



REPUBLIC OF KENYA



**KENYA LAW**  
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**Omayo v John (Environment and Land Case 12 of 2023)  
[2025] KEELC 5921 (KLR) (23 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5921 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND CASE 12 OF 2023**

**EK MAKORI, J  
JULY 23, 2025**

**BETWEEN**

**COSMAS KIMWEI OMAYO ..... APPLICANT**

**AND**

**HELENA NABUKWERE JOHN ..... RESPONDENT**

**JUDGMENT**

1. The Applicant submitted a claim through an Originating Summons dated 30 May 2023, requesting the resolution of the following issues, which I frame for the determination of this court:
  - a. Whether the Applicant and his family members, on whose behalf he is filing this suit, have acquired prescriptive rights and overriding interests in the seven acres of land known as Kilifi/Mtondia/5907 through adverse possession against the Defendant.
  - b. Whether the Applicant should be registered as the proprietor for himself and in trust for his family members, on whose behalf he files this suit for the 7 acres of land known as Kilifi/Mtondia/5907.
  - c. Who is entitled to the costs of this suit?
2. From the supporting affidavit by the applicant, he states that his case is that he and his family took possession of the suit land measuring 7 acres and have been in occupation of that parcel of land. He has occupied the 7 acres that are the subject of the suit openly, peacefully, and quietly without any interruption since 1999, and therefore has acquired the right of adverse possession.
3. In response to the Applicant's claim, the Respondent filed a detailed Replying Affidavit to the Originating Summons dated March 28, 2025. Alleging that the Applicant trespassed onto the suit property after the eviction of one Augustine Owiti, who was stopped from mining stones on the suit



property. Since then, the Applicant has been involved in a series of blackmail attempts to acquire the suit property.

4. Counsel for the parties filed written submissions on the threshold to be achieved before adverse possession attaches.
5. The Applicant cited decisions in *Joseph Macharia Kairu v Kenneth Kimani Muiruri* [2021] eKLR, *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR, *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, *Peter Mbiri Michuki v Samuel Mugo Michuki* [2014] eKLR, and *Public Trustee v Wanduru Ndegwa* [1984] KLR 314 concerning the incident, burden of proof, and the elements of adverse possession.
6. On the other hand, the Respondent cited the decisions in *Titus Kasuve v Mwaani Investments Ltd and 4 Others* [2004] 1KLR 184, *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, and *Aboud and 18 others v Khan (Civil Appeal 21 of 2020)* [2023] KECA 1286 (KLR) (27 October 2023) (Judgment).
7. As submitted by the Respondent, the Applicant bears the burden of demonstrating, on a balance of probabilities, that he fulfills the legal criteria for adverse possession.
8. As correctly submitted by the parties, it is well-established that the elements of adverse possession were summarized in the case of *Titus Kasuve v Mwaani Investments Ltd and 4 Others* [2004] 1 KLR 184, as follows:

“...and in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition.”
9. Similarly, in the matter of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, the court held as follows:

“The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years.”
10. Based on the materials presented to me, the Applicant has not proven actual, peaceful, open, or exclusive occupation for 12 years on the suit property. The Applicant’s claim that he has occupied the land since 1999 lacks evidence. Conversely, the record, including the Respondent’s affidavit, shows the Applicant only entered the suit land in April 2022 after removing a third-party trespasser, Augustine Owiti. Subsequently, the Applicant unlawfully started stone excavation without the Respondent’s permission. This timeline is confirmed by the demand letter dated March 28, 2022, along with photographs and employment letters indicating occupation beginning in 2022, not 1999.
11. The Applicant did not provide any evidence, documentary or otherwise, that he or his family occupied the land for the required 12 years. Therefore, the threshold under Section 7 of the *Limitation of Actions Act* has not been met. The Plaintiff’s acts of aggression, threats, and illegal excavation constitute trespass, not adverse possession.
12. The Respondent has provided unequivocal evidence indicating that land parcel Kilifi/Mtondia/5907 was originally a mother title, which has since been subdivided into multiple parcels now registered in the names of third parties. The title deed corroborates this information, as evidenced by its designation as Annexure HN1, demonstrating that Kilifi/Mtondia/5907 ceased to exist following the subdivision. Consequently, the Applicant’s claim pertains to a title that no longer exists.



13. The Applicant has not demonstrated whether the 7-acre portion he claims falls within any of the new subdivided parcels, or whether such parcels are still under the Respondent's ownership.
14. This Court cannot issue orders in vain. If the Applicant's claim is permitted concerning a parcel that no longer exists, any subsequent decree will be legally unenforceable. Furthermore, any adverse determination may impact the rights of third-party bona fide purchasers who are not parties to this litigation, thereby contravening the fundamental principle of Audi alteram partem (let the other side be heard as well).
15. I agree with the Respondent that adverse possession must be exclusive and hostile to the title holder. Mere permissive use, secret occupation, or occupation achieved through coercion cannot establish a claim of adverse possession. The Applicants' occupation was not peaceful. The Respondent has demonstrated acts of threats to yield ownership of the suit property. Her house was demolished, and intimidation and coercion were used to secure an illegal agreement for payment of Kshs. 500,000/= under duress. Such conduct is incompatible with the doctrine of adverse possession.
16. In the decision cited to me by the Respondent – *About and 18 others v Khan* (Civil Appeal 21 of 2020) [2023] KECA 1286 (KLR) (27 October 2023) (Judgment) – with which I agree, the Court of Appeal upheld the decision of the Environment and Land Court, where the Court failed to declare the Appellants as adverse possessors due to the use of violence and threats. The Court had this to say:

“Based on the foregoing, there was a proper factual basis for the learned Judge's finding that the appellants forcibly held onto the property, preventing the respondent from occupying it. In that regard, the learned Judge of the ELC stated:

“ I have no hesitation in finding that the Respondents have since the year 2000 forcefully held onto the suit property and that their claim for adverse possession thereof must fail. Their occupation of that property is illegal, unlawful, and without any foundation in law or otherwise. They have clearly by their admission used unlawful means to deprive the Petitioner of the use and occupation of his property. This Court will not allow them to continue to benefit from the illegality of their actions.”

45. We respectfully agree. The averments in the appellants' answer to the claims by the respondent in the petition that he was forcibly kept out of the property are effectively admissions by the appellants that the respondent was indeed forcibly denied access to the property. The argument that the appellants' averments in that regard were “banter” is hardly persuasive. Banter has no function in pleadings.”

17. The Respondent has shown that she legally inherited the disputed land through transmission via Succession Cause No. 143 of 2013. Later, the Respondent obtained the title and was officially registered as the owner of Kilifi/Mtondia/5907 in 2022. From 2022 until the start of this litigation, a period of 12 years had not passed, during which a claim of adverse possession could have been filed.
18. In conclusion, the Applicant's claim is dismissed with costs.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 23<sup>RD</sup> DAY OF JULY 2025.**

**E. K. MAKORI**

**JUDGE**



In the Presence of:

Ms. Buluma, for the Respondent

Happy: Court Assistant

In the Absence of:

Mr. Muranje for the Applicant

