

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT EMBU**  
**ELCL APPEAL NO. E048 OF 2024**

**ANTONY** **KIBECHU**  
**NJOKA.....APPELLANT**

**VERSUS**

**PENINAH** **MWENDE** **NYAGA.....**  
**RESPONDENT**

*(Being an appeal from the Judgement of Hon. Njoki Kahara (SRM) delivered on 25/09/2024 in Siakago MCELC Case No. E041 of 2020 Peninah Mwende Nyaga v Antony Kibechu Njoka*

**JUDGMENT**

1. The Respondent herein was the Plaintiff before the trial court wherein she had sued the Appellant vide a Plaint dated 28/07/2022 seeking an order of eviction of the Appellant from land parcel Embu/Ngangara/163. She averred that she was the registered owner of the said land and that the Appellant had unlawfully, illegally and without any authority encroached and occupied the land and had refused to vacate.
2. The Appellant filed a defence and counterclaim dated 15/09/2020 and admitted that the Respondent was the

registered proprietor of the suit land. He denied that he was unlawfully occupying the suit land and averred that since he was born, he found his father cultivating and utilizing the whole of the suit land and that in the year 2005, his father told him to take over utilization of the land. He stated that ever since, he has extensively developed the land to the exclusion of the Respondent and her predecessor in title and therefore he had acquired the land by way of adverse possession.

3. In the Counterclaim he sought inter alia, a declaration that the Respondents proprietary rights over the whole of land parcel No. Embu/Gangara/163 had been extinguished; the Appellant be registered as the absolute proprietor of the whole of the suit land instead of the Respondent and be issued with a title deed; that the production of the requisite documents for transfer be dispensed with at the time of registration of the Appellant as the proprietor; in the alternative and without prejudice, a declaration be made that the Respondent is registered as the proprietor of the suit land in trust for the Appellant and the trust be terminated by registered the Appellant as the absolute proprietor thereof.
4. The Respondent filed a reply to the defence and counterclaim and denied the Appellants allegations. She averred that the Appellant forcefully entered and occupied the suit land in 2015 claiming that his late father had bought the land from her late

father. She averred that the Appellant is her neighbor but that he utilizes his own parcel of land but no the suit land herein.

5. When the former suit came up for directions, the parties agreed to proceed with the hearing by way of viva voce evidence.
6. PW1, Peninah Mwende Nyaga adopted her written statement dated 28/07/2020 as her evidence in chief. She testified that she knew the Appellant but that they had no relationship. She stated that the Appellant entered the suit land in 2013 claiming to have bought the suit land from her father but that is not the case. She stated that she had informally tried to evict the Appellant from the land without success. She produced in evidence an official search for the suit land as PExh1.
7. On cross examination, she stated that she currently lives in her brothers land but she used to live on the suit land before her father died in 1986. She stated that she got married in 1993 and then came back to the land. That she used to live on the suit land with her parents when she was young until she got married. She was born in 1973. The mother died in 1986 and she continued to live with her father and siblings. Her siblings do not live on the suit land. Her mother and father were not buried on that land but on her brother's land. She had no photographs to show anything that was on that land.

8. She stated that when she came back she planted miraa and mango trees but had no photographs to prove it. That she had built a house but it fell down. She averred that the Appellant chased her from the land in 2013 and he started clearing the land. He was saying the land belonged to his father. The Appellant lives on the land with his family. He has a house and has planted more miraa. She averred that it was not true she has never lived on that land. She stated that she did not give the defendant consent to live on that land.
9. DW1, Anthony Kibechu Njoka adopted his written statement dated 11/07/2023 as his evidence in chief. He stated that he lives on the suit land as a farmer. As per his statement, he stated that the Respondent is the registered proprietor of land parcel No. 163 having inherited it from her deceased father Nyaga Gatema. He was born in the year 1980 and at that time he found his father utilizing the suit property. All that time growing up he was aware that his father had purchased the suit land from the deceased but the process of transfer had not been initiated. That when he became of age his father directed him to take occupation and utilization of the suit land and in the year 2005 he took full possession and began developing it.
10. He stated that his developments include permanent houses, a live fence and barbed wire around the suit property, grazing livestock, preserving the natural vegetation, planting miraa and trees both indigenous and exotic. He further stated that since he was born, neither the Respondent nor her predecessors in title have ever been in possession or utilization

