

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT
EMBU
ELC LAND CASE NO. 18 OF 2022 (OS)

NGUNGI **NDERANGU.....**
.....PLAINTIFF

VERSUS

CYPRIAN NYAGA NGARI.....1ST
DEFENDANT

JULIUS NYAGA NTHIGA.....2ND
DEFENDANT

SIMON IRERI NGARI.....3RD
DEFENDANT

JUDGMENT

1. Through the Originating Summons dated 18/7/2022, the plaintiff sought to be declared to have become entitled through adverse possession to the land known as Evurore/Kathera/468, which was subdivided into Evurore/Kathera/3495 and 3496 (the suit land). Further, he sought to have the defendants directed to transfer the suit land failing which the Deputy Registrar of the court should sign the requisite documents to effect the transfer.
2. The plaintiff claimed that he had become entitled to the suit land through adverse possession and that the rights of the

defendants over the suit land had been extinguished because he had occupied the land peacefully, openly and continuously as of right for over 12 years. The plaintiff sought to have the Land Registrar, Siakago dispense with the need for the production of the original title deeds for Evurore/Kathera/3495 and 3496.

3. The plaintiff swore the affidavit in support of the Originating Summons and averred that he knew the 1st defendant and that in 1972 they agreed that the 1st defendant would handle the dispute over the land adjudication before the Adjudication Committee in Committee Case No. 11 of 1972 to 1973 regarding Evurore/Kathera/468 which was the plaintiff's and Evurore/Kathera/580 which was for the 1st defendant. He claimed that the case was decided in their favour and the land was to remain in the 1st defendant's name vide the decision made on 20/3/1973.
4. He stated that he was in possession of Evurore/Kathera/468 and had built a permanent house where he lived with his family and was rearing animals on that land. He relied on the photographs showing his house and the structures erected for his animals. That after the decision of the committee, the 1st defendant was registered as the proprietor of the suit land on 4/1/1978 and that his attempts to have the 1st defendant transfer the suit land to his name did not bear fruit even with the involvement of the village elders who held a meeting on 17/9/2013. He annexed a copy of the minutes of that meeting.
5. When he did a search on 14/6/2022, he discovered that the 1st defendant had subdivided Evurore/Kathera/468 into Evurore/Kathera/3495 and 3496 and transferred the

subdivided parcels to the 2nd and 3rd defendants respectively. He contended that he had an overriding interest over the suit land, which could not be defeated by transfers, mutations or subdivision. He maintained that he had occupied the land since 1972 and had erected permanent houses where he lived with his family.

6. The 1st defendant swore the replying affidavit in response to the Originating Summons and confirmed that the plaintiff was his brother while the 2nd and 3rd defendants are persons whom he sold the suit land. He maintained that Evurore/Kathera/468 ceased to exist after it was subdivided. He emphasised that the plaintiff had his own land known as Evurore/Kathera/580, which neighbours the suit land. He conceded that they filed a case before the adjudication committee whose outcome was that Evurore/Kathera/468 belonged to him while Evurore/Kathera/580 belonged to the plaintiff. He was emphatic that the plaintiff did not live on Evurore/Kathera/468 and that he lived on Evurore/Kathera/580, which shares a boundary with Evurore/Kathera/468.
7. The 1st defendant averred that sometime back, the plaintiff built a semi-permanent structure to put his crops in with the 1st defendant's permission. He maintained that he was aware of the semi-permanent structure which the plaintiff built on his land and that he was the one who gave him permission to build. He maintained that he sold the suit land and passed a clean title to the 2nd and 3rd defendants and that the plaintiff agreed to remove the structures from the suit land. He maintained that the plaintiff had failed to prove that he

resided on the suit land and urged the court to dismiss the suit.

