



**Sirya & 9 others v Karani (Enviromental and Land Originating Summons  
60 of 2020) [2023] KEELC 16689 (KLR) (27 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16689 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 60 OF 2020**

**MAO ODENY, J  
MARCH 27, 2023**

**BETWEEN**

**EPHESIANS THOYA SIRYA ..... 1<sup>ST</sup> PLAINTIFF  
KAJOLE KAHINDI THOYA ..... 2<sup>ND</sup> PLAINTIFF  
MASHA SIRYA THOYA ..... 3<sup>RD</sup> PLAINTIFF  
WILLIAM THOYA SIRYA ..... 4<sup>TH</sup> PLAINTIFF  
KAVIHA KAHINDI THOYA ..... 5<sup>TH</sup> PLAINTIFF  
FRANK KAHINDI KWAGWA ..... 6<sup>TH</sup> PLAINTIFF  
ALPHAEUS KAHINDI THOYA ..... 7<sup>TH</sup> PLAINTIFF  
MOSES KAHINDI THOYA ..... 8<sup>TH</sup> PLAINTIFF  
MERCYLINE FURAHA KAHINDI ..... 9<sup>TH</sup> PLAINTIFF  
PERIS KAHINDI SIRYA ..... 10<sup>TH</sup> PLAINTIFF**

**AND**

**LEVIS KIRAHA KARANI ..... DEFENDANT**

**JUDGMENT**

1. By an Originating Summons dated August 13, 2020 the Plaintiffs prayed that the court declares that they have acquired the suit land parcel No Kilifi/MbarakaChembe/184 measuring 17.784 acres located in Mbaraka Chembe Village near Malindi by adverse possession.
2. The Plaintiff relied on Section 7, 17 and 38 of *Limitations of Actions Act*; Order 37, rule 7 and 8 of *Civil Procedure Rules, 2010* and sought the following orders: -



- a. That the Defendant's title or right to all that parcel of land situated at Mbaraka Chembe village near Malindi containing by measurement 17.784 acres or thereabouts and known as Land Parcel No Kilifi/MbarakaChembe/184 and his claim to own the same was extinguished and time barred by virtue of Section 17 of the Limitations of Actions Act Chapter 22 Laws of Kenya.
  - b. That the Plaintiffs have acquired legal possession and ownership rights by adverse possession and prescription of all that parcel of land situated at Mbaraka Chembe village near Malindi containing by measurement 17.784 acres or thereabouts and known as Land Parcel No Kilifi/MbarakaChembe/184 by dint of adverse possession and prescription.
  - c. That the Plaintiffs are entitled to be registered as owners of all that parcel of land situated at Mbaraka Chembe village near Malindi containing by measurement 17.784 acres or thereabouts and known as Land Parcel No Kilifi/MbarakaChembe/184 by dint of adverse possession and prescription.
  - d. That the Land Registrar, Kilifi Land Registry, do register the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs Ephesian Thoya Sirya, Kajole Kahindi Thoya, Kadzo Kahidni Kwangwa as owners of Land Parcel No Kilifi/MbarakaChembe/184 in trust for the other Plaintiffs without requiring the Plaintiffs to avail the original Title Deed and issue to the Plaintiffs a Title Deed for Land Parcel No Kilifi/MbarakaChembe/184.
  - e. That the Defendants do bear the costs of this suit.
3. In a Notice of Motion application, the Plaintiffs sought leave to effect service of summons by way of substituted service, application which was allowed. Consequently, notice was published in the Daily Nation Newspaper on July 8, 2021 and another sent via registered mail to the Defendant's last known address on July 12, 2021 as per the affidavit of service sworn and filed on July 2, 2021.
  4. The Defendant did not, however, enter appearance hence this suit proceeded undefended.
  5. PW1 Ephesians Thoya Sirya and PW2 Kajole Kahindi Thoya as PW2 adopted their witness statements dated August 13, 2020 as their evidence in chief. PW1 also produced as PEXH 1-7, from the list of document filed by the Plaintiffs'.
  6. Counsel reiterated the Plaintiffs' evidence and submitted that the Plaintiffs have met the ingredients of adverse possession as were set out in the case of Francis Katana and 29 Others -v- Shabbudin Karmali Nathoo, 208 of 2017 [2022] KEELC 2232 KLR.
  7. The Plaintiffs' case was that the suit property was originally registered in the name of one Kahindi Toya who transferred the same to the Defendant on July 25, 1978 and that despite the said transfer the Plaintiffs have continued to reside on the suit property for more than 12 years and have even buried some of their 5 family members thereon. According to the Plaintiffs, the Defendant has known of their unauthorized occupation but has never interfered with their possession.

