



**Wangwi v Seria (Sued as the Legal Representative of Seria Boroye Sinda – Deceased) (Environment and Land Case E027 of 2021) [2025] KEELC 5968 (KLR) (26 August 2025) (Judgment)**

Neutral citation: [2025] KEELC 5968 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT AND LAND CASE E027 OF 2021  
FO NYAGAKA, J  
AUGUST 26, 2025**

**BETWEEN**

**JACKSON CHACHA WANGWI ..... PLAINTIFF**

**AND**

**SAMWEL WILSON SERIA (SUED AS THE LEGAL REPRESENTATIVE OF  
SERIA BOROYE SINDA – DECEASED) ..... RESPONDENT**

**JUDGMENT**

1. By way of Originating Summons dated 29<sup>th</sup> June 2021, the Plaintiff initiated a suit for adverse possession. He sought determination of the following issues;
  - a. That the rights of the Defendant to recover a portion of land parcel No. Bukira/Buisaboka/77 measuring 6 acres is barred under the Provisions of *Limitation of Actions Act* and the Defendant's title thereto is extinguished on the grounds that the plaintiff has been in open, peaceful, quiet, uninterrupted and continuous possession and occupation thereof for a period of more than 18 years hence this court ought to make a declaration accordingly.
  - b. That having been in such occupation and possession of the portion of the suit property in the manner aforesaid the Plaintiffs interest in the suit property amounts to an overriding interest as envisaged under the provision of the *Land Registration Act* and merits registration and the court ought to make a declaration accordingly.
  - c. That this court therefore, upon finding that the title to the Defendant over a portion of the suit property measuring 6 acres has been extinguished by effluxion of time, does issue an order for the subdivision and transfer of the said portion to the plaintiff.
  - d. That there be an order of permanent injunction restraining the plaintiff by himself, his agents, his servants, his employees, his family members or any person claiming under him or acting with his express and/or implied authority from alienating, transferring, entering, and re-



entering. Trespassing onto disposing of in any way or interfering with the plaintiff's possession, occupation and quiet enjoyment of the portion of the suit property measuring 6 Acres.

- e. That in furtherance of the issues herein and in default of the Defendant executing such requisite documents and/or instruments to effect the sub division and transfer of the portion to the plaintiff the executive officer of this court be directed to so execute the said documents and instruments.
  - f. That the costs of these proceedings be borne by the Defendant.
2. The Summons are premised on the grounds on the face of it and the averments of the Plaintiff in the supporting affidavit. In his affidavit, he deponed that he knows of his own knowledge that land parcel No. Bukira (Buisaboka) 77 measuring 40.0 Ha was originally registered in the name of Sirira Boroyi – Deceased annexing and marking as “JCW1” a copy of the green card. Further, that the Defendant herein is the administrator of the estate annexing and marking as “JCW 2” a copy of the grant of letter of administration intestate.
  3. The deponent averred that the said grant has been confirmed and a certificate of confirmation of grant duly issued annexing and marking as “JCW 3” a copy of the certificate of confirmation. He stated that sometime on or about the 16/4/2003 and 7/3/2012 respectively, he entered into an agreement for sale of portions of the above parcel of land measuring 4 Acres and 2 Acres respectively with one Wilson Seria Boroyi, annexing and marking as “JCW4” a copy of the sale agreement. He paid the consideration of Kshs. 180,000/= in full. Upon execution of the said agreement he was put in possession of the entire portion measuring 6 Acres and has maintained such possession to date.
  4. He stated that though the deceased (Wilson Seria Boroyi) executed the agreement for sale of the portion in his favour, no steps were made to have the parcel transferred. Neither was the requisite consent of the Land Control Board to transfer the portion obtained within the requisite period or at all. He urged that he has remained in occupation and possession of the portion sold for a period in excess of 18 Years having taken possession in the year 2002. He urged that neither the deceased nor the Defendant has taken any steps to interfere with his possession and occupation. He stated that he has extensively developed the parcel of land by putting up structures and carrying on farming activities on the whole of the portion, annexing and marking as JCW5 a bundle of photographs of such development. He stated that by virtue of his occupation, the title of the deceased and by extension the Defendant in respect of the portion of the suit property measuring 6 Acres has been extinguished by effluxion of time.
  5. He urged that the Defendant's right to recover the said portion is now barred under the provision of section 38 of the *Limitation of Actions Act*. Further, that he has acquired prescriptive rights over the said portion measuring 6 Acres by adverse possession and the said portion ought to be sub-divided and transferred to him.
  6. The defendant filed a replying affidavit dated 4<sup>th</sup> August 2021 in opposition to the Summons. He urged that this matter is with regard to the estate of Seria Boroyi Sinda (1<sup>st</sup> deceased) where he is the administrator of the estate annexing and marking as “SWS 1” a copy of the Certificate of Confirmation of Grant dated 3<sup>rd</sup> March, 2021. Further, that Wilson Seria Boroyi (2<sup>nd</sup> deceased) was not an administrator of the estate of Seria Boroyi Sinda and had no capacity to deal and/or sell any portion of parcel no. Bukira/Buisaboka/77, which comprised the estate of the 1<sup>st</sup> deceased.
  7. The defendant stated that any such dealings amounts to intermeddling in the estate of a deceased person contrary to Section 45 of the *Law of Succession Act* Cap 160 Laws of Kenya. Further, that any occupation of any portion of the suit land has been met with hostility as evidenced in Migori High Court of Kenya ELC No. 3 of 2017, Kehancha PM Court Criminal case no. 676 of 2015, Criminal