8. The 2nd defendant swore a replying affidavit in opposition to the plaintiff's claim, in which he averred that he purchased Evurore/Kathera/3495 from the 1st defendant on 20/4/2021 after conducting due diligence and being satisfied that the suit land had no encumbrances. That he went to the land physically accompanied by the 1st defendant and a surveyor who was to ascertain the boundaries of the suit land. Prior to visiting the land, the 1st defendant had informed him that there was a semi-permanent structure on the land which belonged to the plaintiff and that he had given him permission to build it on the suit land.
9. When they visited the land, he saw the semi-permanent structure at the edge of the portion of the land that he wanted to purchase. That while there, the 1st defendant called the plaintiff who stated that he would demolish the structure. That he went ahead with the transaction and the land was transferred to his name. In 2022 when he wanted to fence his land, he requested the plaintiff to demolish the structure and the plaintiff assured him that he would do so only to serve him with documents claiming adverse possession of the suit land.
10. The 2nd defendant maintained that the plaintiff had no cause of action against him since he had not demonstrated actual occupation of the suit land. Further, that the permanent structures in the photographs tendered by the plaintiff were on the plaintiff's land, which was adjacent to the portion that the 2nd defendant bought. He contended that since the plaintiff was granted permission to stay on the suit land, the

permission extinguished any claims of acquiring the suit land through adverse possession. The 2nd defendant exhibited the sale agreement dated 20/4/2021 in respect of Evurore/Kathera/3495.

11. The 3rd defendant also swore a replying affidavit in opposition to the plaintiff's claim. He deponed that he purchased Evurore/Kathera/3496 from the 1st defendant and was registered as the proprietor after conducting due diligence. That he purchased the land vide the sale agreement dated 12/8/2020. He urged the court not to grant the orders sought and added that since he purchased the land, he was using it for farming and that no one else was on the land.
12. The hearing of the suit started on 3/6/2025 when the plaintiff gave evidence. He told the court that the 1st defendant divided their father's land to them because their father had died. After that, Kubuta Njogu stole his land and they agreed that the 1st defendant would pursue the claim. They won the case on 20/3/1973. That the 1st defendant demanded to be paid costs for doing the case and was registered as the owner of the land on 4/1/1978 yet the plaintiff had been living on the land prior to 1972. He maintained that he had acquired the land through adverse possession having used it for over 50 years and lived with his family on the suit land.
13. The plaintiff produced copies of the certificates of the official search for the suit land, Evurore/Kathera/3495 and 3496 and the register for the suit land. He also produced photographs.
14. On cross examination, he stated that he did not know that the suit land was subdivided in 2021. He denied that a title had been issued. He told the court that his land was

Evurore/Kathera/439 but did not know the size. He did not know about Evurore/Kathera/580. He stated that his brother had three parcels of land. On reexamination, he stated that the 1st defendant gave him Evurore/Kathera/439 and that he sued his brother for selling the suit land, which belonged to him.

15. The case proceeded for further hearing on 29/9/2025 when Saverio Njiru Ngare gave evidence. He told the court that the plaintiff was his brother and that the suit land belonged to their father who unfortunately died before the land was registered in his name. He stated that it was agreed that since the 1st defendant was their eldest brother, he would do the case and once it was concluded, he would transfer the suit land to the plaintiff. He told the court that the 1st defendant transferred to him his own land because there was no dispute but refused to transfer the suit land to the plaintiff yet he had occupied and used the suit land from 1972 up to around 2022 when they discovered that the land had been sold. He stated that the plaintiff had buildings which he erected on the land in 2008 and had been farming on the land.
16. On cross examination, the witness stated that he did not know the land reference of the 1st defendant's land. He stated that he did not understand English and that he gave his evidence to the lawyer in Kimbeere before the witness statement was written in English.
17. Verina Mbuya Nduma gave evidence and told the court the suit land belonged to the plaintiff and that the 1st defendant was to do the case since he was the eldest after the land was stolen by Kubuta Njogu. She told the court that the plaintiff

was given the land after the case was done and that the plaintiff leased the land to her to do farming on it. She asserted that for over 20 years the plaintiff had been farming on the suit land and had planted trees on the land. On being cross examined, she told the court that she did not know how to read and that she gave her evidence and it was translated into English. She confirmed that she was the sister to the plaintiff and the 1st defendant.

