



**Ndwiga v Mwara (Environmental and Land Originating Summons  
E001 of 2022) [2025] KEELC 5875 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5875 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E001 OF 2022**

**AK BOR, J**

**JULY 17, 2025**

**BETWEEN**

**IRENE WARUE NDWIGA ..... PLAINTIFF**

**AND**

**NANCY NJOKI MWARA ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed the originating summons dated 6/1/2022 seeking a declaration that she had become entitled to a portion measuring 0.20 hectares (ha) out of the Defendant's land known as Kyeni/Mufu/10658 measuring 0.50 ha. In the alternative, she sought a declaration that the Defendant is registered as proprietor of the portion measuring 0.20 ha in trust for her. She sought to be registered as the proprietor of the portion measuring 0.20 ha out of land known as Kyeni/Mufu/10658 and the costs of the suit.
2. The Plaintiff brought the suit in her own capacity and as the legal representative of the estate of her late husband, Justin Nyaga Mwaniki who passed away on 23/12/2019. She averred that vide a sale agreement dated 6/9/2002, the Defendant agreed to sell to her late husband a portion of land measuring 0.2 ha out of Kyeni/Mufu/10658 at the agreed consideration of Kshs. 110,000/=. At the time, the land was registered in the name of the Defendant's late father, Grishon Mwara Kathingaruru and was the subject of succession proceedings in Runyenjes Succession Cause 34 of 1997. She averred that they paid the Defendant the agreed sum of Kshs. 110,000/= with her late husband in instalments and that the last instalment was paid on 21/12/2004. That they were shown the land they were buying and the surveyor marked their portion and they took possession of the land.
3. She averred that they paid the Defendant a further sum of Kshs. 9,060/= as compensation for the developments that fell on the subject portion of land consisting of coffee and assorted trees. They developed the land by planting 100 stems of bananas, over 100 assorted trees including macadamia, 'mivariti', 'mikarikaba' trees and that they dug a 30 feet well on the land. The Defendant failed to effect



- transfer of the 0.20 ha to them despite several reminders. Instead, the Defendant stated that she would transfer the suit land on condition that the Plaintiff paid the costs of subdivision and transmission of the original land parcel Kyeni/Mufu/2991 to all the beneficiaries and thereafter subdivision of the Defendant's share of the land so that the Plaintiff could get her portion.
4. Being agreeable to the condition, the Plaintiff claimed that she paid the surveyor Kshs. 61,000/= and parcel no. 2991 was subdivided and the Defendant's portion became Kyeni/Mufu/10658. Even then, the Defendant declined to have parcel no. 10658 subdivided so that the Plaintiff could get her share. The Plaintiff averred that the Defendant was offering the portion in dispute for sale to other people. The Plaintiff contended that based on the fact that they took possession of the suit land with her deceased husband and had worked on the land for over 12 years without interference from the Defendant, the Defendant had lost her claim over that portion of land.
  5. The Defendant filed a replying affidavit and denied that the Plaintiff was entitled to the suit land through adverse possession. She averred that the sale agreement dated 6/9/2002 was crafted to appear like she was selling the land yet it was a lease. She averred that the Plaintiff had been in occupation of the land as a licensee and that since she is a widow, the Defendant could not chase her from the land but had asked her to get an alternative place before she could take steps to evict her.
  6. The Defendant denied receiving the full purchase price and explained that that is the reason why the Plaintiff and her late husband were not included in the family succession cause. She averred that the Plaintiff was a licensee on parcel number 2991 and not 10658 for over 12 years. She contended that at the time of the alleged agreement, parcel number 2991 was registered in the name of Grishon Mwara Kathingaruru hence she was not capable of entering a valid sale agreement with the Plaintiff or her late husband.
  7. The Defendant contended that she did not intend to transfer any portion of the land because the Plaintiff and her husband breached the agreement and that it was frustrated and is now unenforceable. It was her case that the Plaintiff was not entitled to the reliefs sought in the suit.
  8. The case was heard on 25/10/2023 when the Plaintiff gave evidence. She told the court that the Defendant sold her land with her husband. Her husband died on 23/12/2019. They bought half an acre out of Kyeni/Mufu/2991, which was registered in the Defendant's father's name. The money they paid was meant to assist the Defendant file the succession proceedings for her mother's and father's estates. They were shown the land they were buying and a surveyor went and marked their portion. That they paid the full purchase price and an extra Kshs. 9000/= for the coffee bushes. That they took possession and started cultivating the land and planted more coffee and trees. They dug a well on the land. She stated that they finished paying for the land in 2004.
  9. When her husband died, she approached the Defendant and requested her to transfer their portion to her. The Defendant informed her that she did not have money. She paid about Kshs. 61,000/= for subdivision. The Defendant refused to transfer the land and was even trying to sell it to someone else. The Plaintiff told the court that she was still on the land. She denied leasing the land from the Defendant. She produced copies of the sale agreement, her husband's death certificate and the certificate of confirmation of grant. She also produced a copy of the acknowledgement of the receipt of the monies they paid to the Defendant. She also produced a copy of the surveyor's letter dated 14/12/2021 and copies of the green card for the suit land and the title deed.
  10. On cross examination, she stated that they bought the land in 2002. She lived on the land. She conceded that the Defendant was registered as the proprietor of the land in 2021. It was her position that by the time they took possession the land, the Defendant had obtained a grant over her late mother's estate.



The Plaintiff clarified that she had not built on the suit land but had grown coffee, macadamia, bananas and trees on the land.

11. The Plaintiff called Ernest Kauma Gershon to give evidence in support of her case. He told the court that the Defendant was his younger sister. He confirmed that she sold land to the Plaintiff. He told the court that when she was administrator of their father's estate, the Defendant refused to ensure that his own title was processed. He emphasised that the Plaintiff was not leasing the land from the Defendant. He confirmed that the Plaintiff was the one using the suit land and that the Defendant sold the land when she needed money to go for medical treatment. He was present when the initial payment of Kshs. 30,000/= was paid to the Defendant but did not know when the last instalment was paid.
12. Augustine Njeru Njuguna, a cousin of the Defendant also gave evidence and stated that the Defendant sold the portion of land to the Plaintiff's late husband. He confirmed that the Plaintiff had been using the land. He was present when the surveyor got involved in the matter.
13. The Defendant testified on 17/1/2024 and maintained that she did not sell land to the Plaintiff but that she leased it to her. She could not recall when she leased the land. She conceded that they entered into an agreement but contended that she was only paid Kshs. 30,000/=. She stated that she was the one who allowed the Plaintiff to use the land. The Defendant sought time to bring legible documents and was granted an adjournment.
14. The Defendant further gave evidence on 28/4/2025 and told the court that the Plaintiff and her late husband started using the land in 2002 and that they had leased the land from her. Her brother Ernest Kauma was her witness when she signed the sale agreement. Her father died in 1994 while her mother died in 2000. By the time she entered into the agreement in 2002 the land was in her father's name. She was appointed administrator of her father's estate in 2003.
15. The Defendant told the court that her father subdivided the land and that she paid the surveyor's fees. When the Plaintiff's husband died in 2019, his people started demanding the land. She claimed that he went to her house with the Plaintiff and told her that they would finish their work and then move out of the land but he died before that happened. She explained that she could not have sold the land because it was her father's land and she became an administrator of his estate in 2003. She had never chased the Plaintiff from the suit land. She told the court that when she goes to the suit land her brother chases her away.
16. The court directed parties to file written submissions which it has considered. The Plaintiff submitted that she seeks to be declared to have become entitled to a portion measuring 0.2 ha out of the land known as Kyeni/Mufu/10658, which was registered in the Defendant's name on 18/2/2021 through transmission. The Plaintiff relied on *Mtana Lewa v Kahindi Ngala Mwagandi* (2015) eKLR on the prerequisites for adverse possession. She submitted that her late husband purchased the portion of land measuring 0.2 ha from the Defendant for valuable consideration and that the last instalment of the purchase price was paid on 21/12/2004. That through the sale, the Appellant's late husband took possession of the portion of land. The Appellant pointed out that clause 5 of the sale agreement stipulated that possession would be granted to the purchaser upon payment of the first and second installments. That since the second instalment was paid on 15/9/2002 then the date of possession can be pegged on 15/9/2002.
17. The Plaintiff submitted that the succession proceedings in respect of the Defendant's deceased father's Estate were instituted in 1997 as Runyenjes Succession Cause No. 37 of 1997 and that the document the Defendant referred to and tendered in evidence was actually summons for the rectification of grant. Further, that a grant in respect of the Defendant's late father's estate had been issued to her mother on 7/5/1998 and was confirmed on 27/4/2000 when the Defendant inherited an acre out of



- Kyeni/Mufu/2991. The Plaintiff submitted that the sale agreement dated 6/9/2002 was therefore valid since the grant in respect of the Defendant's late father's estate had already been confirmed and the Defendant's beneficial interest in Kyeni/Mufu/2991 identified.
18. The Plaintiff submitted that the purchaser paid the final instalment on 21/12/2004 and that that is when time started running for purposes of adverse possession. That at the time of filing suit the Plaintiff had been in possession of the portion measuring 0.2 ha for 21 years. The Plaintiff urged that for the 21 years she was in possession of the portion of 0.2 ha the Defendant did not take any steps to evict the Plaintiff from the land.
  19. The Defendant submitted that the sale agreement dated 6/9/2002 was bad in law because its subject matter was going through succession proceedings and that the Defendant's mother died before the suit land was transferred to the Defendant. The Defendant contended that while the Plaintiff's husband was aware that the grant was yet to be confirmed, he proceeded to enter into the sale agreement with the Defendant. She argued that the sale agreement did not contain the parcel number and that that created uncertainty. The Defendant relied on Section 82 (b) of the Law of Succession Act and was emphatic that the Plaintiff should not be allowed to benefit from an illegality.
  20. The Defendant contended that the Plaintiff's late husband failed to abide by the terms of the sale agreement which stipulated when payments were to be made and that he made numerous payments in the following years without adhering to the provisions of the sale agreement. She maintained that her intention was for the Plaintiff's husband to utilise the suit land under a license until the grant in respect of her father's estate was confirmed.
  21. The Defendant relied on *Gabriel Mbui v Mukindia Maranya* [1993] eKLR on the point that if a person is in possession as a result of permission given by the owner or if he is in possession as a licensee then he is not in adverse possession. She maintained that the Plaintiff's possession of the land was permissive and based on the incomplete and legally unenforceable sale agreement. It was her case that she merely permitted the Plaintiff's husband to occupy the suit land temporarily as a licensee. She urged that the Plaintiff had failed to demonstrate *animus possidendi*, that is, the clear intention to dispossess the true owner. She maintained that the Plaintiff was never in open, exclusive or hostile possession of the suit land and urged the court to dismiss the suit with costs to the Defendant.
  22. The issue for determination is whether the Plaintiff has acquired title to 0.20 ha out Kyeni/Mufu/10658 through adverse possession and whether the Defendant holds title to the portion of land in trust for the Plaintiff.
  23. Adverse possession is a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for at least 12 years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites are that possession of the adverse possessor is neither by force or stealth nor under the license of the owner and must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. See *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] KECA 532 (KLR).
  24. In *Wambugu v Njuguna* [1983] KLR 172, the court laid down the guiding principles for determining a claim for adverse possession. These are: - the owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it; and the dispossession of the proprietor must be inconsistent with his enjoyment of the soil for the purpose of which he intended to use it. That the proper way of assessing proof of adverse possession is whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.



25. The court stated in *Samuel Kihamba v Mary Mbaisi* [2015] KECA 853 (KLR) that for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly without force, without secrecy, and without license or permission of the land owner, with the intention to have the land.
26. It is not in dispute that the Defendant is the current registered proprietor of Kyeni/Mufu/10658, a copy of the title deed was produced. It is also common ground that the Plaintiff took possession of the portion of land in 2002 pursuant to a sale agreement dated 6/9/2002. Although at the time the land was registered in the name of the Defendant's deceased father, the agreement was between the Defendant and the Plaintiff's husband, Justin Nyaga Mwaniki (deceased). The Defendant disputes the nature of the agreement, claiming it was intended to be a license agreement.
27. The Plaintiff produced a copy of the sale agreement and called two witnesses, Ernest Kauma Gerishon, the Defendant's brother and a witness to the sale transaction. Augustine Njeru Njuguna, a cousin to the Defendant who introduced the surveyor to the parties also testified. Their evidence corroborated the Plaintiff's testimony that the transaction was a sale and not a lease or license as the Defendant claimed.
28. The Defendant did not tender any evidence to support her claim that her intention was to lease the portion of land to the Plaintiff's husband and not sell it. She did not deny signing the agreement dated 6/9/2002 which was clearly titled agreement for sale. The Plaintiff produced acknowledgement receipts signed by the Defendant all of which were clearly titled agreement for sale of land and each acknowledged receipt of specific instalments towards the agreed purchase price. The Defendant did not disown these documents nor did he tender any evidence to rebut their contents or authenticity. The Defendant's allegation that the transaction was a lease and not a sale is unconvincing and not persuasive.
29. The Plaintiff's testimony, which was not rebutted, was that she and her late husband took possession of the portion of land in 2002, developed the land by planting banana stems, trees and digging a well and continued cultivating it without interruption. She facilitated the subdivision of the Defendant's family land by paying Kshs. 61,000/= to the surveyor. The original parcel of land, that is Kyeni/Mufu/2991 was subdivided, and Kyeni/Mufu/10658 was registered in the name of the Defendant. That the Defendant refused to honour her part of the bargain by transferring the agreed 0.20 ha portion to the Plaintiff.
30. The evidence adduced proves that the Plaintiff's entry into the suit land was not clandestine, forceful, or under licence. Her occupation was open, continuous, and exclusive. The Defendant confirmed that the Plaintiff remained in possession without being evicted or asked to vacate until this dispute arose. The Plaintiff continued to utilise and develop the suit land by cultivating it, planting trees and coffee and even dug a well on the land. The Plaintiff's actions demonstrate an intention to possess the land as her own. Her possession was therefore *nec vi, nec clam, nec precario*, that is, without force, secrecy, or permission).
31. In *Gabriel Mbui vs Mukindia Maranya* (1993) eKLR, the court stated that where adverse possession arose out of a sale of agreement under which the payment of the purchase price by the adverse possessor was by installments, and the agreement fails, the period of limitation for an action for adverse possession started running only after the last and final payment has been made to complete the agreed purchase price. That the period of limitation started to run on the date of the payment of the last installment of the purchase price.



32. In this case, time started running at the very latest in 21/12/2004, when the final instalment of the purchase price was paid. The Defendant did not take any steps to assert her title or interrupt the Plaintiff's possession since that time. From 21/12/2004 to 7/2/2022 is about 17 years, which is more than the 12 years required by law to prove a claim for adverse possession. The court is satisfied that the Plaintiff has proved her case for adverse possession, that she has been in uninterrupted, exclusive, and open possession of 0.20 Ha out of Kyeni/Mufu/10658 for a period exceeding 12 years.
33. The court is persuaded that a constructive trust arose from the parties' conduct. The Plaintiff and her husband paid the full purchase price for the suit land and were shown the land. They took possession and started developing it and even paid for the subdivision process which culminated in the Defendant being registered as proprietor of Kyeni/Mufu/10658. Equity would impose a trust to prevent the Defendant from being unjustly enriched. The Defendant's conduct in accepting full consideration and allowing the Plaintiff to take possession created a constructive trust over the portion of land. The court finds that the Defendant holds the suit portion of land in trust for the Plaintiff.
34. The Plaintiff has proved her claim on a balance of probabilities. A declaration is issued that the Plaintiff is entitled to be registered as proprietor of a portion measuring 0.2 hectares out of Kyeni/Mufu/10658. The Plaintiff is awarded the costs of the suit.

**DELIVERED VIRTUALLY AT EMBU THIS 17<sup>TH</sup> DAY OF JULY 2025.**

**K. BOR**

**JUDGE**

In the presence of: -

Mr. Justin Nderi for the Defendant

Diana Kemboi- Court Assistant

No appearance for the Plaintiff

