



REPUBLIC OF KENYA



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**Kirimi v Ikou & another (Civil Appeal 224 of 2019)
[2025] KECA 1150 (KLR) (5 June 2025) (Judgment)**

Neutral citation: [2025] KECA 1150 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 224 OF 2019
J MOHAMMED, JW LESSIT & A ALI-ARONI, JJA
JUNE 5, 2025**

BETWEEN

GILBERT IRERI KIRIMI APPELLANT

AND

NELSON NTHIGA IKOU 1ST RESPONDENT

MICHAEL MUGO IRERI 2ND RESPONDENT

(Being an appeal from the Judgment and Decree of the Environment and Land Court at Embu (B. N. Olao, J.) delivered on 9th June, 2016 in E.L.C. Case No. 12 of 2015.)

JUDGMENT

1. This appeal was heard virtually before us on the 10th December 2024. Present for the appellant was learned counsel Ms. Wambui Gitao. There was no representation for the respondents despite service of the hearing notice upon their advocates, Mr. Duncan Muyondi and Mr. Dennis Gitonga on 19th November 2024 at 1.30 p.m.
2. The brief facts of this case is that the 1st respondent filed Originating Summons seeking the following orders:
 - a. That the plaintiff has acquired land parcels No. Evurore/Nguthi/1624 and Evurore/Nguthi/1625 by way of adverse possession.
 - b. That the 1st and 2nd defendants were holding land parcels No. Evurore/Nguthi/1624 and Evurore/Nguthi/1625 in trust for the plaintiff.
 - c. Evurore/Nguthi/1624 and Evurore/Nguthi/1625 by virtue of adverse possession.
 - d. That the plaintiff be awarded costs of this suit.



3. At the time of filing suit, Land parcels No. Evurore/Nguthi/1624 and Evurore/Nguthi/1625 (1625 hereinafter the 'suit land') were registered in the names of the 2nd respondent (Nelson Nthiga Ikou) and the appellant Gilbert Ileri Namu respectively. Previously, land parcel No. Evurore/Nguthi/1624 was registered in the names of Nahashon Ikou Ileri (the 2nd respondent's father) who on 9th July 1993 or thereabout transferred it to his son, the 2nd respondent. The appellant on the other hand purchased parcel No. Evurore/Nguthi/1625 from Johnston Nyaga Namu on 6th January 2004. All this time, the 1st respondent's father Edward Ileri Kiathi was living on the suit land and so the 2nd respondent and the appellant issued notices to him to vacate after a Court case. The 1st respondent's father vacated the suit land following the notices but the 1st respondent did not do so even after notices were issued to him in 2008.
4. The 1st respondent filed the Originating Summons on the 19th December, 2008 laying claim over the suit properties 1624 and 1625 as set out herein above. His claims lies in adverse possession and asserts that the 2nd respondent and the appellant held the title to both properties in trust for him. The case was heard by viva voce evidence, with the witnesses adopting their statements/affidavits as their evidence before being cross examined.
5. In his supporting affidavit, the 1st respondent averred that he was born on parcel No. Evurore/Nguthi/1624 in 1972 and has lived there ever since. He averred that he has extensively developed the said parcel and planted avocado, mangoes, grevillia and Eucalyptus trees and the 2nd respondent who is the registered proprietor has never occupied nor utilized that parcel of land. The 1st respondent deposed that he utilizes and occupies the land parcel No. Evurore/Nguthi/1625 registered in the name of the appellant who has also never occupied nor utilized that parcel of land. He deposed that he has been in occupation and utilization of the suit land and that it has been open, un-interrupted, exclusive and continuous for over 12 years and he has therefore acquired the suit land by way of adverse possession.
6. The 1st respondent called Ephantus Njue Ikathe who said he was his uncle and testified that the 1st respondent was born on the suit land in 1972 where his father lived with the 1st respondent and other family members. He stated that the 1st respondent has planted fruit and other trees and built on houses on 1624 where he lives with his family. That as for 1625, the suit land, he cultivates on it. Ephantus had a second statement in which he contradicted himself. In it he stated that he as the one in occupation of the suit land and not the 1st respondent, saying that he was utilizing 4 acres of the land and was not sure what the acreage was.
7. The 2nd respondent resisted the 1st respondent's claim by filing a replying affidavit. He stated that the land No. Evurore/Nguthi/ 1624 was given to him as a gift by his father, Nahashon Ileri Kou, and that he is the current registered proprietor. He annexed the title to the land showing it was registered in his name. He averred that it was not true that the 1st respondent has had un-interrupted possession of the land for 12 years, deposing that his father and 1st respondent's father had Court cases over the land.
8. He annexed an affidavit sworn by his father, Nahashon Ikou Ileri in support, as well as the plaint and the defence in a suit filed by his father against the 1st respondent's father, in Embu Principal Magistrate's Court Civil Case No. 62 of 1992. His father testified and confirmed that on 3rd August 1979 he was the registered proprietor of the land parcel No. Evurore/Nguthi/1624 which he transferred to his son the 2nd respondent on 9th July 1993 while the 1st respondent's father and his family were unlawfully living thereon. He averred that he issued the notices dated 13th December 1982, 13th October 1987 and 26th May 2001 to the 1st respondent's father and then filed Embu Principal Magistrate's Court Civil Case No. 62 of 1992 against the plaintiff's father which was determined in his favour. He averred that 1st