18. The 1st defendant gave evidence and adopted his replying affidavit in evidence. He maintained that the plaintiff did not live on or use the suit land. On cross examination he told the case that he did a case in 1973 with the surveyor over the suit land. That when he won the case, the plaintiff invaded his land laying claim to it. They had a case before the Chief over the land. He denied stating that he wanted to be paid costs of Kshs. 4,000/= so that he could transfer the suit land to the plaintiff. He stated that the plaintiff constructed on his land in 2008.
19. He denied that the plaintiff was tilling the land and maintained that he was the one who was ploughing it. He sold the land to the 2nd and 3rd defendants because it was his. He conceded that it was true that the plaintiff was on the land and had built three houses on the land. He added that the people who bought the land had built on it. He stated that the land was subdivided in 2020 and that there was no objection to the subdivision and they went to the board.
20. The 3rd defendant testified and adopted his replying affidavit. On cross examination, he stated that he had a title deed but had not brought it to court. That he bought the suit land for

Kshs. 230,000/=, which he paid in cash to the 1st defendant. He conceded that the sale agreement did not state the purchase price. He explained that he was buying a different parcel of land which the 1st defendant sold to a third party.

21. The 1st defendant stated that the present land was transferred to him because Evurore/Kathera//476 which belonged to the 1st defendant had been sold to somebody else. He maintained that he had built on the suit land even though he did not bring photographs to show that he had built on the land. He conceded that by the time the sale agreement dated 12/8/2020 was executed, the land had not been subdivided but maintained that the plaintiff had a separate piece of land where he lived with his family. On re-examination, he stated that he paid Kshs. 11,000/= which he was buying. He told the court that he lived on Evurore/Kathera/3496, where he claimed to have built. He too told the court that he was illiterate.

22. The 2nd defendant testified and adopted his replying affidavit. He told the court that he bought Evurore/Kathera/3495 for Kshs. 625,000/=, which he paid in cash to the 1st defendant. He was told that the plaintiff's houses were on the land and did not ask for how long the plaintiff had been on the suit land. He stated that the plaintiff agreed that he would demolish his structures on the land and that he would go to his own land even though this was not put in written. He was emphatic that the plaintiff's structures were on Evurore/Kathera/439 although he did not have a map to confirm that the two parcels were adjacent to each other. He did not have a surveyor's report to show the boundaries for the land.

23. He emphasised that the plaintiff was not ploughing the land that he bought or grazing his livestock on it. He stated that he knew the plaintiff's land and the 1st defendant's land and added that he did not know that the plaintiff was claiming parcel number Evurore/Kathera/468. When he bought the land nobody was living on it but he saw houses at the edge of the land. He spoke to the person who was living in the houses and the plaintiff agreed that he said would remove the structures.
24. He stated that the plaintiff was aware that he was buying the land but did not object before the land control board or at the Chief's office. He relied on land register showing the history of the land and pointed out that there was no caution registered against the land except the one registered by his wife.
25. Upon conclusion of the hearing, the court directed parties to file and exchange written submissions. The plaintiff submitted that it was not denied that he was rearing animals and lived with his family on the three houses shown on the photographs. He submitted that his possession was visible and was admitted by the defendants. Further, that the 1st defendant alleged that the plaintiff began claiming the land and dispossessed him which forced him to sell it to the 2nd and 3rd defendants to defeat the plaintiff's claim.
26. He urged that by 2021 the 1st defendant's title had been distinguished and that he had met the adverse possession period. He relied on Sections 7 and 37 of the Limitation of Actions Act in support of his claim. He also relied on **Mtana Lewa v Kahindi Ngala Mwagandi [2005] eKLR** where the court held that adverse possession required actual possession and the intention to exclude the true owner's possession. He

urged that the defendants tried to take possession in 2021 and that the 1st defendant had admitted that he was in possession since 2008. He added that it was not contested that he leased the land to the third witness.