case no.795 of 2014, Criminal case no.717 of 2014 and Criminal case no.475 of 2013. He urged that the applicant is not entitled to benefit under the doctrine of adverse possession as alleged, and that their application be dismissed with cost.

### Hearing of the suit

8. The Plaintiff testified as PW1. He adopted his affidavit in support of the Summons as evidence in chief. He testified orally by repeating the evidence as was deposed in the Affidavit. He reproduced the documents that were annexed to the Affidavit as exhibits in support of the oral testimony. He prayed that the summons be allowed as prayed.

### Analysis & Determination

9. The only issue that arises for determination is; Whether the Plaintiff has acquired Land Parcel No. Bukira/Buisaboka/77 by way of adverse possession. Attendant thereto is who to bear the costs of the Summons.
10. A claim for adverse possession arises in 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 essential prerequisites are that the possession of the adverse possessor is neither by force, or stealth, or 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.
11. As Court of Appeal emphasized recently in the case of *Abdulkhalik Mohamed Abdulkhalik Mazurui & 2 others v Josiah Kafuta J. Mtila & another* [2021] KECA 653 (KLR), the principle embodied in the Latin maxim *nec vi, nec clam, nec precario* which is interpreted that the entry is not by force or hidden (or by subtlety for that reason) or with the permission of the owner should be proven by the claimant. The Court held,

“The burden of proving adverse possession lay with the 1<sup>st</sup> respondent who made the claim. That burden was to be discharged by him demonstrating, on a balance of probabilities, that his possession was adverse; open, peaceful, without consent of the 1<sup>st</sup> and 2<sup>nd</sup> appellants and for an uninterrupted period of 12 years, expressed in Latin as *nec vi, nec clam, nec precario*. Or, as Lord Hoffmann put it in *R. vs. Oxfordshire County Council ex p. Sunningwell Parish Council* [2000] 1AC 335 at 350, ‘not by force, nor stealth, nor the licence of the owner’. See also *Kimani Ruchine vs. Swift Rutherford & Co.Ltd* [1980] KLR on this point.

A claim of adverse possession can only be maintained against a registered owner, as set out in *Chevron (K) Ltd vs. Harrison Charo Wa Shutu* [2016] eKLR, and time as envisioned under Section 7 of the *Limitation of Actions Act*, can only run against a registered owner. Here time started to run when the suit property was transferred, first to William Nduva Makau and Beatrice Njoki Githii and continued uninterrupted when the 1<sup>st</sup> and 2<sup>nd</sup> appellants acquired the property on 22<sup>nd</sup> October, 1998. One of the important lessons to be drawn from the Court of Appeal’s decision in *Githu vs. Ndeete* (1984) KLR 776 is that;

“The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person’s adverse possession.”



12. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act*, which is in these terms:-

“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.”

13. The *Limitation of Actions Act* makes further provision for adverse possession at Section 13 that:

“(1) 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 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.

(2) 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.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3), the land in reversion is taken to be adverse possession of the land.”

14. Sections 37 and 38 of the *Limitation of Actions Act* stipulate that if the land is registered under one of the registration acts then the title is not extinguished, but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him.

15. Section 37 provides that:-

“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, to land or easement or land comprised in a lease registered under any of those Acts, 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.”

