



REPUBLIC OF KENYA



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**Wambua & 5 others v Ndetei (Environmental and Land Originating Summons  
66 of 2020) [2025] KEELC 783 (KLR) (25 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 783 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 66 OF 2020  
CA OCHIENG, J  
FEBRUARY 25, 2025**

**BETWEEN**

**MARY NTHENYA WAMBUA ..... 1<sup>ST</sup> PLAINTIFF  
MUTUKU MUTUA ..... 2<sup>ND</sup> PLAINTIFF  
CHRISTINE SAMMY ..... 3<sup>RD</sup> PLAINTIFF  
MUTUNGA NZIOKA ..... 4<sup>TH</sup> PLAINTIFF  
JOHN MUTISO MBOLE ..... 5<sup>TH</sup> PLAINTIFF  
REUBEN M. NDETEI ..... 6<sup>TH</sup> PLAINTIFF**

**AND**

**MULI NDETEI ..... DEFENDANT**

**JUDGMENT**

1. Through an Originating Summons dated the 10<sup>th</sup> August, 2020, the Plaintiffs seeks the following orders:
  - a. That the Plaintiffs be declared as having acquired LR No. Masii/Vyulya /926 by adverse possession and consequently be registered as owner thereof.
  - b. That costs of this suit abide by the result thereof.
2. The Originating Summons were premised on the 6<sup>th</sup> Plaintiff's supporting affidavit sworn on the 10<sup>th</sup> August 2020.
3. In opposition to the Originating Summons, the Defendant filed a replying affidavit sworn on the 8<sup>th</sup> November 2022 contending that he is the registered proprietor of Masii/Vyulya/926, hereinafter referred to as the 'suit land'.



4. The suit was consolidated with Machakos CMC ELC No. 93 of 2018 pursuant to this court's ruling delivered on the 4<sup>th</sup> November 2011.
5. The matter proceeded for hearing where the Plaintiffs called seven witnesses while the Defendant had three witnesses.

### **Evidence of the Plaintiffs**

6. The 1<sup>st</sup> Plaintiff as PW1 adopted her witness statement dated 12<sup>th</sup> April 2024 as her evidence in chief. She produced a sale agreement dated 12<sup>th</sup> January 2002 as Exhibit 1. She claimed that she has been in open occupation, use and possession of the suit land since the year 2002 having acquired a portion measuring 40 ft by 100 ft vide the Sale Agreement dated the 12<sup>th</sup> January 2002 from Francis Mutua Ngwala (now deceased) who had acquired the whole of the suit land from the Defendant. She explained that she never acquired the consent of the Land Control Board but the Defendant was aware of the sale agreement and did not object to her possession until 2018 when he demanded that she vacates.
7. During cross-examination, PW1 insisted that Mutua Ngwala (deceased) measured out to her a plot measuring 40 by 100 ft and put a sisal hedge as boundary. Further, that the parcel number was not indicated in the Sale Agreement between them. She denied knowledge of existence of a title as the vendor did not show it, to her. She pointed out that the vendor only gave her a copy of his National ID Card. She denied being summoned by the Chief at the point of purchase of suit land, nor knowledge of the dispute between the Defendant and Mutua Ngwala (deceased).
8. During re-examination, PW1 clarified that the suit land is Matuu/Vyulya/926 and that she had not utilized it, since 2018 as there were orders of injunction issued by the court.
9. The 2<sup>nd</sup> Plaintiff as PW2 adopted his witness statement dated the 12<sup>th</sup> April 2023 as his evidence in chief. He claimed to be the son of Francis Mutua Ngwala (deceased) and contended that his late father entered into a written agreement in 1969 with the Defendant and his step brother namely Matheka Ndetei. He averred that he had lived on the suit land all his life, from 1975 and had known the parcel to belong to his father. He confirmed that his father sold several portions of the suit land, during his lifetime. He insisted that the Defendant only sought to evict them, when he received his title deed.
10. During cross-examination, PW2 stated that the original Sale Agreement between his father and the defendant was not in court. He was unable to confirm the land being sold nor the purchase price paid by his father, by looking at a copy of the said agreement, as the title number was not indicated therein. He was emphatic that he was born on the suit land.
11. During re-examination, PW2 clarified that he had not been born when his father entered the suit land and that the agreement of 1969 between his father and the defendant does not indicate the parcel number since the suit land had not been allocated a number by then.
12. The 4<sup>th</sup> Plaintiff as PW3 claimed that he has been on the suit land since 1999 having acquired a portion measuring 30 ft by 100 ft from Francis Mutua Ngwala (deceased). Further, that the sale was regularized vide the Agreement dated the 12<sup>th</sup> September 2009, which he produced as Exhibit 3. He testified that after acquiring his portion of the land, he built a shop and hotel, which he has operated since 1999 without any disturbance from the Defendant who was aware of the agreement, but did not object until 2018, when he started claiming ownership.
13. During cross-examination, PW3 insisted that he had paid the full purchase price to Mutua Ngwala (deceased).