27. The defendants submitted that the plaintiff was required to prove that his possession was adverse to the interest of the owner, that it was actual as opposed to constructive possession. Additionally, that it was open, notorious, without force, exclusive and was continuous and uninterrupted for 12 years as the Court of Appeal held in **Andafu v Akhwuonya [2025] KECA 714 KLR.**

28. The 1st defendant submitted that he permitted the plaintiff to build semi-permanent structures at the far end of the land near the plaintiff's boundary. Further, that the 1st defendant had proved that the plaintiff's land was parcel number 469 which bordered the 1st defendant's land. That based on this, the plaintiff's claim for adverse possession failed. The defendant added that the plaintiff was not in continuous occupation of the suit land and had not developed it, and therefore his claim fails for these reasons. The defendant submitted that the plaintiff's second witness denied that he authored the witness statement. The defendant submitted that the plaintiff confirmed during cross-examination that he was aware that the 2nd and 3rd defendants had purchased the subdivided land and that he conceded that they had substantially developed the land.

29. The defendants relied on Sections 28 and 143 of the Registered Land Act on the rights of a registered proprietor

and the prerequisites for rectification of the register respectively. The Registered Land Act was repealed.

30. The defendants submitted that the 2nd and 3rd defendants produced sale agreements for the two parcels of land and that they did due diligence and were aware of the plaintiff's building on one of the parcels of land, and that the plaintiff had confirmed that he would bring down the semi-permanent structures. They maintained that they confirmed the true ownership of the suit land before the transfer and that the land was not encumbered. That they paid consideration and good titles were passed to them and embarked on developing their portions of land. The 2nd and 3rd defendants urged that they had proved that good title was passed to them and that they were therefore purchasers for value without notice.
31. The issue for determination is whether the plaintiff has proved on a balance of probabilities that he is entitled to ownership of the disputed land through adverse possession. The 1st defendant is the defendant's older brother. The plaintiff called their other brother and sister to give evidence, who told the court that the suit land belonged to the plaintiff. It was the plaintiff's testimony that the 1st defendant handled the dispute over the suit land in 1973 and the 1st defendant confirmed that after that the plaintiff started laying claim to the suit land.
32. The evidence led confirmed that the plaintiff and 1st defendant each had other parcels of land. The plaintiff's evidence was that the 1st defendant was the one mandated to distribute the family land among his siblings since their father died before the adjudication of the land. The 1st defendant stated that a portion of the suit land was transferred to him because

Evurore/Kathera//476, which he initially bought from the 1st defendant had been transferred to a third party.

33. A key ingredient in adverse possession is that the occupation must be continuous, exclusive and uninterrupted. The 1st Defendant told the court that the plaintiff built on the suit land in 2008. The 2nd and 3rd defendants also mentioned in their evidence that when they went to the land after purchasing it they found the plaintiff's structures and that he undertook to remove the structures but instead filed this suit. This suit was filed in 2022. Even if this court were to assume that the plaintiff entered the suit land in 2008, by 2022 he had been on the land for more than 12 years.
34. The defendants' advocate submitted that the plaintiff's witnesses told the court that they did not write their witness statements. In this court's view nothing turns on this point because the witnesses explained that they gave instructions to their advocate who reduced them into the witness statements, which they adopted as their evidence in the case.
35. The court is satisfied on a balance of probabilities that the plaintiff has been in possession of Evurore/Kathera/468, on which he has built a permanent house and lives with his family. The plaintiff has proved that he has become entitled to Evurore/Kathera/468 subdivided into 3495 and 3496 through adverse possession.
36. The court grants prayers 1, 2 and 3 of the Originating Summons dated 18/7/2026. Each party will bear its costs.

Delivered virtually at Bungoma this 30th day of June 2026.

K. BOR

JUDGE

In the Presence of:-

Mr. Ngungi Nderangu- Plaintiff

Ms. M. Mboi holding brief for Mr. K. Guantai for the Defendants

Court Assistant – Diana Kemboi

ORIGINAL FILE COPY