respondent's father filed an appeal against the case being High Court Civil Appeal No. 82 of 1994, the same was dismissed for want of prosecution, and order made for the 1st respondent's family to vacate.

9. The 1st respondent annexed the notices to vacate he served on the 1st respondent's father as proof, dated 1982, 1987, 2001 and 2008. He also produced an order of W. Ouko, J. (as he then was) dated 24th October 2008 dismissing High Court Civil Appeal No. 82 of 1994 for want of prosecution.
10. The appellant on his part denied all the averments in the 1st respondent's Originating Summons and testified that the land parcel No. Evurore/Nguthi/1625, the suit land, is registered in his names having purchased it from Johnstone Nyaga in 2006 after due diligence. That he got title to the land in 2008 and that is when the 1st respondent sued him. He denied that the 1st respondent was in continuous occupation of the suit land, stating that at the time he bought the land, one Julius utilized a small portion of 30% with his house on the boundary of the land; one Aloiso a brother of the 1st respondent utilized 40%; and, the 1st respondent utilized 30%. He said Aloiso surrendered the 40% he was utilizing to him and produced an agreement to that effect.
11. The appellant called Johnstone Nyamu as his witness who confirmed that he was the one who sold the suit land to him in 2006. Johnstone said he was allocated the land by his clan after the adjudication process 1979. He stated that he charged the land in 1991 for a loan which he repaid by 2001. His evidence was the suit land was being utilized by one Thomas Njue and that he gave him notice to vacate which he obliged. That in 1997, the father to the 1st respondent invaded his land and started utilizing it, resisting to vacate the premises on notices until 2001 when he finally left. He stated that the 1st respondent then encroached on part of his land after his father left and refused to move.
12. After considering the case, the learned Judge of the ELC, Olao, J. ruled in favour of the 1st respondent and entered judgment as follows:

“Ultimately therefore, after considering all the evidence herein, I am satisfied that the plaintiff is entitled to the orders sought in his Originating Summons filed on 19th December 2008 having proved his case against the defendants. I accordingly enter judgment for the plaintiff against the defendants in the following terms: -

1. That the plaintiff has acquired land parcels No. Evurore/Nguthi/1624 and Evurore/Nguthi/1625 by way of adverse possession.
 2. That the 1st and 2nd defendants title to the suit land are extinguished and the plaintiff be registered as the proprietor of land parcels No. Evurore/Nguthi/1624 and Evurore/Nguthi/1625.
 3. Each party to meet their own costs.”
13. The appellant was aggrieved by the judgment of the trial court and so filed this appeal which he challenges on the following grounds:
 - i. That the Learned Judge erred in law in finding and holding that the 1st respondent is entitled to Parcel Number Evurore/Nguthi/1625 by way of adverse possession;
 - ii. That the Learned Judge misdirected himself as to the facts in finding and holding that the 1st respondent had occupied Parcel Number Evurore/Nguthi/1625 for more than 12 years;
 - iii. The Learned Judge misdirected himself in law and fact in ignoring the lack of evidence by the 1st respondent as to when he IN FACT took possession of Parcel Number Evurore/Nguthi/1625;



