had only asked the purchasers to bring a surveyor and to meet the survey costs.

13. On cross-examination by Mr. Kioko, DW1 asserted that the Applicants had been using the suit property since 1989. He contended that the Applicants were occupying more land than what they had purchased. He stated that he had not reported the case to any authority. DW1 added that he did not have any evidence to show that he was willing to transfer the land purchased by the Applicants.

14. DW2, Mulei Nyange Kimeu adopted his statement dated 22/03/2025 as his evidence in chief. He stated that the suit property was sold to the Kitika family in 1989 by his brother Benson Kimeu. He added that the Kitika family have been using the land ever since they purchased it. DW2 contended that the Kitika family had trespassed into their land. He added that they were not involved by the Applicants when they surveyed the suit property.

15. In cross-examination, DW2 averred that they had never complained of any trespass by the Applicants. He added that the Applicants have been using the entire land that was purchased in 1989.

16. At the close of their respective cases, the parties elected to file written submissions.

17. In the Applicants' submissions dated 20th January 2026, Counsel identified three issues for determination: -

- a) *Whether the Applicant has met the threshold for grant of orders for adverse possession;*
- b) *Whether the Applicant is entitled to a portion of land measuring 1.57 acres to be excised out of land parcel No. NZAUI/NZIU/236; and*
- c) *Who should bear the costs of the suit.*

18. Submitting on the first issue, Counsel contended that the Applicants had become entitled to the suit property by virtue of adverse possession since they had been in possession for a period in excess of 12 years. That the Applicants took occupation of the suit property in 1989 immediately after the purchase price was paid to the vendor and have remained in continuous and uninterrupted possession.
19. Counsel went on to submit that the Respondent never took any plausible step to assert his rights over the suit property.
20. Submitting on the second issue, Counsel maintained that the Applicant had clearly described and identified the land that they occupy. That a copy of title deed extract was also attached in accordance with Order 37 Rule 7 of the Civil Procedure Rules showing that the Respondent is the registered owner of land Parcel No. NZAUI/NZIU/236.
21. On costs, Counsel submitted that the successful party ought to be awarded costs of the suit.
22. In the Respondent's submissions dated 4th February, 2026, Counsel identified the following issues for determination: -
- a) Whether the Applicants have met the threshold for adverse possession;*
 - and*
 - b) Whether the Applicant is entitled to a portion of land measuring 1.57 acres to be excised out of land parcel No. NZAUI/NZIU/236.*
23. Counsel argued that Munguti Kitika purchased the suit property without the intention of dispossessing the Respondent. Counsel further argued that the plea of title and a claim for adverse possession are mutually inconsistent.
24. Submitting on the second issue, Counsel argued that the Applicants did not call any witness who was present during the sale of the suit property in 1989 to verify that 1.57 acres of land was sold to Munguti Kitika. Counsel was of the

opinion that the Applicants had neither proved a claim of adverse possession nor any entitlement to 1.57 acres of land as alleged in the originating summons. Counsel urged the court to dismiss the suit with costs.

25. After a consideration of the pleadings, the evidence adduced and the submissions of the parties, the following facts are common ground:-

- i) The suit property, Title No. NZAUI/NZIU/236 is registered in the name of the Respondent.
- ii) The Applicants are the personal representatives of the Estate of Munguti Kitika (Deceased) vide the grant of letters *ad litem* issued on 8th May, 2023 in Makueni CM P&A E022 of 2023.
- iii) Munguti Kitika (Deceased) purchased a portion of land from the Respondent vide the sale agreement dated 21/4/1989 at a purchase price of Kshs. 26,000/=.
- iv) The family of Munguti Kitika (Deceased) took possession of their portion of the suit property immediately after payment of the purchase price as per the sale agreement.
- v) The family of Munguti Kitika (Deceased) has remained in continuous possession of the suit property ever since 21/4/1989.

26. Two issues for determination arise from the case as follows: -

- i) Whether the Applicants are entitled to the suit property by virtue of adverse possession.**
- ii) What are the appropriate orders in the circumstances.**

27. In his testimony, PW1 gave an elaborate account of how the family of his late grandfather (Munguti Kitika) came into possession of the portion the suit property where they occupy to date. It was his testimony that they took possession of the suit property in 1989 immediately after purchase from the Defendant. PW1 produced a copy of the certificate of official search (PEX1)

showing that the Respondent is the registered owner of the suit property which measures 9.2 hectares.

28. PW1 went on to produce a copy of the sale agreement dated 21/4/1989 showing that indeed the Respondent executed the sale agreement together with the purchaser, Munguti Kitika, in the presence of six witnesses (PEX 3A). PW1 also produced a sketch map of the area they occupy (PEX 3B) showing that their apportioned size of land is 1.57 acres.

29. In his evidence, DW1 conceded that indeed the Applicants took possession of their portion of the suit property after they purchased it in 1989 and have remained in possession thereof till date. Nonetheless, the Respondent contended that the Applicants have further encroached into the suit property, taking a larger portion of the land than what was initially sold to them in 1989.

30. Section 107 (1) of the Evidence Act outlines the burden of proof in the following terms: -

‘(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.’

31. The Applicants’ claim to the suit property is based upon the sale agreement dated 21/4/1989 on the basis of which they took possession of their portion of land measuring 1.57 acres and have remained thereon to date.

