

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VIHIGA

ELC (OS) NO.E007 OF 2025

NORMAN WELSBY MWANGAH PLAINTIFF/APPLICANT

VERSUS

PATRICK MUSUNGU 1ST DEFENDANT/RESPONDENT

LIVINGSTONE IBYWA2ND DEFENDANT/RESPONDENT

GEDION ALULU3RD DEFENDANT/RESPONDENT

J U D G E M E N T

Vide the Originating Summons dated 2nd May, 2025, NORMAN WELSBY MWANGAH, the Plaintiff/Applicant herein, who claims to have become entitled, by adverse possession and/or prescriptive rights, to the property known as KAKAMEGA/SHAMAKHOKHO/264 registered in the name of Edah Mbone Levi, deceased, sought the following orders;

- (i) A declaration that the Plaintiff is entitled to be registered as the indefeasible owner of that Property known as KAKAMEGA/SHAMAKHOKHO/264 measuring 0.31Ha registered in the names of the Defendants by virtue of adverse possession in terms of Sections 7, 13, 37 and 38 of the Limitation of Actions Act Cap 22

Laws of Kenya on account of her/his/their continued and uninterrupted possession, occupation and use of the suit property for a period exceeding 12 years from 1970 to date.

- (ii) A declaration that such interests, rights, estate and/or title, if any, that one EDAH MBONE LEVI (now deceased) being the person through whom the Defendants claim and/or his estate had in the suit property namely KAKAMEGA SHAMAKHOKHO/264 were extinguished upon expiry of twelve (12) years from 1970 with the result that no interest, right, estate or title to the suit property could legally be transferred/transmitted to the Defendant on 1992 (date property transferred to DEFENDANT) or at any other time in view of the provisions of Section 7, 13, 37 and 38 of the Limitation of Actions Act, Cap 22 Laws of Kenya.
- (iii) A declaration that transfer and registration of the suit property, namely KAKAMEGA/SHAMAKHOKHO/264, in the name of the deceased is subject to the Plaintiff's

overriding rights like prescription on account of his occupation and possession.

- (iv) A declaration that the Defendant holds the suit property in trust for and on behalf of the Plaintiff.
- (v) An order be issued directing the Defendant to execute, deliver, and hand-over transfer documents, the title deed, and application for consent(s) in respect of the suit property, namely KAKAMEGA/SHAMAKHOKHO/264 in favour of the Plaintiff, failure of which the Deputy Registrar of this Honourable Court be empowered and authorized to execute the documents of transfer in favour of the Plaintiff.
- (vi) An order of prohibitory injunction be issued restraining the Defendant(s), whether by themselves, agents, servants, or by any other person(s) whatsoever, from trespassing, leasing, assigning, disposing, advertising, or in any other manner whatsoever dealing with the suit property, namely KAKAMEGA/SHAMAKHOKHO/264.

(vii) An order of prohibitory injunction be issued restraining the Defendant, whether by themselves, agents, servants or by any other persons whatsoever, from trespassing upon, evicting, developing, building upon, damaging, wasting, utilizing, or in any manner whatsoever from interfering with the Plaintiff's possession and occupation of the suit property, namely KAKAMEGA/SHAMAKHOKHO/264.

(viii) The costs of this Summons be paid by the Defendant(s).

The Originating Summons was accompanied by a Supporting Affidavit sworn by the Applicant on 2nd May, 2025, and the annexures thereto.

The Originating Summons was undefended. The record shows that the Defendants/Respondents who were served with the Originating Summons, Supporting Affidavit, and annexures, never filed any response to the Plaintiff/Applicant's claim. An Affidavit of Service sworn by Joseph Kibet Maritim describes how the Originating Summons was served upon the Defendants/Respondents.

The matter therefore proceeded without the participation of the Defendants/Respondents.

The applicant's case

The Applicant's case is that he has had actual, open, continuous, exclusive, and uninterrupted possession of the suit property parcel number KAKAMEGA/SHAMAKHOKHO/264 for a period exceeding 12 years.

That the suit land was an ancestral land initially registered in the name of JAMES MUSUNGU, the Plaintiff/Applicant's grandfather.

That transfer of the land was unfair and was meant to deny the Applicant the right to ownership. That the Respondents, being legal representatives of Edah Mbone Levi, the deceased herein, hold the suit property in trust for the benefit of the Applicant and are bound to transfer the same in favour of the Applicant. That the Respondent should desist from such acts as are likely to prejudice the Applicant's interests, such as trespass, encroachment, wasting, damaging, offering for sale, advertising, alienating, transforming, leaving, and/or charging the property.

The suit was heard by way of oral evidence pursuant to directions taken under Order 37 of the Civil Procedure Rules.

The Applicant who testified as PW1 adopted the contents of the Supporting Affidavit sworn on 2nd May, 2025, and the witness statement recorded on 8th December, 2025, as his evidence in chief. He had stated in the witness statement that the Respondents are the sons of Edah Mbone Levi, deceased, who died in the year 2024, and in whose name the suit land was registered.