- iv. That the Learned Judge erred in law and fact by not taking into consideration written and oral testimony of the appellant and the appellant's witnesses disproving the 1st respondent's assertions and claims;
 - v. That the Learned Judge erred in law and fact in admitting unverified photos in evidence in spite of the fact that the appellant had disputed the photographs and made an application for the court to visit the scene in a bid to prove that the photographs were not taken there;
 - vi. The Learned Judge misdirected himself in law and fact by interpreting the fact that the 1st respondent was born on Parcel Number Evurore/Nguthi/1624 to mean that he was also in possession Parcel Number Evurore/Nguthi/1625 from the time of his birth;
 - vii. That the learned Judge erred in law and in fact in finding that by simply obtaining the age of majority the 1st respondent took actual possession of the suit property;
 - viii. While the learned Judge correctly interpreted control of the suit property, he misdirected himself as to when the 1st respondent took control of the suit property from his father;
 - ix. The 1st respondent's case was anchored primarily on the land Number Evurore/Nguthi/1624 and no attempt was made to show when he took possession of land Number Evurore/Nguthi/1625. The learned Judge therefore erred as far as the land Number Evurore/Nguthi/1625.
14. The appellants seeks orders:
1. That the Appeal be allowed and Decision/Judgment of the Honorable Mr. Justice B.N. Olao made on 9th June, 2016 be quashed, vacated or set aside in as far as Parcel Number Evurore/Nguthi/1625 is concerned
 2. That the Appellant be upheld as the registered, true and only owner of Parcel Number the 1st respondent ordered to vacate the said property.
 3. That the Respondent bears the costs for the proceedings before the Superior Court and those before this Honorable Court.
15. This being a first appeal, our mandate is akin to a retrial. Under Rule 31 (1)(a) of this Court's Rules, 2022, we are required to re-appraise the evidence and draw our independent inferences and conclusions. This mandate was explained in *Abok James Odera T/A A. J Odera & Associates vs. John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR as follows:
- “This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
16. In exercising this jurisdiction, we bear in mind and give room to the fact that we have not had the benefit that the trial court had of seeing and hearing the witnesses testify thereby being able to gauge their demeanour.
17. We have considered the evidence on record, the submissions by the appellant's counsel and the law relied on. Having considered all these and the grounds in the memorandum of appeal, we find that what falls for our determination, and the central question in this appeal is whether the ingredients of adverse possession were proved to the required standard. It was further observed in *Abok James*



Odera T/A A. J Odera & Associates, (supra), that corroboration of the fact and length of occupation by independent verifiable and reliable evidence is necessary in cases of adverse possession, to be able to meet the threshold required of a balance of probabilities to divest a registered owner of his or her property. This requirement is also necessary to avoid the risk of collusion as regards the fact and duration of possession of the property.

18. It is settled that the nature of physical possession required to be demonstrated by an adverse possessor is complete and exclusive physical control over the subject land for the requisite period of twelve years. This requirement was confirmed by the decisions in Buckinghamshire CC vs. Moran [1990] Ch. 623 and JA Pye (Oxford) Ltd vs. Graham [2003] 1 AC 419, in addition to the possession being open, peaceful and adverse, that is not by consent of the true owner. The elements required to be proved in this regard are explained in the text by Kevin Gray and Susan Francis Gray on Elements of Land Law, 5th Edition at page 1184 -1185:

“The factum or corpus of possession required to be shown by the successful squatter necessarily involves evidence of complete and exclusive physical control over the land claimed. The duration of the squatter’s occupation, its exclusivity and the acts of user relied upon must normally be verifiable by a physical survey of the land. Adverse possession may be asserted in respect of only part of the land titled in the paper owner, the latter remaining in effective possession of the remainder of his land. Provided that the squatter is in exclusive factual possession of an identifiable portion of the land, it is irrelevant that the owner of the paper title has not been wholly dispossessed.”

19. We reiterated in Mate Gitabi vs. Jane Kabubu Muga alias Jane Kaburu Muga & 3 Others [2017] eKLR where this Court stated that 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 secrecy, without force and without license or permission of the owner and with the intention to have the land.
20. In Kilimo Shutu & 6 Others vs. Godfrey Karume [2017] eKLR, the Court stressed that for a claim of adverse possession to succeed the party claiming ownership by adverse possession must demonstrate that the possession has been actual, exclusive, continuous, open and notorious and also hostile to the title and interest of the true owner. Possession by itself cannot therefore found a claim for adverse possession. It is when it is adverse that it can found a claim in favour of the person in adverse possession. See Sammy Likuyi Adiemo vs. Charles Shamwati Shisikani [2014] eKLR. In Kasuve vs. Mwaani Investments Limited & 4 Others [2004] 1KLR the Court expressed that:

“In order to be entitled to land by adverse possession, the claimant must prove that she has been in exclusive possession of land openly and as of right and without interruption for 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.”