14. The 5<sup>th</sup> Plaintiff as PW4 adopted his witness statement dated the 12<sup>th</sup> April 2024 as his evidence in chief. He produced a Sale Agreement dated the 15<sup>th</sup> March 2005 between Francis Mutua Ngwala and himself as Exhibit 4 and testified that he had lived on the suit land for over 30 years, having purchased a 20ft by 100ft plot, in 1993, which was reduced into writing on 15<sup>th</sup> March 2005.
15. In cross-examination, PW4 stated that Mutua Ngwala (deceased) did not show him, ownership documents to the suit land. He confirmed that he had erected a shop that he was running on the suit land.
16. In re-examination, PW4 reiterated his averments in chief and in cross-examination and stated that he had never seen the Defendant. He insisted that he occupies the suit land, where he runs a business.
17. Samuel Mutinda Mutua as PW5 adopted his witness statement dated the 12<sup>th</sup> April 2023. He claimed to be a son of Mutua Ngwala (deceased) and testified that he was born in 1961 and that the subject land neighbour's another parcel, which belonged to their father. He produced a copy of the Sale Agreement between his father, the Defendant and Matheka Ndeti as Exhibit 5.
18. During cross-examination, PW5 insisted that the Defendant sold land to his father in 1969, but he did not witness the sale as he was 8 years old. He contended that the Defendant and his brother Matheka Ndeti are alive, while the rest who witnessed the transaction are all deceased. He confirmed that his father sold land to the Plaintiffs who had built thereon, when he was alive. It was his testimony that his father owned the adjacent parcel to the suit land.
19. The 6<sup>th</sup> Plaintiff as PW6 adopted his witness statement dated the 12<sup>th</sup> April 2023 as his evidence in chief. He produced sale agreements between the late Francis Mutua Ngwala and himself dated the 2<sup>nd</sup> December 1997 and 9<sup>th</sup> December 1997 as Exhibits 6 and 7 respectively. He testified that he purchased a portion of the suit land measuring 40 ft by 100 ft. It was his testimony that he built three (3) houses on the suit land, rented them out and has been in open occupation, use and possession for more than 22 years, until 2018 when the defendant attempted to evict him.
20. During cross-examination, PW6 stated that he did not know the parcel number for the suit land, at the time of purchase. He explained that he had been in the process of developing the land, when the court stopped them. Further, that he had rental houses thereon, which he started renting out in 2000. He denied receiving the Chief's letter dated the 28<sup>th</sup> November 2015, concerning a dispute over the suit land.
21. In re-examination, PW6 stated that they belong to one family with the Defendant and Mutua Ngwala (deceased). Further, that he knew the suit land had been sold to Mutua Ngwala (deceased). He claimed to have built on a portion of the suit land, before the court order.
22. Wilson Mavuti Ndeti as PW7 claimed that he was a neighbour to the 6<sup>th</sup> Plaintiff and the Defendant. He testified that the suit land belonged to Francis Mutua Ngwala (deceased), as the defendant had sold it, to him in 1997. It was his testimony that the defendant had always known that the deceased had sold portions of the suit land to the Plaintiffs but after Mutua Ngwala's death, he sought to evict them.
23. During cross-examination, PW7 stated that he did not know the suit land's parcel number. He claimed that the Defendant and the 6<sup>th</sup> Plaintiff have their homesteads thereon and there are sisal hedges to demarcate boundaries. In re-examination, PW7 stated that Matheka Ndeti is his brother while the Defendant is his step brother.



