

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ELC (O.S) NO. E005 OF 2025

EDWARD WANG'AYA

MUTORO.....APPLICANT

VERSUS

MICHAEL NASIMOLO

MUYELELE.....RESPONDENT

JUDGMENT

The Applicant, Edward Wang'aya Mutoro, instituted this suit against the Respondent vide an Originating Summons dated 20th February 2025 seeking, inter alia, to be declared owner of one (1) acre to be excised from land parcel NO. S. MALAKISI/S. NAMWELA/825 on account of adverse possession. In the alternative, he sought a declaration that the Respondent holds the said portion in trust for him. He also prayed for consequential orders of registration and cancellation of the Respondent's title to the extent of the claimed portion.

The claim is premised on the grounds that the suit land is a subdivision of land parcel NO. S. MALAKISI/S. NAMWELA/693, allegedly held by the original proprietor in trust for family members, and that in 1997, the Applicant purchased one acre from one Robert Marani Kunyu, took possession, fenced the

same, and has since utilized it openly and continuously for a period exceeding 28 years.

The Respondent opposed the claim through a Replying Affidavit sworn on 14th March 2025, contending that he is the registered proprietor of the suit property, that he has been in occupation thereof, and that the Applicant has never occupied the land. He further denied any transaction with the Applicant and termed the claim as misconceived and an abuse of the court process.

The matter proceeded by way of viva voce evidence. The Applicant testified and called three witnesses who generally supported his claim that he purchased and has occupied the land since 1997. The Respondent testified in opposition, maintaining that the Applicant resides on a different parcel and only attempted to trespass onto the suit land in 2025.

Having considered the pleadings, the evidence on record, and the submissions by Counsel, the issues that fall for determination are:

1. Whether the Applicant has established a claim for adverse possession over one (1) acre out of land parcel NO. S. MALAKISI/S. NAMWELA/825;
2. Whether, in the alternative, a trust exists in favour of the Applicant;
3. What orders ought to issue.

1. Whether the Applicant has established adverse possession

The law on adverse possession is anchored under Sections 7, 13, 17 and 38 of the Limitation of Actions Act, Cap 22 Laws of Kenya. For such a claim to succeed, a claimant must demonstrate open, continuous, exclusive and uninterrupted possession of land adverse to the interests of the true owner for a period of at least twelve (12) years. (See *Kasuve v Mwaani Investments Ltd & 4 Others* [2004] 1 KLR 184; *Wambugu v Njuguna* [1983] KLR 172). Comparative jurisprudence such as *Powell v McFarlane* (1977) and *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30 underscores the requirement of factual possession coupled with the intention to possess.

The Applicant's case is that he entered the suit land pursuant to a sale agreement in 1997 allegedly entered into with one Robert Marani Kunyu. However, the evidence reveals significant deficiencies. The purported vendor admitted that he did not sign the agreement; the purchase price was allegedly paid to a third party without proof of authority; and crucially, the land at the material time was registered in the name of Proders Khwituta Malemo, who neither executed the agreement nor consented to the transaction.

Entry pursuant to a sale agreement, even if defective, is not adverse but permissive, and time for adverse possession can only begin to run when such permission is repudiated. No evidence was tendered to demonstrate when, if at all, such possession became adverse.

On the question of occupation, the Applicant's claim of continuous possession for 28 years is not borne out by the evidence. He conceded in cross-examination that he resides on a separate half-acre parcel allegedly purchased from John Kundu. On the other hand, the Respondent testified that his son resides on the suit land. There is no cogent evidence of exclusive possession by the Applicant.

Further, the existence of disputes, including proceedings before the Land Disputes Tribunal and the Respondent's report to the police in 2025, points to interruption and contestation of possession. It is settled law that time ceases to run where possession is effectively interrupted (*Githu v Ndeete* [1984] KLR 776).

While it is correct that change of ownership does not interrupt time running, that principle only applies where adverse possession has already crystallized. In this case, the Applicant has failed to establish that he had acquired prescriptive rights prior to the transfer to the Respondent or at all.

The Applicant also relied on the award of the Sirisia Land Disputes Tribunal. However, such tribunals lacked jurisdiction to determine title to land, and their awards cannot found a claim for adverse possession.

In the premises, the Applicant has failed to prove the essential elements of adverse possession.

2. Whether a trust exists in favour of the Applicant

In the alternative, the Applicant urged that the Respondent holds the suit land in trust for him.

The law on customary trust is now well settled, as set out by the Supreme Court in *Isack M'Inanga Kiebia v Isaaya Theuri M'lintari & Another* [2018] eKLR. A claimant must demonstrate, inter alia, the existence of a family or clan relationship and the intention that the registered proprietor would hold land for the benefit of others.

In the present case, the Applicant is not a member of the alleged family of the original proprietor. No evidence was led to establish any intention on the part of the Respondent to hold the land in trust for the Applicant. The alleged transaction, even if proved, would not give rise to a trust in the absence of capacity and participation of the registered owner.

Accordingly, the plea of trust is not supported by evidence.

3. Conclusion and Orders

In the final analysis, the Applicant has failed to prove his case on a balance of probabilities. His claim for adverse possession is not supported by credible evidence, and the alternative claim for trust is equally unmerited.

Accordingly, I make the following orders:

1. The Originating Summons dated 20th February 2025 is hereby **dismissed**;

2. The Applicant has failed to establish entitlement to one (1) acre out of land parcel NO. S. MALAKISI/S. NAMWELA/825 by adverse possession or otherwise;
3. The alternative claim based on trust is hereby **rejected**;
4. Costs of the suit are awarded to the Respondent.

It is so ordered.

**DATED, SIGNED and DELIVERED VIRTUALLY THIS 09TH DAY
OF APRIL, 2026**

HON.E.C CHERONO
JUDGE
ENVIRONMENT AND LAND COURT

In the presence of;

1. Mr. Were for plaintiff
2. Defendant/ Advocate Absent
3. Diana Kemboi - Court Assistant