21. Having these principles in mind, we have considered the evidence that was adduced by the parties touching on the suit land. The 1st respondent stated that he was born on the neighbouring plot, 1624 and that he utilized the suit land and planted trees on it and developed same by building houses. He gave the date of birth as 1972 and that it was from that date that he was in possession. The witness he brought to corroborate his evidence, Ephantus, contradicted himself by having two contradicting statements, one saying the 1st respondent was born on the land 1624 in 1972 and developed the suit land. The other statement showing that the 1st respondent only occupied and utilized 1624, but that it was he, Ephantus who utilized the suit land exclusively.



22. On the other hand, the evidence of Johnstone that he was the registered owner of the suit land after the land was allocated to him by the clan following the adjudication process. His testimony was that at the time he was registered as owner, he found one Thomas cultivating the land, and that when he eventually told him to vacate, he obliged. He said that in 1997, the father of the 1st respondent invaded his land, and despite giving him various notices to vacate the land, he did not oblige until 2001 when he left for his farm in Ishiara. Johnstone testified that by the time he sold the land to the appellant, the 1st respondent had encroached onto part of it.
23. The appellant testified that when he took over the land after purchasing it from Johnstone, the 1st respondent encroached onto his land and was utilizing 30% of it; his brother Aloiso was utilizing 40% and one Julius utilized 30%. He produced an agreement between him and Aloiso showing that Aloiso had occupied his land but was surrendering it back to him.
24. The learned trial Judge had the following to say in regard to possession:
- “The plaintiff’s occupation of the suit land was further confirmed by the 2nd defendant’s witness Johnston Nyaga Nyamu (DW4) who said as follows in cross examination: -
- “I know the plaintiff has been on the land since I gave his father notice to vacate. The plaintiff used to live there with his father but when his father vacated, the plaintiff remained on the land”
- Further, on, the same witness said: -
- “It is true that the plaintiff has been living on that land since he was in primary school”.
- It is clear from both the replying affidavits and the oral evidence herein that the plaintiff’s occupation of the suit land has not been rebutted and has in fact been confirmed by the defendants and their witnesses. Occupation or possession simply means the physical control of the suit land and from the evidence before me, the suit land is registered in the names of the defendants but the physical control thereof is in the hands of the plaintiff who was born on land parcel No. Evurore/Nguthi/1624 in 1972 and has utilized and continues to utilize land parcel No. Evurore/Nguthi/1625 on which he has a crop of various fruits.”
25. The question is what does adverse possession mean for the purposes of a claim for land under section 38 of the LAA? Referring to the text we cited earlier, Kevin Gray and Susan Francis Gray on Elements of Land Law, 5th Edition at page 1184 -1185:
- “The factum or corpus of possession required to be shown by the successful squatter necessarily involves evidence of complete and exclusive physical control over the land claimed. The duration of the squatter’s occupation, its exclusivity and the acts of user relied upon must normally be verifiable...”
26. The learned trial Judge was overly impressed with the undisputed evidence that the 1st respondent was born in parcel 1624 and that he utilized the suit land from 1972, the date of his birth, and so found by 2008 when the appellant served on him the notice to quit, he had been on the land for over 20 years.
27. To be in adverse possession means that one has to adduce evidence to establish that he was in complete and exclusive physical control over the land claimed. The learned Judge considered the year of the 1st respondent’s birth as the time started running, stating that the same is undisputed by the appellant and his witness as they admitted he was on living in 1624 since he was in primary school. It is unimaginable that a child can be in possession of land from the year they were born on the land. For adverse possession



to be established, the 1st respondent needed to adduce verifiable evidence to show he was in exclusive physical control of the land claimed. If anyone was to claim exclusive control and possession in 1972. It should have been the father of the 1st respondent, who lived on the land with his wife and children including the 1st respondent.