## Evidence of the Defendant

24. The Defendant as DW1 adopted his witness statement dated the 4<sup>th</sup> November 2023 and produced a List of documents dated the 4<sup>th</sup> November 2022 as Exhibits 1-6. He claimed to be the sole registered owner of the suit land, since the 17<sup>th</sup> April 1971 but the title was issued on 12<sup>th</sup> July 1976. He contended that he has quietly and peacefully enjoyed and used his land without any interruption from anyone until 1993 when Mutua Ngwala (deceased) started claiming ownership. It was his testimony that he reported the matter to the clan elders of Atwii Athinzu clan, which summoned both of them, and after presenting their respective cases, the clan issued a judgment on 28<sup>th</sup> January 1994 directing the late Ngwala to vacate the suit land.
25. He explained that in 2004, some of the Plaintiffs herein including; Mwanzia Nzioka, the 6<sup>th</sup> Plaintiff, 1<sup>st</sup> Plaintiff, 5<sup>th</sup> Plaintiff and Sammy Kioko Ndunda started trespassing into his property alleging that they had purchased their parcels of land from the late Mutua Ngwala, prompting him to report the matter to the Chairman of Atwii Athinzu Clan (DW2), whom he also furnished with the clan's decision of 28<sup>th</sup> January 1994. He contended that the Clan's chairman authored a letter dated the 16<sup>th</sup> April 2004 addressed to the aforementioned trespassers and advised them to adhere to the clan's decision of 28<sup>th</sup> January 1994. He contended that he reported the dispute to the Assistant Chief of Uuni Sub-location who tried to evict the Plaintiffs but his efforts were not fruitful therefore he authored a letter dated the 23<sup>rd</sup> April 2015. It was his further testimony that in 2017, the 3<sup>rd</sup> Plaintiff started putting up permanent structures on the suit land necessitating him to institute ELC Case No. 93 of 2018 at the Chief Magistrate's Court, Machakos.
26. In cross-examination, DW1 denied selling the suit land to Francis Mutua Ngwala (deceased) nor entering into the Agreement of 1969, with him. He insisted that the Plaintiffs entered the suit land between 1994-2000. Further, that their Sale Agreements were fake. He testified that PW2 and PW5 were not born on the suit land.
27. Richard Muteti Kithusi as DW2 confirmed that as the current chairman of the Atwii Athinzu Clan, he authored the letter dated the 16<sup>th</sup> April 2004 advising trespassers on the suit land to abide by the decision of the clan rendered on 27<sup>th</sup> January 1994.
28. During cross-examination, DW2 averred that as per the clan's decision of 27<sup>th</sup> January 1994, the suit land belongs to the Defendant, as he had a title but the late Ngwala had trespassed thereon. He stated that the late Ngwala never vacated the suit land because in 2004, the Defendant lodged a complaint with Atwii Athinzu clan, of which the office wrote the letter of April 2004, which he produced in evidence.
29. Peter Ngui Mutundu as DW3 confirmed that the Defendant had sought his assistance as the then acting Assistant Chief for Muusini Sub Location to resolve a dispute following the Plaintiffs' trespassing on the suit land. He confirmed summoning the Plaintiffs in 2015 in two separate meetings to attempt to resolve the dispute herein. It was his testimony that the Plaintiffs claimed to have purchased plots from Francis Mutua Ngwala but he was clear to them that the suit land belonged to the Defendant. However, since they could not reach an amicable solution, he authored the letter dated the 23<sup>rd</sup> April 2004.
30. In cross-examination, DW3 averred that that he was informed of the dispute in 2015 and at the time, 21 years had lapsed since the clan's decision of 27<sup>th</sup> January 1994. He contended that he had a meeting with the Defendant and Mutua Ngwala, before he passed on and the late Mutua Ngwala confirmed that he had purchased the suit land from the Defendant but he never finished paying the purchase



price. He stated that he relayed this information of payment of the balance to the Plaintiffs and at that time, only the 5<sup>th</sup> Plaintiff and Mutua Ngwala (deceased) had built on the suit land. He further testified that in the first meeting, the Plaintiffs sought to negotiate the purchase price but in the second meeting, they refused to pay any monies, since they had paid Ngwala (deceased).

