



**Mutisya v Mumangi (Enviromental and Land Originating Summons
E001 of 2023) [2026] KEELC 2477 (KLR) (28 April 2026) (Judgment)**

Neutral citation: [2026] KEELC 2477 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E001 OF 2023
NA MATHEKA, J
APRIL 28, 2026**

BETWEEN

JOSEPH MUNYAO MUTISYA APPELLANT

AND

TIMOTHY WAMBUA MUMANGI RESPONDENT

JUDGMENT

1. Joseph Munyao Mutisya the Applicant claims to be entitled through adverse possession of a portion measuring approximately 0.80 Hectares contained and to be excised from half share of all that land known as Ndalani/Ndalani block 1/386 for the determination of the following issues;
 1. Whether the Applicant has acquired prescriptive rights by way of adverse possession over all that portion of and measuring approximately 0.80 Hectares contained and to be excised from half share of all that land known as Ndalani/Ndalani block 1/386 registered in the name of the Respondent?
 2. Whether the Respondent should pay costs of this application?
2. The Applicant seeks the following orders;
 1. That, the Applicant be and is hereby declared the owner by prescription and by way of adverse possession of all that portion measuring approximately 0.80 Hectares contained and to be excised from the ½ share of all that land known as Ndalani/Ndalani block 1/386 registered in the names of the Respondent.
 2. That, an order do issue directing the Respondent to execute all the necessary transfer forms, land Control Board Consent forms and other relevant forms in order to effect the subdivision and transfer within 14 days and in default, the deputy registrar do execute the same.



3. That the court do wave the requirement for land control board consent in order to effect subdivision and transfer into the name of the applicant.
4. That, the Respondent do pay the costs of this application.
3. After considering the originating summons application, the replying affidavit and submissions therein, I have found that the issues for determination are as follows;
 - i. Whether or not the Plaintiff has met the threshold for adverse possession.
 - ii. Who will bear the costs?
4. The provision of law concerned with adverse possession is section 38 (1) and (2) of the Limitations of Actions Act Cap 22 which states 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.
 - (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”
5. And section 37 of the Limitations of Actions Act Cap 22 states as follows:

“This Act applies to land registered under the Government Lands Act (Repealed), the Registration of Titles Act (Repealed), the Land Titles Act (Repealed) or the Registered Land Act (Repealed), in the same manner and to the same extent as it applies to land not so registered, except that—

 - (a) where, if the land were not so registered, the title of the person registered as proprietor would be extinguished, such title is not extinguished but is held by the person registered as proprietor for the time being in trust for the person who, by virtue of this Act, has acquired title against any person registered as proprietor, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by this Act;”
6. The law in respect to adverse possession is now settled. For a party to succeed in a claim of adverse possession he/she must satisfy the following criteria stated in the case of *Maweu vs Liu Ranching and Farming Cooperative Society* 1985 KLR 430 where the Court held;

Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”.
7. I am also guided by *Samuel Miki Waweru vs. Jane Njeru Richu*, Civil Appeal No. 122 of 2001, the Court of Appeal delivered the following dictum:

... it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in *Jandu v*



Kirpal [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted.”

8. The copy of the search title annexed as JM1 2 dated 10th July 2023 shows that Timothy Wambua Mumangi and Wambua Nzomo were the joint registered owners of Ndalani/Ndalani block 1/386. The Plaintiff produced had written sale agreements dated 27th May 2001 for 2 acres of land and another dated 19th September 2011 for additional land (JM2a and b). That he took possession and planted tress after contracting the Defendant to do so. He produced the mutation forms of the said suit land.
9. The *Law of Contract Act* clearly stipulates the requirements for a valid instrument to convey an interest in land. Section 3 (3) of the *Law of Contract Act* (Cap 23 of the Laws of Kenya) stipulates that;
No suit shall be brought upon a contract for the disposition of an interest in land unless—
 - a. the contract upon which the suit is founded—
 - i. is in writing;
 - ii. is signed by all the parties thereto; and
 - b. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
10. While Section 38 (1) of the *Land Act* states;
Other than as provided by this Act or by any other written law, no suit shall be brought upon a contract for the disposition of an interest in land—
 - (a) the contract upon which the suit is founded—
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
 - (b) the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.
11. In Harris JA in *Garvey vs Richards* (2011) JMCA 16 the court in considering the essential components of a contract reflected the following principles;

It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable an essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence.”
12. The Supreme Court of United Kingdom in *RTS Flexible Systems Ltd vs Moikerei Alois Muller GMBH & Co K. G.* (2010) UKSC 14;

The general principles are not in doubt, whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon them, by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain



terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precaution to a concluded and legally binding agreement”.

13. The Defendant testified that he received Kshs. 80,000/= in installments to help offset his wife’s medical bills at St Luke Nursing Home. No agreement was ever entered into and the ones produced in court were forgeries and he never signed the same. That there were discussions about the sale of land in the future but the price was never agreed upon. He produced a certificate of title dated 27th October 2023 showing that he was the registered proprietor of Ndalani/Ndalani/ block 1/386. I find the suit land belongs to the Defendant as per the documentary evidence produced in court. No evidence has been adduced by the Plaintiff to prove adverse possession.

14. Section 109 of the *Evidence Act* Cap 80 is clear that;

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

15. The well-known mantra “he who asserts must prove.” Was well pointed out by the Court of Appeal in Jennifer Nyambura Kamau vs Humphrey Mbaka Nandi (2013) eKLR as follows;

We have considered the rival submissions on this point and state that Section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the *Evidence Act* provides that “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.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

16. In James Muigai Thungu vs County Government of Trans-Nzoia & 2 others (2022) eKLR it was held that;

It is now settled law that whosoever asserts the existence of a legal right or liability is vested with the burden to prove it except in so far as the law may expressly exempt him or her. Section 107 of the *Evidence Act* Chapter 80 Laws of Kenya succinctly states:

17. Whosoever 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.

Also, further, Section 108 of the Act states thus:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

18. Again Section 109 of Act refers to the burden of proof of a particular fact. It states that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.



19. I have perused the said agreements and find that the same are not witnessed and are also not signed by both parties. Be that as it may, as cited in the authority above adverse possession cannot succeed when the Applicant took possession with the permission of the Defendant. Secondly, the Plaintiff did not produce any evidence showing that they took open, exclusive and uninterrupted possession save for photos of vacant land. They did not call witnesses to prove their possession from 2001. I find that the Plaintiff has failed to prove his case on a balance of probabilities and I dismiss it. Cost generally follow the event under section 27 of the [Civil Procedure Act](#) and hence the Plaintiff is to bear the costs of this suit.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 28TH DAY OF APRIL 2026.

N.A. MATHEKA

JUDGE