32. Section 38 (1) of the Limitation of Actions Act sets out as follows: -

‘(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.’

33.PW1 averred that the purchase price of Kshs.26,000/= was paid to the Defendant in full by Munguti Kitika (Deceased) upon execution of the sale agreement dated 21/4/1989. In **Public Trustee and another v Wanduru [1976–1985] 1 EA 488 (CAK)**, Madan, JA held as follows: -

“The true owner ceased to be in possession on March 16, 1967. His possession was discontinued on that day. Discontinuance of possession occurs where the person in possession goes out and another person takes possession if that possession is continuous and exclusive... A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run under section 10(1) of the English Limitation Act, 1939 (closely akin to our section 7) as against the vendor: Bridges v Mees (1957) 1 Ch 475 at 484; referred to with approval by this court in Mwangi Githu v Livingstone Ndeti and Others, CA No 24 of 1979 (unreported).”

34.Endorsing the judgment of Madan, JA, Kneller, JA went on to observe as follows in **Public Trustee and another v Wanduru (supra)** ; -

“The absent registered owner always retains the legal estate and this prima facie entitles him to resume possession from anyone in possession or actual occupation from the date of the possession or actual occupation but if he does not exercise it, he may not bring any action to recover the land after the end of twelve-years section 7 (ibid). Whether or not an action to resume possession would have succeeded is irrelevant. Re Cussons (1904) 74 LJ Ch 296.”

35.The Court of Appeal goes on to state as follows: -

“If the vendor trustee allows the purchaser cestui qui trust to remain in possession the latter is in adverse possession because the vendor as the absent registered owner always retains the legal estate and this prima facie

entitles him to resume possession from the purchaser in possession. The limitation period will begin to run from the date of the payment of the purchase price in full or last instalment of it. See Harman J in Bridges v Mees [1957] 2 All ER 577; and Simpson J (as he then was) in Hosea v Njiru [1974] EA 526 (K)."

36. It is indisputable that the Munguti Kitika (Deceased) paid the purchase price for his portion of the suit property to the Respondent in full. Having demonstrated the foregoing, have the Applicants shown their entitlement to the suit property by virtue of adverse possession?

37. In the case of Mate Gitabi v Jane Kabubu Muga Alias Jane Kaburu Muga & 3 Others [2017] eKLR, the Court of Appeal stated as follows: -

"For one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin maxim nec vi, nec clam, nec precario. See also ... Kasuve vs Mwaani Investments Limited & 4 Others [2004] 1KLR where this Court stated as follows:

'In order to be entitled to land by adverse possession, the claimant must prove that she has been in exclusive possession of land openly and as of right and without interruption for 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.'"

38. At the hearing of the case, the testimonies of PW1 and DW1 were in harmony that the Applicants' family took possession of the suit property in 1989

immediately upon payment of the full purchase price. It was also conceded by the Respondent that the Applicants have remained in continuous and exclusive possession thereof since 1989 without any interruption from the Respondent. This evidence was corroborated by PW2, PW3, PW4 and DW2.

39. It is therefore the finding of this court that the Applicants have been in open, continuous, exclusive and uninterrupted possession of their portion of 1.57 acres of the suit property for a period in excess of twelve years from 21/4/1989. Undoubtedly, the Applicant have fully demonstrated the ingredients of adverse possession.

40. Whereas the Applicants are claiming 1.57 acres of the suit property by adverse possession, the Respondent contends that the Applicants have encroached into a larger portion than what was sold.

41. Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya provides 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.’

42. The Respondent did not adduce evidence of any action or proceedings being taken by himself after 21/4/1989 in order to prevent his dispossession from the alleged extra portion of land than what had been agreed in the sale agreement. His inaction as the registered proprietor prevents him from any claim towards the 1.57 acres of land that has been in the Applicants’ quiet possession since 1989.

43. In the case of Gathoni v Kenya Co-operative Creameries Ltd (1982) KLR 104 Potter, JA observed that:-

“The law of Limitation of Actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intended plaintiff to exercise reasonable diligence and take reasonable steps in his own interest.”

44. Consequently, the Respondent has no claim to the Applicants’ 1.57 acres of land within Title No. NZAUI/NZIU/236.

45. In the end, the Applicants have demonstrated their case against the Respondent on a balance of probabilities. The appropriate orders in the circumstances are as follows: -

- 1) A declaration is hereby issued that the personal representatives of MUNGUTI KITIKA (Deceased) who are the Applicants herein Mukenyi Munguti Kitika and Edwin Mutie Muema, have acquired title by adverse possession of over twelve (12) years for their occupation of the suit premises NZAUI/NZIU/236 in a portion measuring 1.57 acres.
- 2) An order is hereby issued that the registration of BENSON MUTHOKA KIMEU as the proprietor of all that land known as NZAUI/NZIU/236 be cancelled forthwith and the land registrar do rectify the register to enter the name of the Applicants as registered proprietors for their portion of land measuring 1.57 acres in place of the Respondent or anyone deriving title from him.
- 3) Costs of the suit to the Applicants.

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HON. E. O. OBAGA

JUDGE

**JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT
TEAMS THIS 23RD DAY OF APRIL, 2026.**

IN THE PRESENCE OF:

Ms. Ngumbao for Respondent.

Mr. Kioko for Applicants.

Court assistants – Steve and Nyaanga

ORIGINAL