31. During re-examination, DW3 claimed in the meeting with the late Mutua Ngwala and the Defendant, he asked them to deliberate as a family but they never reverted to him and during Mutua Ngwala's burial, he informed mourners to visit his office, in case of any dispute over the suit land.
32. The Plaintiffs and Defendant filed their submissions.

### **Analysis and Determination**

33. Upon consideration of the Originating Summons, replying affidavit, Pleadings in Machakos CMC ELC No. 93 of 2018, testimonies of the witnesses, exhibits and the rivalling submissions, the only issue for determination is whether the Plaintiffs have trespassed on the suit land or acquired it, through adverse possession.
34. The Defendant claims the Plaintiffs have trespassed on the suit land, which fact is opposed by the Plaintiffs who contend that they purchased their respective portions of the land from Mutua Ngwala (deceased), settled thereon and have continued to openly utilize the said land, hence entitled to it, through adverse possession. In the lower court suit, the Defendant had sought to evict the Plaintiffs while in the Originating Summons, the Plaintiffs have sought to be declared owners of the suit land through adverse possession. All the Plaintiffs witnesses admitted that the Plaintiffs entered the suit land at different times and have been utilizing the respective portions they occupy, which fact was not disputed by the Defendant.
35. Clerk & Lindsell on Torts, 18th Edition, page 923, paragraph, 18-01 defines trespass to land as follows:

“As any intrusion by a person on the land in the possession of another without any justifiable cause”.
36. While section 3 of the *Trespass Act* stipulates thus:

“(1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence. (2) Where any person is charged with an offence under subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.”
37. In the case of *Municipal Council of Eldoret v Titus Gatitu Njau* [2020] eKLR, the Court of Appeal favourably cited the case of *M'Mukanya v M'Mbijiwe* [1984] KLR 761, wherein the ingredients of the tort of trespass were described as follows:

“Trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership (See *Thomson v Ward*, (1953) 2QB 153.”
38. From the evidence tendered before court, I note most of the Plaintiffs purchased their respective portions of the suit land from Francis Mutua Ngwala (deceased) who had purportedly bought the land from the Defendant in 1969. It emerged in evidence that the Plaintiffs have been on suit land for several



years, even during the lifetime of Mutua Ngwala (deceased) but the Defendant never took any action and only commenced to do so in 2018 after the demise of Mutua Ngwala. Further, that some of the Plaintiffs even put up permanent structures and run their businesses thereon.

39. Which brings me to the question that if the Plaintiffs had been on the suit land for a long period, why didn't the Defendant evict them during Mutua Ngwala's lifetime. In my view, I find that the Plaintiffs entered the suit land as purchasers, after having paid Mutua Ngwala (deceased) the purchase price. Further, I note the Defendant as DW1 actually admitted that the Plaintiffs had entered the suit land from 1994 upto 2000. To my mind, I find that the Defendant was not being candid when he claimed they had trespassed thereon, almost eighteen (18) years' later and never evicted them. This brings me to the point that if the Plaintiffs entered the suit land with permission from Mutua Ngwala (deceased), then are they entitled to it, through adverse possession.

40. The legal provisions governing Adverse possession are contained in Sections 7, 37 and 38 of the Limitation of Actions Act. Section 38 (1) and (2) of the Limitation of the Actions Act which stipulates that:

“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.”

41. The Court of Appeal in *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR provided tenets on adverse possession and stated thus:

“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 assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or in action of the owner. The essential prerequisites 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.

42. While in the case of *Wambugu V Njuguna* (1983) KLR 173 the Court of Appeal held thus:

“Adverse possession contemplates two concepts: Possession and discontinuance of Possession. It further held that the proper way of assessing proof of Adverse Possession would be 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 or she has been in possession for the requisite number of years.”