28. The point is that the 1st respondent could not have been in possession and control of the suit land from the point of birth. Someone else was, his father.
29. As for the father of the 1st respondent, Johnstone, who owned the suit land testified that the 1st respondent's father invaded his land in 1997 until 2001 when he bowed to notice to vacate and that he never returned. The 1st respondent has not controverted that evidence. That means two things; one that as it was the father who was in possession of the suit land between 1997 up to 2001, time for purposes of adverse possession stopped running when he left in 2001. Secondly, the 1st respondent encroached onto the land after 2001 according to Johnstone.
30. According to the appellant, he found three people on the land in 2006, as stated hereinabove. Therefore, for purposes of adverse possession, time started running again from the time the 1st respondent encroached onto the suit land, which is after 2001. The burden was on the 1st respondent and he was required to establish the date when he entered the suit land. He did not meet that requirement.
31. Further, the 1st respondent was not in exclusive control of the suit land, he had three companions. The position is that one should be in exclusive possession of the land claimed. This Court in *Mount Elgon-Beach Properties Limited vs. Kalume Mwanongo Mwangaro & Another* [2019] eKLR, cited with approval a High Court decision thus:

“Kuloba, J. (as he then was) expounded extensively on the requirement for “exclusive possession” as an essential ingredient in maintaining a claim for adverse possession in the case of *Gabriel Mbui vs. Mukindia Maranya* [1993] eKLR, where he stated that:

“exclusive possession means that the exercise of dominion over the land must not be shared with the disseized owner, the land being in actual possession with intent to hold solely for the possessor to the exclusion of others.”

32. The other issue is whether there was interruption of his possession and control over the suit land? The learned trial Judge considered this issue and delivered himself thus:

“The 2nd defendant's attempt to enter the suit land was, by his own oral evidence, frustrated when plaintiff [read 1st respondent] and his brothers repulsed him while armed with bows and arrows and this resulted in a Criminal Case at Siakago Court where the plaintiff was charged with assault. Among the documents produced by the 2nd defendant [read appellant] herein is the charge sheet in Siakago Magistrate's Court Criminal Case No. 1014 of 2014 in which the plaintiff was charged with having assaulted him on 26th September 2014. That must be the time when the 2nd defendant was attempting to assert his ownership by entering the suit land.”

33. This Court in the case of *Benjamin Kamau Murma & Others vs. Gladys Njeri*, [*CA No. 213 of 1996*](#) held that:

“The onus is on the person claiming Adverse Possession:



“.. to prove that they have used this land which they claim as of right: Nec vi, nec clam, nec precario (No force, no secrecy, no evasion). So the Applicant must show that the respondent had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavors to interrupt it or by any recurrent consideration.”

34. The burden was upon the 1st respondent to prove that his possession was Nec vi, nec clam, nec precario interpreted to mean ‘No force, no secrecy, no evasion.’ We think that the 1st respondent did not prove that his possession was ‘Nec vi, nec clam, nec precario’. The learned trial Judge found as a fact that the 1st respondent chased the appellant from the suit land with bow and arrows and in company with other violent characters. The possession was not free of force, nor free of evasion and being accused of assault against the appellant is a breach of the ingredients for adverse possession, which the 1st respondent breached. He did not contest that evidence.
35. Having carefully considered this appeal, we have come to the conclusion that the learned trial Judge fell into error and misdirected himself: when he found that the 1st respondent had established the actual date he entered into the suit property and thus proved occupation and possession for the required period of no less than 12 years; by interpreting the fact that the 1st Respondent was born on Parcel Number Evurore/Nguthi/1624 to mean that he was also in possession of the suit land, Parcel Number Evurore/Nguthi/1625 from the time of his birth; when he found that the 1st respondent established that he was in exclusive possession and control of the suit land, when in fact there was evidence that others also utilized the suit land at one time or other; when he found that the 1st respondent’s possession was with no force, no secrecy, no evasion, when there was evidence to the contrary; and, when he came to the conclusion that the 1st respondent had extinguished the appellant’s title to the suit land.
36. We find that the appellant’s appeal has merit and order as follows:
1. The appellant’s appeal is allowed;
 2. The judgment of the Environment and Land Court (Oloa, J.) delivered on the 9th June 2016 is hereby set aside in relation to the suit land Evurore/Nguthi/1625;
 3. The appellant Gilbert Ileri Namu is upheld as the registered owner of the suit land;
 4. The 1st respondent do vacate the suit land within 60 days from the date of this judgment, in default eviction to issue;
 5. The 1st respondent will meet the appellant’s costs of this appeal and of the case before the Environment and Land Court.

DATED AND DELIVERED AT NYERI THIS 5TH DAY OF JUNE, 2025.

JAMILA MOHAMMED

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

ALI-ARONI



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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar

