



Nugikuyu & 4 others v Mbindyo (Sued as the Personal Representative of William Mutinda Kaliali (Deceased)) (Environmental and Land Originating Summons 2 of 2022) [2025] KEELC 854 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEELC 854 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 2 OF 2022
LG KIMANI, J
FEBRUARY 27, 2025**

BETWEEN

**RODAH MUGIKUYU 1ST APPLICANT
LUKA MUIINDE 2ND APPLICANT
JUDITH K MBOKA 3RD APPLICANT
JUSTUS MUNYOKI 4TH APPLICANT
MUSILI MAKAU 5TH APPLICANT**

AND

**DOMINIC MWANGANGI MBINDYO RESPONDENT
SUED AS THE PERSONAL REPRESENTATIVE OF WILLIAM MUTINDA
KALIALI (DECEASED)**

JUDGMENT

1. This suit was instituted through the Originating Summons dated 13th February 2014 where the Applicants pray for Orders:
 1. That the Applicants are entitled to ownership of the respective portions they are currently occupying of Land Parcel Yatta B2/Kwa Vonza/1 (now sub-divided into parcel nos.789-806 inclusive) jointly and severally by reason of adverse possession.
 2. That the Applicants are entitled to be issued with Title deeds for the respective portions they are currently occupying on Land Parcel Yatta B2/Kwa Vonza/1 (now sub-divided into parcel nos.789-806 inclusive), and the Registrar of Titles be and hereby ordered to issue the Title Deeds forthwith.



3. That the respondent bears the costs of this application.
2. The Originating Summons is supported by the affidavit sworn by the 1st Applicant with the authority of the other applicants.
3. The Applicants claim that they have been living on the suit land Yatta B2/Kwa Vonza/1 (now subdivided into parcel Nos.789-806 inclusive) measuring approximately 17.1 acres at Yatta B2 Kwa Vonza Location within Kitui County since 18th July 1996. Their occupation started when they were settled on the land by the local provincial administration.
4. That the applicants were informed by the defunct Kitui County Council that the suit land originally belonged to William Mutinda Kaliali (Deceased), who had surrendered it to the Council on or about March 1989 to be used for purposes of building divisional headquarters in exchange with another parcel that the Council had offered him. However, the divisional headquarters was built elsewhere and they were settled on the land.
5. The Applicants further state that they occupied the suit land openly, continuously and with the full knowledge of the deceased until his death and he never raised any objections. Since they have occupied the suit land for more than 12 years, the applicants claim their right of ownership by way of adverse possession has accrued.
6. They claim that the deceased's family have subdivided the land into parcel numbers 789 to 806 inclusive.
7. It was deposed that since the deceased had surrendered the suit land to the Council, the deceased's estate cannot claim ownership of the land. They urge the Court to make a declaration that the deceased's proprietorship of the land was extinguished when he surrendered the land to the Council and they have acquired the same by way of adverse possession.

The Respondent's Replying Affidavit

8. The respondent swore an affidavit in response to the originating summons and deposed that at the time of the deceased's death, land parcel Yatta B2/Kwa Vonza/1 had long ceased to exist. He also deposed that the parcels of land named in the originating summons are undescriptive, uncertain and/or incapable of identification.
9. Further, he deposed that the said parcels of land were registered on 16.12.1992, 11 years before the death of the deceased William Mutinda Kaliali.
10. The Respondent stated that the administration of the estate of William Mutinda Kaliali ended on 6.11.2012, therefore settling the matter concerning proprietary interests in the estate, which has never been challenged and still remains in force.

The Hearing of the suit

11. The hearing of the suit began on 28th March 2023 when PW 1 Rodah Mugikuyu Mutunga testified relying on the affidavit in support of the originating summons as evidence. She also produced the documents attached thereto as evidence.
12. She stated that her home is on the suit property where she lives, noting that they entered the suit property in 996 and she has never lived on any other land.
13. Upon cross-examination, she stated that she was born in 1954 and was married in 1972. By the time she entered the suit parcel of land in 1996, her husband was deceased and she had three children. She stated



- that she was shown her portion of land by the Clerk, the chief and the chairman of the County Council who told her that the land belonged to the council and that they would be issued with allotment letters. She denied paying for the land.
14. The witness stated that they carried out a search on the suit land and confirmed that it was registered in the name of Mutinda Kaliali but she could not confirm exactly which land she lives on.
 15. She therefore asked the Court to order that the portion where she lives belong to her and not to the deceased. On re-examination, she stated that she could point out her portion of land to a surveyor.
 16. DW 1 Dominic Mwangangi Mbindyo testified and stated that he only knows the 1st Applicant and does not know the rest of the Applicants. He confirmed that his grandfather, William Mutinda Kaliali (Deceased) is the registered owner of the suit land, in whose estate he is an administrator.
 17. He produced his bundle of documents including the confirmed grant in Succession Cause 25 of 2006- Estate of William Mutinda Kaliali (Deceased), a certificate of official search on Land Parcel Yatta B2/ Kwa Vonza/1, and noted that on 16/12/1992, the proprietor surrendered only part of the land for an access road and that the title was finally closed on sub-division of the land to 789-806.
 18. The witness testified that the parcels of land B2 Yatta/Kwa Vonza/791 and 792 were given to Paul Mwanza Mutua and the rest are held by him in trust for the other family members.
 19. Upon cross-examination, the Respondent admitted that the 1st Applicant is on the land, but denied knowing the other people. He also denied knowing when she entered the suit land or if any of the family members have tried removing the Applicants from the land.
 20. On re-examination, the respondent denied knowing that his grandfather surrendered the suit land to Kitui County.
 21. This marked the close of the defence case and parties were given time to file their written submissions.

The Applicant's submissions

22. Counsel for the Applicant submitted that the Applicants have been living on the suit land since 1996 and do not know any other home. They were settled on the land by the defunct Kitui County Council after the deceased gave up his land to the Council. They lived on the suit land uninterrupted until 2014 when some of the deceased family members started pointing out the land to potential buyers, which necessitated the filing of this case.
23. Submitting on the elements of adverse possession, counsel cited the cases of Tabitha Waitherero Kimani v. Joshua Ng'ang'a(2017)eKLR and Celina Muthoni Kithinji v. Safiya Binti Swaleh & 8 others(2018)eKLR.
24. It was submitted that the applicants have actual possession and occupation of the suit land. That the entry was neither permissive nor consensual by the owner since they were settled there by the Council and is therefore adverse. On this point, they relied on the holding in the case of Mombasa Teachers Co-operative Savings & Credit Society Limited v. Robert Muhambi Katana& 15 others (2018)eKLR.
25. Counsel therefore submits that the deceased's owner as well as that of the administrators and beneficiaries were extinguished upon lapse of 12 years as from 1996.
26. As to the nature of the occupation, counsel submitted that it was open, continuous and exclusive, citing its definition as was given in the case of Samuel Kiamba v. Mary Mbaisi(2015)eKLR.



27. Counsel highlighted that there has neither been discontinuance nor dispossession of the Applicant's occupation of the suit land, noting that they have continued to occupy the land since they filed this suit in 2014. It was submitted that the succession case was not a part of asserting their rights over the suit property since the applicants were not part of that suit.

The Respondent's Written Submissions.

28. Counsel for the Respondent submitted that land parcel Yatta B2/Kwa Vonza/1 stopped existing on 16.12.1992 upon subdivision and therefore could not be occupied by anyone in 1996. They submit that the subdivisions are distinct individuals and separate from each other and any occupation would be on an identified, distinct and individual parcel of land.
29. It was also submitted that no evidence was given to support the allegation that the suit property was surrendered to the Kitui County Council in March 1989. They also submit that no evidence was given to show that the applicants are in occupation of the suit land.
30. Further, it was submitted that no evidence was produced identifying the respective portions of land that the applicants claim to be currently occupying, therefore there is no evidence to prove any adverse possession of the resultant titles. Counsel for the Respondent urged the Court to find that the applicant's case has no merit both in law and in fact and dismiss the suit.

Analysis and Determination

31. The court has considered the Applicants' claim under the Originating Summons, the supporting affidavits, replying affidavits and documents relied on and submissions filed by Counsel for the parties. The court finds that the issue for determination is whether the Applicants have a valid claim of adverse possession over the suit parcels of land Yatta B2/Kwa Vonza/1 (now sub-divided into parcel nos.789-806 which they claim to occupy and which they state is registered in the name of William Mutinda Kalialic(deceased). The Respondent is sued as administrator of the estate of the registered proprietor of the land William Mutinda Kaliali (deceased).
32. Section 7 of the *Limitation of Actions Act* CAP 22 Laws of Kenya provides that;
- “An action may not be brought by any person to recover the 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.”
33. Section 37 provides for the application of the *Limitation of Actions Act* to registered land and states that;
- “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—
1. 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.”



34. Section 38(1) of the *Limitation of Actions Act* CAP 22 provides that:

“Registration of title to land or easement acquired under Act 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.”

35. The procedure for making such an application is set out by Order 37 Rule 7 of the Civil Procedure Rules (2010) which provides that:

“An application under section 38 of the *Limitation of Actions Act* shall be made by originating summons.

(2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.”