16. In this matter, when did the Plaintiff's interest become adverse? It is evident that the suit land was registered in the name of the late Sirira Boroyi as per the green card that was produced annexed as JCW1. He then passed away and his estate was then administered by the defendant herein, pursuant to the grant of letters of administration annexed as JCW2 and the certificate of confirmation of grant annexed as JCW3. The applicant then entered into two different sale agreements with Wilson Seria as per the sale agreements annexed as JCW4 with the first one being made on 16<sup>th</sup> April 2003 and the second one on 7<sup>th</sup> March 2012.



17. This set of facts presents a situation where the plaintiff claims adverse possession arising from a sale agreement as there was no transfer of title. In *Gabriel Mbui v Mukindia Maranya* [1993] KEHC 161 (KLR) the court expressed itself as follows;

Normally, a person claiming adverse possession is allowed in possession as a purchaser pending completion of the purchase price, or if he has already paid in full, then pending compliance with the requisite statutory formalities; and he is allowed to stay there because he is a purchaser, and not a mere trespasser.

18. In the case of *Public Trustee – v- Wanduru*, (1984) KLR 314 at 319 Madan, J.A. stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.
19. Evidently, the plaintiff's interest became adverse upon payment of the purchase price on 16<sup>th</sup> April 2003 upon which he took possession of the suit land.

### **Whether the plaintiff has met the threshold for orders of adverse possession**

20. In *Teresa Wachuka Gachura v Joseph Mwangi Gachira*, Civil Appeal No. 325 of 2003, the Court emphasized that proof of possession, being a question of fact, will depend on the circumstances and peculiar facts of each case. The Court explained that:-

“Possession could have been by way of fencing or cultivating depending on the nature, situation or other characteristics of the land. Periodic use of the land is not inconsistent with the enjoyment of the land by the proprietor.”

21. Similarly in *Wabala v Okumu* [1997] LLR 608 (CAK), the Court emphasized that:-

“Thereafter he left and he had not lived there upto the time he was sued in 1990. The house which he had built on the land and which constituted tangible or physical evidence of his occupation had fallen down. That means that the only form of “occupation” the respondent had over the land was cultivating it. That in these circumstances, the learned magistrate was perfectly justified in coming to the conclusion that the respondent had failed to prove that he had been in occupation of the land for a continuous period of twelve years. We think that it would not only be wrong but also dangerous to introduce the concept of constructive occupation. To be able to acquire title to land registered in another person's name, one had to literally be in occupation of the land, for mere presence of crops on land may not necessarily mean that the grower of such crops is asserting a claim of ownership to the land. As the lawyers of old used to say, the occupation must be *nec vic, nec clem, nec precario*.”

22. The entry of the plaintiff into the suit land was clearly not by stealth. He provided photographic evidence, as annexure JCW5, of the developments that he has made on the suit land including the planting of trees, crops and the rearing of animals. It is evident that he has settled on the land over time and has been in notorious and open occupation of the said land. There was no evidence that was led to the contrary and therefore, the same remains uncontroverted.
23. Upon considering the evidence tendered in court, the pleadings and annexures thereto and the submissions, it is my considered view that the plaintiff has proved his case on a balance of probabilities. He entered a sale agreement with the owner of the suit land but no steps were made to transfer the



land. The defendant has not shown that there was any interruption of his existence from 2003 and clearly, the Plaintiff has a visible presence in the land.

24. In the premises, I hereby enter judgment for the Plaintiff and order that;
- i. The plaintiff has acquired ownership of land parcel No. Bukira/Buisaboka/77 measuring 6 acres or thereabouts by way of adverse possession.
  - ii. The Plaintiff is entitled to and should be registered forthwith as owner of the six (6) acres being the specific portion of part of the parcel of land known as Bukira/Buisaboka/77 which he occupies, which portion is to be surveyed forthwith at the expense of the Plaintiff and excised from the larger parcel herein stated.
  - iii. The Defendant is ordered to sign all the necessary documents, including the Mutation and Transfer Forms, to effect the transfer of the six (6) acres or thereabouts in favour of the Plaintiff in default of which the Deputy Registrar of this Court to execute the same forthwith.
  - iv. Respondent shall bear the costs of the suit.
25. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT MIGORI VIA THE TEAMS PLATFORM  
THIS 26<sup>TH</sup> DAY OF AUGUST 2025.**

**HON. DR. IUR NYAGAKA**

**JUDGE**

From 09:10 AM, in the presence of,

Mr. Oseno Advocate for the Plaintiff

N/A for the Defendant though served.