43. In this instance, each of the Plaintiffs confirmed how they entered the suit land. From the evidence tendered before court, which I have summarized above, it is clear that the Plaintiffs never had permission from the Defendant to enter the suit land. Further, they continued to openly and uninterruptedly occupy the suit land, in a manner adverse to the Defendant's use. From the testimony of the Defendant, he was well aware of the Plaintiffs' presence therein from 1994 upto 2000, but never took any legal action to evict them. DW1 confirmed he was issued with his title to the suit land on the 12<sup>th</sup> July 1976. He claimed that he had quietly and peacefully enjoyed and used his land without any interruption from anyone until 1993 when Mutua Ngwala (deceased) started claiming ownership.



44. However, I note from 1993, the Defendant never filed any suit but reported dispute to the Atwii Athinzu Clan in 1994. Even though he denied entering into a Sale Agreement dated the 1<sup>st</sup> June, 1969 with Mutua Ngwala (deceased), he did not tender evidence to demonstrate why he let the Plaintiffs who claim to have purchased portions of the land from Mutua Ngwala, to enter his land and continue to use it adversely and only waited until the demise of Mutua Ngwala to sue them. Further, I note the Plaintiffs produced a handwritten Sale Agreement dated the 1<sup>st</sup> June 1969 between the Defendant, the deceased and one Matheka Ndeti. In the said agreement, it indicates that on 7<sup>th</sup> December 1969, both parties agreed that they had settled everything in terms of consideration. This evidence of a sale agreement was collaborated by the evidence of the Defendant's own witness, DW3 who told the court that he had mediated the dispute between the Defendant and the deceased and it concerned payment of a balance of the purchase price that the deceased had allegedly not settled in 1970's, when he purchased the suit land from the Defendant.
45. I note from 1969 to 1994, the deceased had been on the suit land for 25 years. In my considered view, his right to the suit land had crystallized by 1981, which was 12 years after his peaceful entry in 1969. I opine that the decision of the clan dated the 28<sup>th</sup> January 1994 was inconsequential as it is not a court order and neither did time stop running for purposes of limitation. Further, DW2, confirmed that the deceased never left the suit land after the decision of Atwii Athinzu clan of 1994 and no evidence was tendered to confirm that the Defendant evicted him thereafter.
46. The Plaintiffs' presence on the suit land was first questioned vide DW2's letter of 16<sup>th</sup> April 2004. By this time, the deceased's rights over the parcel had crystallized and it appears that he continued with possession until he passed on, in 2013. Further, during his stay on the suit land, he sold a plot to the 1<sup>st</sup> Plaintiff vide a sale agreement dated 12<sup>th</sup> January 2002, he gave his son the 2<sup>nd</sup> Plaintiff a portion, sold a plot to the 4<sup>th</sup> Plaintiff and the 5<sup>th</sup> plaintiff in 1993, which he later regularized vide Sale Agreement of 15<sup>th</sup> March, 2005 and to the 6<sup>th</sup> Plaintiff vide Sale Agreements dated 2<sup>nd</sup> December 1997 and 9<sup>th</sup> December 1997 respectively. From my analysis above, I opine that the Plaintiffs have demonstrated that the deceased's possession of suit land was known to the Defendant and it was uninterrupted from 1969 until his demise. On calculation of the period Mutua Ngwala (deceased) and the Plaintiffs had openly, uninterruptedly and notoriously occupied the suit land, it is for more than the required 12 years.
47. In the foregoing, while relying on the legal provisions quoted and associating myself with the decisions cited, I find that the Plaintiffs have proved their claim of adverse possession over the suit land but the Defendant has not proved his claim of trespass. In the circumstances, I find that the Plaintiffs have proved their case on a balance of probability and will proceed to enter judgment in their favour in the following terms:
- a. That the Plaintiffs be and are hereby declared to have acquired their respective portions of land within LR No. Masii/Vyulya /926 by adverse possession and consequently should be registered as owners thereof.
  - b. Each Party to bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25<sup>th</sup> DAY OF FEBRUARY 2025**

**CHRISTINE OCHIENG**

**JUDGE**

In the presence of:

Court Assistant: Joan

