



REPUBLIC OF KENYA



**Katana v Chengo & another (Environment & Land Case 192 of 2014)  
[2023] KEELC 16527 (KLR) (21 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16527 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 192 OF 2014**

**MAO ODENY, J**

**MARCH 21, 2023**

**IN THE MATTER OF: ORDER 37 RULE 7 OF THE CIVIL PROCEDURE RULES, 2010  
AND SECTION 7 OF THE LAND REGISTRATION ACT AND IN THE MATTER OF:  
AN APPLICATION BY FREDRICK MWAMBIRE FOR AN ORDER UNDER SECTION  
38 OF THE LIMITATION OF ACTIONS ACT, CAP 22 OF THE LAWS OF KENYA**

**BETWEEN**

**FREDRICK MWAMBIRE KATANA ..... PLAINTIFF**

**AND**

**KARISA MLEKA CHENGO ..... 1<sup>ST</sup> DEFENDANT**

**PUBLIC TRUSTEE ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By an Originating Summons dated October 13, 2014, the plaintiff herein sued the defendants claiming to be entitled to be registered as the proprietor of all that parcel of land known as Kilifi/Mbaraka Chembe/379 measuring approximately 2.43 Ha by reason of having purchased six acres of title no Kilifi/Mbarakachembe/58 from Lewa Chongo Mleka and Lwembe Chongo Mleka vide a sale agreement dated September 10, 1986 and has stayed on the suit land for over 20 years.
2. The applicant listed 11 questions which the court should deal with and urged the court to allow the Originating Summons as prayed.
3. The matter proceeded by way of *viva voce* evidence. The applicant relied on the supporting affidavit and the list of documents where he deponed that he begun informal negotiations to purchase the suit land in the year 1985 and further stated that upon the demise of Chongo Lewa Mleka, Lwembe Chongo Mleka instituted a Succession Cause with the help of the public trustee and the financing of the plaintiff whereby the public trustee caused the land known as Kilifi/Mbarakachembe/58 to be subdivided for the purpose of hiving off the six acres sold to the plaintiff.



4. The applicant further deponed that he received a demand letter from the advocates of one Karisa Chongo Mleka a grandson of the deceased demanding that he ceases to deal with the suit property but stated that he has never parted with possession or physical control of the land.
5. PW2 Ziro Kalama adopted his witness statement dated October 19, 2020 as his evidence in chief where he supported the applicant's case.
6. The respondent filed a replying affidavit but never participated during the hearing of the suit so the same proceeded undefended.
7. Counsel for the applicant submitted that the applicant has adduced evidence of sale agreements between Lwembe Chongo Mleka and himself showing that he purchased the six acres of land and took possession of the same immediately thus the right to adverse possession accrued from the year 1985.
8. Counsel cited the cases of *Kasuve v Mwaani Investments & 4 Others* [1KLR 184] and *Wilson Njoroge Kamau v Nganga Muceru Kamau* [2020] eKLR.

### **Analysis and determination**

9. The issue for determination is whether the plaintiff has established that he is entitled to 6 acres of the suit land by way of adverse possession.
10. The plaintiff gave an elaborate detail on how he entered the suit land vide a sale agreement in 1985 and has been in possession since then uninterrupted and therefore has acquired the suit land by way of adverse possession.
11. In the case of Nairobi Civ No 283 of 1990 *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, where the court held: -
 

“The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown”
12. The principle of adverse possession is well settled under *Limitation of Actions Act*. Section 7 of the said Act places a bar on actions to recover land after 12 years from the date on which the right accrued.
13. In the case of *Mtana Lewa vs Kabindi Ngala Mwangandi* [2015] eKLR the Court of Appeal defined adverse possession as: -
 

“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.”
14. It is not disputed that the plaintiff has been in occupation of the suit land from 1985 and the he has also attached photographs of mature trees on the suit land. The plaintiff asserted his right over the suit land and the owner t did not take any action to evict or remove the plaintiff.



15. In the case of *Wilfred Kegonye Babu vs Henry Mose Onuko* [2019] eKLR quoting from *Wambugu vs Njuguna* [1983] KLR 172 the Court of Appeal held that: -

“where the claimant is a purchaser under a contract of sale of land.... The possession can only therefore become adverse once the contract is repudiated.”

The court further stated that:-

“where the claimant pleads the right to land under an agreement and in the alternative seeks an order based on adverse possession, the rule is: the claimant’s possession is deemed to have been adverse to that of the owner after the payment of the last instalment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve years after such payment.”

16. Entry onto land by a purchaser on the basis of a land sale agreement can mature into adverse possession if the sale transaction is not completed. In this case the transfer was not effected hence the transaction was not completed as per the sale agreement. Similarly, this is an agreement that was entered into by the parties in 1986, the plaintiff took possession and occupation the same year and has been in such possession for over 38 years.
17. In the case of *Catthy Alucia Jebor Kiplagat vs Vincent Komen Krelnut* [2018] eKLR the court held that adverse possession can be claimed where registered owner fails to complete land sale process to frustrate the buyer who is in possession and occupation of the suit land.
18. Similarly in the case of *Peter Mbiru Michuki vs Samuel Mugo Michuki* [2014] eKLR relied on in *Public Trustee vs Wanduru*, 1984 KLR 314 the Court held that: -

“adverse should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date the true owner is dispossessed of possession. A purchaser in possession of the land, after having paid the purchase price, is a person in whose favour the period of limitation can run.”

19. In the case of *Francis Mwaniki Ngumba v John Mwariri Wamai & 4 others* [2019] eKLR the court while quoting the case of *Sospeter Wanyoike v Waithaka Kabiri* [1979]eKLR where Todd J (as he then was) held that in a purchase scenario , the period of limitation starts to run on the date of the of payment of the last instalment of the purchase price.
20. I find that this is a case where the plaintiff has established that he entered into a transaction more than 38 years ago, the plaintiff made the payment of the purchase price in full but he was frustrated by the vendor who did not fulfil part of the bargain, therefore time started running upon payment of the purchase price and occupation of the suit land.
21. The upshot is that the plaintiff has proved that he acquired parcel of land known as Kilifi/Mbaraka Chembe/379 measuring approximately 2.43 Ha. The defendant to pay costs of the suit.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST 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.