That the initial owner of the suit land was James Musungu, who died in the late 1950s.

That in the year 1980, he was allocated by his father one JOTHAM ATSENGA MAHANGANI, part of the suit land measuring 0.31Ha, and 049Ha remained for one Levi Musungu, who was the husband of Edah Mbona Levi, deceased.

That he took possession of the land in the year 1980, built a house, started farming thereon, and has been residing on it uninterrupted. He urged the court to come to his aid and declare that he was the rightful owner through adverse possession.

He produced 2 exhibits, namely a certificate of official search for KAKAMEGA/SHAMAKHOKHO/264 dated 30th April, 2025, and photographs.

PW2 was James Musungu Shigala, an uncle of the Applicant. He adopted the contents of his witness statement dated 8th December,

2025, as his evidence in chief. He had stated in the witness statement that he had lived in the neighbourhood of the suit land since the year 1952, when he was born. That he was aware that the Applicant had lived on the land for many years since 1979. That although it is the late Jotham Atsenga Mahangani who purchased the land, it was the Applicant who paid the whole purchase price from his finances as he worked with the Postal Corporation and would send money home to his father, now deceased.

That the final payment of the purchase price was in the form of a heifer, which the Applicant gave to Levi Musungu to enable him to pay his bride price.

PW3 was Ezina Mdeizi Atsenga. She too adopted the contents of her witness statement dated 8th December, 2025, as her evidence in chief. She had stated in the witness statement that the suit land belonged to James Musungu originally, who was her father, who apportioned it to Levi Musungu. That Levi Musungu sold a portion measuring 0.31 Ha of the land to the late Jotham Atsenga Mahangani.

That the last payment of the purchase price was in the form of a cow, which was given by the Applicant herein to Levi Musungu.

That immediately after paying the purchase price, the Applicant planted trees on the land which existed to date.

That by 1979, the Applicant had completed construction of his house on the land and continued to utilize the land to date. That the Applicant has developed the land and uses it to house his family members over the years during major family events.

Submissions

At the close of the evidence, written submissions dated 24th March, 2026, were filed by Ivy Maria Kerre, Advocate, on behalf of the Applicant.

Analysis and determination

The Applicant's case is based on the doctrine of adverse possession, which, as explained by the Court of Appeal in the case of Mtana Lewa vs- Kahindi Ngala Mwagandi [2015] e KLR

“..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.”

The certificate of official search dated 30th April, 2025, attached to the Supporting Affidavit, shows that the suit land is registered in the name of Edah Mbone Levi. It was the applicant’s case that Edah Mbone Levi died in the year 2024.

The three (3) Respondents are sued as estate representatives of Edah Mbone Levi. In paragraph 2 of the Supporting Affidavit, they are described as sons of the deceased Edah Mbone Levi, having legal representative of her estate, to which the suit land is registered.

For a person to attain the status of personal representative of the deceased, such a person must be appointed as such in accordance with the provisions of the Law of Succession Act. Section 2(1) of the Law of Succession Act makes the Act the law that regulates succession and administration of the estates of deceased persons in Kenya. Section 45 makes it an offence for any person who has not been so appointed to deal in the property of the deceased.

Sections 79 and 82 vest the property of the deceased in the duly appointed personal representatives and grant such personal

representatives the power to enforce the rights of the deceased by inter alia the filing or defending suits.

No evidence is exhibited herein that the Respondents have ever been appointed as legal representatives of the deceased.

This brings the capacity of the Defendants to be sued into question. In the absence of a Grant of Letters of Administration, I find that the Defendants have no capacity to be sued herein and that any orders, judgment, or decree that may be passed against them shall be incapable of execution as they are not the registered owners or personal representatives of the deceased registered owner. The fact that the Defendants may be children of the deceased does not qualify them as her personal representatives.

Further, the Applicants claim that the suit land is his ancestral land, which he inherited from his father, and that registration of the land in the name of Edah Mbone Levi was unfair. PW2 & PW3 testified that, in fact, the land had been purchased by the Applicant's father, and the Applicant paid the purchase price. If this is true, then a claim by the applicant based on adverse possession is not sustainable in respect of land which belongs to the Applicant by virtue of the land being his ancestral land.

I have read and considered the submissions by Counsel for the Applicant. The same does not address the issue of the capacity of the Respondents to be sued and the pleadings by the Applicant that the land is his ancestral land belonging to his grandfather, James Musungu, and given to him by his father.

I find that a claim of adverse possession has not been proved against the Respondents as sued.

Although the Respondents filed no defence to the Originating Summons, the Applicant still had the burden to prove the claim, including the capacity of the parties, on a balance of probabilities.

The upshot is that the suit is dismissed. No orders as to costs.

Orders accordingly.

Judgment dated and signed at Vihiga and delivered virtually this 9th day of July, 2026.

E. ASATI,

JUDGE.

In the presence of:

Kerre Advocate for the Plaintiff/Applicant.

No appearance for the Defendants/Respondents.