### **Analysis and Determination**

8. The issue for determination is whether the Plaintiffs have met the ingredients of adverse possession.
9. A party relying on the doctrine of adverse possession must show vide clear and unequivocal evidence that his possession was not permissible, open, with the knowledge of the true owner and excluded the true owner from the enjoyment of his property.



10. Section 7 of the *Limitation of Actions Act* provides;

"An action may not be brought by any person to recover 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."

Section 13-

"(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land."

11. Section 17 extinguishes the rights of a registered owner where there is a successful claim for adverse possession and Section 38 provides;

"(1) 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."

12. The Court in *Wangari Waitbanje & 2 Others –v- Thathi Francis Muruaria* [2017] eKLR held that in a claim for adverse possession, the law is that the Plaintiffs have to prove the following: -

1. That they have been in continuous and uninterrupted occupation and possession of land in dispute for 12 years or more having dispossessed the original owner thereof.
2. That such possession has been open, notorious and with the knowledge of the registered owner.
3. That such occupation is without the permission of the owner.
4. That the Plaintiffs have asserted a hostile title to the registered owner of the property.

13. It was the Plaintiffs case that they have been on the suit land since 1978 and that the suit property was transferred to the Defendant. It was further the Plaintiffs case that their forefathers also lived on the suit land and have buried 5 of their relatives without any opposition from the Defendant.

14. In the case of *Aloys Adiang Olande v Samuel Amon Siaji & 3 others* [2018] eKLR this court held that subdivision, change of description, and change in proprietorship, does not constitute any interruption of the possession of the land by the Plaintiff.



15. Similarly, in the case of *Francis Mungai Kimani -vs- Ngendo Kibogoro* [1988] eKLR it was held that;
- “the Defendant on being registered as the proprietor of the land as successor in title to her husband acquired exactly the same rights and liabilities as her husband had held. She could not have acquired rights which were superior to her deceased husband...”
16. It follows that the transfer of the suit land did not interrupt the Plaintiffs’ possession and further that the said transfer was effected in 1978 which is still within the statutory period of limitation. The Plaintiffs have therefore been in occupation for a period more than 12 years.
17. The Plaintiffs produced a transfer and a copy of an extract of the certificate showing that Defendant is the registered owner of the suit land, photographs of the structures that they have developed, graves, and trees that they have planted over the years to demonstrate that they have had uninterrupted and open possession of the land since then.
18. In the case of *Tabitha Waitherero Kimani v Joshua Ng’ang’a* [2017] eKLR where Ombwayo J held follows: -
- “(a) Open and notorious use of the Property
- For this condition to be met the adverse party’s use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim. The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If a legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about.
- (b) Continuous use of the property
- The adverse party must, for Statute of Limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor’s time on the land, not how long true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned.
- (c) Exclusive use of the property
- The adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a barn on the owner’s property, and the owner then uses the barn, the adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (i.e. owners) in common, so long as the other elements are met.
- (d) Actual possession of the property



The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession.”

19. The Plaintiffs have proved that they have been in actual notorious and open possession, continuous and exclusive use of the suit property for a period of over 12 years and are therefore entitled to be registered as owners vide the doctrine of adverse possession. The court therefore enters judgment in favour of the Plaintiffs as prayed in the Originating Summons.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 27TH DAY OF MARCH, 2023.**

**M.A. ODENY**

**JUDGE**

**NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.**