of the suit property as his family had been in occupation of the land. He stated that he has been in open, continuous and uninterrupted occupation of the suit land since 2005 without the Respondents or her predecessor's permission. That the Respondent is his neighbour and has been seeing him develop, occupy and utilize the suit property since 2005. He stated that therefore, the Respondents title to the land had been extinguished by virtue of adverse possession and she has no proprietary rights over the same.

11. On cross examination, he stated that he had no proof that his father had bought the land from the Respondents father. That his father was alive but he did not live on the suit land. He stated that his father told him that he bought the land in the 1970's and that the Respondents father died before he could transfer the land to him.
12. On re-examination, he stated that he did not chase the Respondent away from the suit land because she was not on the land. He produced his identity card as DExh 1, photographs as DExh 2 and green card to Embu/Gangara/163 as DExh 3.
13. DW2 Mbui Gatema adopted his written statement dated 11/07/2023 as his evidence in chief. He stated the Appellant is a neighbor whereas the Appellant is his niece and that her father was his elder brother. He stated that he was aware the Respondent is the registered proprietor of the suit land having inherited it from her deceased father Nyaga Gatema. That the Appellant's father, before his demise, was known to him and was his friend. That in the 1970s, during the adjudication process, the Appellant's father purchased the suit land from

the Respondent's father and in the 1980s took possession and began utilizing the suit property together with his family. He stated that in the year 2005, he saw the Appellant take possession and begin developing and utilizing the suit property.

14. That he put up developments such as permanent houses, a live fence and barbed wire around the suit property, grazing livestock, preserving the natural vegetation, planting miraa and trees both indigenous and exotic. He stated that during his lifetime, neither the Respondent nor her predecessors in title have ever been in possession or utilization of the suit property and that the Appellant and his family have been in exclusive possession and occupation.

15. On cross examination, he stated that the Appellant was given land by his father who bought it from the Respondents father. That he was there when the Appellant's father bought the land as a witness in the sale agreement but he did not have a copy of agreement. He stated that he did not know which year the Appellant entered the land, but around 2017-2018 he started cultivating and building. He stated that Miraa and mangoes had been planted by the Appellant's father and the Appellant added more.

16. On re-examination, he stated that he could not recall when the Appellant entered the suit land but according to his statement, it was in the year 2005. He stated that the Respondent and her family were living on land parcel No. 322

which land belongs to him where he also lives to date and that she left the land in 2016.

17. The trial Court in its judgement found that the Respondent had proved that she is the rightful and legal proprietor of the suit land. The Court observed that the Appellant did not produce any evidence to prove that his father had purchased the suit land from the Respondent's father, nor did he call his father to corroborate that assertion, despite admitting that his father was still alive. The Court found that on the claim of adverse possession, the claim was time barred as per section 7 of the Limitation of Actions Act which provides that a person may not bring an action to recover land after the end of 12 years from the date on which the right of action accrued.
18. The Court reasoned that since the Appellant claimed to have been in occupation of the suit land since 2005, by the time the Respondent filed suit in 2020, he had been on the land for approximately 15 years, and therefore his claim was already time-barred as at the time of filing suit. The Court further found that the claim of trust had not been proved. The Respondents suit was allowed in its entirety whereas the Appellants Counterclaim was dismissed. The Respondent was awarded costs of the suit and Counterclaim.
19. The Appellants were aggrieved by the impugned decision and preferred the present Appeal on the following grounds;
  1. That the learned trial Magistrate erred in law and fact in failing to consider the evidence tendered by the Appellant.

2. That the learned trial Magistrate erred in law and fact by acting on the wrong principles of law and disregarding the provisions governing claims for adverse possession, thereby reaching an erroneous decision that the Appellant did not prove a claim for adverse possession, therefore occasioning a miscarriage of justice.
3. That the learned Magistrate misdirected herself by failing to consider the fact that the Appellant had satisfied the conditions for grant of adverse possession.
4. That the learned trial Magistrate erred in law and fact by failing to consider the Appellant's defence of adverse possession against the Respondent's claim for eviction.
5. That the learned trial Magistrate erred in law in the application of Section 7 of the Limitation of Actions Act by finding that the Appellant's claim was time-barred, a position which ought to have applied to the Respondent's claim.
6. That the learned Magistrate erred in law and fact by failing to consider the submissions and the authorities cited by the Appellant.
20. The Appellants sought to have the judgement of the trial Court set aside and substituted with orders allowing the Respondents suit and dismissing the Counterclaim and that the costs of the appeal be borne by the Respondent.
21. When the appeal came up for directions, the parties agreed to canvass the appeal by way of written submissions. The Appellant filed submissions dated 16/06/2025 through the firm of Kalamu, Ndolo & Company Advocates. They submitted that

this being a first appeal, the Court is obligated to re-evaluate the evidence and reach its own conclusion, guided by the principles set out in *Njihia & another v Njoroge & another* (Environment and Land Appeal 11 of 2023) (2024)Eklr.

22. He submitted that his counterclaim for adverse possession was wrongly dismissed by the trial court. That he testified, and his evidence was supported by a witness and photographs, that he has been in exclusive, open, and uninterrupted occupation of the suit property since 2005, having taken over its use from his father. He averred that the Respondent abandoned the land in 1993 after she got married and she never demonstrated that she occupied or developed the suit land nor did she produce any evidence that she tried to evict him from the land.

23. He argued that the trial Court misapplied Section 7 of the Limitation of Actions Act by holding that his claim was time-barred. He submitted that adverse possession accrues only after twelve years of uninterrupted occupation, not before, and that their claim was properly brought in 2020 after the statutory period had lapsed. They relied on the case of *Mtana Lewa v Kahindi Ngala Mwagandi* (2015) Eklr to support this position.

24. The Respondent filed submissions dated 03/10/2025 through the firm of Igati Mwai and Company Advocates. She submitted that she is the duly registered proprietor of the suit land having been registered on 13/07/2018 following Succession Cause No. 27 of 2017 and that prior to that the land belonged to her father. She argued that the Appellant's

occupation of the land was unlawful, and eviction was properly sought. She submitted that the Appellant relied on hearsay evidence that his father bought the suit land from the Respondents father as no evidence of a sale agreement was produced. On the issue of adverse possession, she submitted that the Appellant's claim was untenable as a claim of that nature cannot be inherited. She averred that since it was alleged that the Appellants father purchased the suit land, then he was the right party to bring a claim for adverse possession.

25. She submitted further that the Appellant could not claim adverse possession given that his claim was tied to a sale agreement he did not produce in evidence. She stated that the Appellants occupation was not peaceful, continuous and uninterrupted as she testified that she had been utilizing the suit land until 2013 when the Appellant chased her away. She further submitted that the trial Court lacked jurisdiction to determine adverse possession claims, which fall exclusively under the jurisdiction of the Environment and Land Court. She relied on the case of *Kimeto v Omwomo* (Environment and Land Appeal Case no. E04 of 2024) (2024) KEELC 13848 (KLR) (18 December 2024)(Judgement) to support that position.

26. Having considered the record of appeal and the rival submissions, I find that the main issues for determination are;

- i. Whether the Appellant proved a claim for adverse possession and;
- ii. Whether the Appellant should be evicted from the suit land.

27. Before addressing the merits of the appeal, the Court will first deal with the issue of jurisdiction raised in respect of the counterclaim for adverse possession in the Appellants submissions. It is not in doubt that the current legal position, Magistrates' Courts do not have jurisdiction to determine claims of adverse possession. However, that position was not always settled. There existed conflicting judicial decisions on the question for some time. It is only after the Court of Appeal in **Sugawara v Kiruti (sued in her capacity as the administrator of the estate of Mutarakwa Kiruti Lepaso alias Mutaragwa Kiruti Lepaso alias Mutaragwa Kiroti Leposo and in her own capacity) & 3 others (Civil Appeal E141 of 2022)(2024)KECA 1417 (KLR)**, that it was settled that the Magistrates' Court do not have jurisdiction in such matters.

28. That decision, however, came after the judgment of the trial court. The judgment appealed from was delivered on 25/09/2024, at a time when subordinate courts were still routinely hearing and determining claims relating to adverse possession. In the circumstances, this Court does not find merit in the objection on jurisdiction.

29. The statutory anchor on adverse possession is Section 7 of the Limitations of Actions Act which provides that:

“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”.

30. Further Section 13 (1-2) of the Limitation of Actions Act provides that:

“A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land. Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

31. Also Section 38 (1) of the said Act provides that:

“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.

32. The Court, in the case of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR: Malindi App No. 56 of 2014, gave a comprehensive definition of what amounts to adverse possession by stating thus;

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner”.

33. Further the court of appeal in the case of Samuel Kihamba v Mary Mbaisi [2015] eKLR stated as follows:

“Strictly, 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 force, without secrecy, 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 phraseology, *nec vi, nec clam, nec precario.*”

34. In the present case, it is not in dispute that the Respondent is the registered proprietor of the suit land. The Appellant’s case is that he entered the suit land in the year 2005 and has since remained in open, continuous and exclusive occupation of the land, developing and utilizing it as his own. In support of this position, he relied on the evidence of DW2 together with photographs to show the developments he has made on the

land. The Respondent however, maintained that the Appellant only entered the land in 2013 and did so unlawfully through force. She further contended that she was in occupation of the land up to that point when the Appellant chased her from the land and that the Appellant's occupation was neither peaceful nor exclusive.

35. The Court notes that the Appellant's account of his entry into the land in 2005 was supported by DW2, who traced the Appellants occupation of the land to the Appellant's father who is said to have purchased the land as far back as the 1970s from the Respondents father. He stated that the Appellants father took over occupation of the land and started utilizing it with his family in the 1980's before the Appellant took over the occupation in 2005. On the other hand, the Respondent's allegation that the Appellant only entered the land in 2013 was not supported by any evidence and remained unsubstantiated.

36. The Court also takes into account the photographs produced by the Appellant, which were uncontested by the respondent, which show a permanent house and mature trees and miraa planted on the suit land. These in this Courts view are features consistent with occupation over a considerable period of time and do not indicate a recent entry into the land as claimed by the Respondent. The Appellants testimony that he has been utilizing the land and making the said developments openly, within the full view of the Respondent who is his neighbour was also not contested. In the circumstances, the Court is satisfied, on a balance of probabilities, that the Appellant and his family have been in occupation of the suit land since at least 2005,

and that such occupation was open and with the knowledge of the Respondent.

37. There is also no evidence that the Respondent made any effective assertion of her title or took any steps to interrupt the Appellant's occupation during the material period. In the circumstances, the period between 2005 and 03/08/2020 when the suit was instituted, is a period of about 15 years which exceeds the statutory period of twelve years.

38. The Court further finds that the trial court misdirected itself in its treatment of Section 7 of the Limitation of Actions Act. The learned Magistrate appeared to treat the lapse of twelve years as a bar to the Appellant's claim rather than appreciating that the expiry of that period is precisely what perfects a claim for adverse possession.

39. In the circumstances, this Court is satisfied that the Appellant has proved, on a balance of probabilities, that he has acquired title to the suit land by way of adverse possession. The Counterclaim therefore succeeds and is allowed in its entirety. Consequently, the Respondent's claim for eviction cannot stand and is hereby dismissed.

40. Costs of the suit, the counterclaim, and this appeal are awarded to the Appellant.

DATED, DELIVERED AND SIGNED THIS 14<sup>TH</sup> DAY OF MAY, 2026.

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HON E. C. CHERONO

## ELC JUDGE

In the presence of;

Mr. Kalamu Ndolo for the Appellant

2. Mr. Mwai for the Respondent

3. M/S Ruth C/A