36. In the case of *Mtana Lewa –vs- Kahindi Ngala Mwangandi* [2015] e KLR the court of Appeal defined adverse possession as:

“Adverse possession is essentially 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 the assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisite being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

37. The Applicants aver that they have been in open, notorious and exclusive occupation of the portions of the suit land since 1996. They further give the history of the suit land as emanating from Land Title Yatta B2/Kwa Vonza/1, which was registered in the name of William Mutinda Kaliali and a title deed was issued on 7/11/1989.

38. The said title was closed on 16/12/1992, upon subdivision into new title Numbers 789-806. The Applicants exhibited the certificates of official search on the resultant subdivisions Land Parcels Yatta B2/Kwa Vonza/789, 791,792, 793, 794, 795, 796, 797, 798,799,800, 801,806, all still registered in the name of William Mutinda Kaliali (Deceased). These subdivisions occurred 4 years before the year 1996 when the Applicants state that they entered the suit land.

39. The 1st Applicant stated during the hearing that she is not aware the parcel of land they occupy out of the resultant subdivisions. The Respondent admitted that the 1st Applicant is in occupation of the suit land, but he is not aware of the date the occupation began and also contended that the portion of land that the Applicant should be clearly identifiable, which the Applicants have failed to do.

40. The Applicants claim that their occupation started when they were settled on the land by the local provincial administration. They stated that they were informed by the defunct Kitui County Council that the suit land originally belonged to William Mutinda Kaliali (Deceased), who had surrendered it to the Council on or about March 1989 to be used for purposes of building divisional headquarters in exchange with another parcel that the Council had offered him. However, the divisional headquarters was built elsewhere and they were settled on the land. They annexed to the supporting affidavit documents which they produced in court during the hearing. The documents produced in court were



not very clear and the court at some point gave the Applicants time to get clearer copies but she stated that she was unable to get the said clearer copies.

41. However, the court has noted the following documents;
 - I. According to the certificate of official search for the title to land parcel Yatta B2/Kwa Vonza /1 the title was registered in the name of William Mutinda Kaliali on 7.11.1989. The title was closed on a subdivision into the new numbers 789 to 806 on 16.12.1992 after surrender of a portion of 0.7 Ha for a road of access.
 - II. All the resultant subdivisions of the above title were registered in the name of William Mutinda Kaliali on 16.12.1992.
 - III. Undated letter by Locational Development Committee, Kitui showing that Wilson Mutinda Kaliali surrendered land measuring 17.1Ha.
 - IV. A letter dated 26th July whose year is unclear addressed to William M. Kaliali (deceased) from the County Council of Kitui indicates that the deceased was required to surrender his title to the suit land and he would be compensated by an award of land. He was required to respond to the latter by 29.07.1993. A further letter dated 5.8.1993 was also written to the deceased as a reminder of the request to surrender the title deed to parcel number Yatta B2/Kwa -Vonza/806.
 - V. A further letter dated 24.8. 2005 addressed to the deceased indicates that there was surrender of the suit parcels of land in exchange for other land and only processing of transfer documents remained.
 - VI. By a letter dated 3rd October 2005, it is shown that the deceased was allocated a parcel of land in exchange for parcels Yatta B2/Kwa -Vonza/806 and 819.
 - VII. Letters from an organisation called Family Advancement In Development Affairs dated 29.8.2003 and 28.10.2005 addressed to the District Commissioner Kitui addressed the issue of the settled community at Yatta B2 /Kwa Vonza Reg. Nos. 1-acre 17.1 and 201 acreage 11.0 claiming that the persons settled on the land were so settled by a former counsellor and was confirmed by the area D.C and a former Minister. The tenor of the letters is that the settled community was requesting to be issued with title deeds to the land they said they occupied.
 - VIII. By a letter dated 20.4.2007 by the Chairman Kwa Key village, Kwa Vonza addressed to the County Council Clerk, Kitui also addressed the issue of surveying land parcels Yatta B2 /Kwa Vonza /1 and 2 which they stated was a settled community.
42. The contents of the documents set out above show that the Applicants' position is that the suit land was initially registered in the name of the deceased William Mutinda Kaliali. He surrendered the land to the defunct County Council of Kitui in exchange for other land elsewhere and hence the suit land became the property of the County Council of Kitui. The Applicants clearly state that the reason they came into possession and occupation of the land was by virtue of the allocation of the land by the defunct County Council of Kitui. It is noteworthy that, the applicants did not join the County Government of Kitui who have been in a position to shed light on some of the claims made by them.
43. It is noted that the Respondent did not specifically deny that the exchange of the suit land between the deceased and the County Council of Kitui occurred either as claimed by the Applicant or in whichever other way.
44. It is trite law that adverse possession cannot accrue against land owned by the Government. Even assuming the Applicants had come into possession and occupation of the suit land as claimed on



18.7.1996, their own evidence is that the land does not belong to the estate of the deceased but was owned by the County Council of Kitui which had put them into possession. Under the circumstances, the Applicants could not adversely possess the land against the County Council such that the Council's rights and interest over the land could be extinguished. The doctrine of adverse possession is inapplicable where the land is public or trust land or is owned by the Government. Section 41 of the Limitation of Actions Act excludes Public Land from the application of the Act. Section 41(a) of the Act provides:-

41. Exclusion of public land

This Act does not -

- (a) enable a person to acquire any title to or any easement over -
 - i. Government land or land otherwise enjoyed by the Government;
 - ii. Mines or minerals as defined in the Mining Act (Cap. 306);
 - iii. Mineral oil as defined in the Mineral Oil Act (Cap. 307);
 - iv. Water vested in the Government by the Water Act (Cap. 372);
 - v. Land vested in the County Council (other than land vested in it by Section 120(8) of the Registered Land Act (Cap. 300)); or
 - vi. Land vested in the Trustees of the National Parks of Kenya; or

45. Further to this, the evidence adduced by the Applicants shows that they question and are challenging the validity of the Plaintiff's title which they state had been acquired by the County Council of Kitui. The question that arises is whether the Applicants can raise a claim for adverse possession while at the same time challenging the title held by the registered owner.

46. The Court's understanding of the doctrine of adverse possession is that the claimant (the person contending to be in adverse possession) must first and foremost concede to, acknowledge and admit the title of the owner of the property which is in question.

47. In the present case, the claimants contend that the suit land does not belong to the Respondent and thus contests and impugns the validity of the registered proprietors title. In the circumstances, the claim for adverse possession is defeated and thus becomes legally untenable.

48. In the case of Catherine Koriko & 3 Others v Evaline Rosa (2020) eKLR, the Court of Appeal held as hereunder;

“A claim for adverse possession is inconsistent with the claim for being a beneficiary of the estate of a deceased person. In the original suit, the appellants did not concede that indeed the respondent was the true owner of the suit property. The appellants' application to amend the statement of defence and counterclaim was nothing but an indirect attempt to re-open litigation over the suit property with a view to circumventing the substantive effect of, and the rights of the parties as had been determined in the Kisii High Court Succession Cause No 105 of 2010. I cannot be blind to this attempt and I decline to condone the same.”



49. The same position that one cannot advance a claim for fraud and adverse possession in the same cause was also discussed in the case of *Haro Yonda Juaje v Sadaka Dzenzo Mbauro & Kenya Commercial Bank* (2014) Eklr, where the Court stated:

“One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claimed the same parcel of land under the doctrine of adverse possession. If Plaintiff’s averment is that the title which was issued to Defendant was fraudulently acquired, then his cause of action would be for the rectification of title by cancellation pursuant to the provisions of Section 143 of the Registered *Land Act* and not adverse possession. He cannot use the doctrine of adverse possession to go around the decision of the Minister.”

49. The court finds that the Plaintiffs herein cannot be heard to impugn the defendant’s title on one hand, while advancing the claim for adverse possession on the other hand.
50. Further, the court has noted that the suit parcels of land range from Yatta B2/Kwa Vonza/789 to 806. The said parcels have separate and distinct titles which were issued in December of 1992 while the Applicants claim that they commenced occupation of the land in 1996. At that point, it was possible for the Applicants to know the specific portions of land they occupied, if at all. The Applicants did not show to the court which particular titles each of them occupy and thus claim. Indeed the 1st Applicant who testified on behalf of the others stated that she did not know the specific parcel number she occupied. No evidence was adduced on behalf of the other Applicants on which parcels of land they occupied, if at all.
51. The Court of Appeal sitting at Malindi in the case of *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another* [2015] eKLR made the following observation:

“The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of *Githu v Ndele* [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them. It is exactly for this reason, perhaps that there was a mandatory requirement under the old *Civil Procedure Act* and the rules made thereunder that when taking out and O. S. anchored on adverse possession an extract of the title to the subject land be annexed to the application. Indeed, the then Order XXXVI Rule 3D(2) specifically provided:

“...The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed...”

52. The court finds that the applicants did not identify the specific parcel of land they individually claim to occupy. They did not describe the portions sizes and locations they occupy respectively.
53. From the foregoing analysis of the issues arising for determination in this suit, it is clear that the Applicant’s’ suit is bad in law and does not meet the threshold expected of a claim for adverse possession.



Final disposition

52. The Court finds that the suit herein has no merit and the same is hereby dismissed with costs to the Respondent.

JUDGEMENT READ, DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI THIS 27TH DAY OF FEBRUARY 2025.

In the presence of: 5

Kinyua Musyoki for the Defendant.

No appearance for the Plaintiff.

Court assistant: Kendi

HON. LADY JUSTICE L.G. KIMANI

JUDGE

