



**Mutahi & another v Mbatia (Environment & Land Case E203 of 2020)  
[2023] KEELC 16428 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16428 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E203 OF 2020  
OA ANGOTE, J  
MARCH 16, 2023**

**BETWEEN**

**MOSES NDUNG’U MUTAHI ..... 1<sup>ST</sup> APPLICANT**

**BENSON NJOROGE MACHARIA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**PAUL MBATIA ..... RESPONDENT**

**JUDGMENT**

1. Before the court for determination is an Originating Summons dated October 23, 2020 brought under sections 17, 37 and 38 of the [Limitation of Actions Act](#), section 7(d) of the [Land Act](#) and Order 37 Rule 7 of the [Civil Procedure Rules](#) 2010. In the Originating Summons, the applicants are seeking for the following reliefs:
  - a) A declaration that the title of the said Paul Mbatia to the interest in land title number L.R. No. 209/10985 (hereinafter the ‘suit property’) has been extinguished by the applicants’ adverse possession thereof for a period of more than 12 years in terms of sections 17 and 38 of the [Limitations of Actions Act](#).
  - b) A declaration that the applicants have acquired the interest in the suit property by their adverse possession thereof for a period of more than 12 years.
  - c) An order do issue requiring and directing the Land Registrar Nairobi to register the applicants as the registered proprietors.
  - d) Costs of the suit be borne by the respondent.
2. The Originating Summons is supported by the affidavits of the applicants and one George Omondi Olago who deponed that sometime in 2005, the applicants moved into a vacant and undeveloped



portion of land in Imara Daima View Park Estate and that they put up a corrugated iron sheet fence and tried to run a garage business but it failed.

3. It is the applicants' deposition that in 2008, they invited George Omondi Olago, a mechanic as a partner in the business; that due to other business commitments, between 2010 and 2017, they left Mr. Olago to run the business and pay them rent for occupying the land and that in 2017, they erected a permanent stone wall and rented the premises out to a church.
4. It is the applicants' case that the church insisted on signing a lease agreement thus prompting them to establish the title number (L.R. No. 209/10985) and other ownership details of the suit property and that they established that the land is owned by the respondent.
5. The applicants deposed that in addition to the church being in occupation of the suit property and paying rent to them, the area Assistant Chief was also aware of their occupation and issued them with a letter that enabled them to obtain a loan using the premises as collateral and that they have occupied the suit property since 2005 without any interference.
6. The court granted the applicants leave to serve the respondent by way of substituted service. The respondent was served through an advertisement in the Daily Nation dated Tuesday, March 23, 2021. The respondent did not enter appearance.
7. During the hearing, the 1<sup>st</sup> applicant testified as PW1. PW1 adopted his supporting affidavit as his evidence-in-chief and produced the annexures thereon as exhibits. The 2<sup>nd</sup> applicant testified as PW2. He also adopted his supporting affidavit as his evidence-in-chief. PW3, George Omondi Olago, also adopted his supporting affidavit as his evidence-in-chief. The applicants did not file any submissions.
8. Based on the foregoing, the following one issue arises for determination:

Whether the applicants are entitled to the suit property by way of adverse possession.

9. Section 38(1) of the *Limitations of Actions Act* provides as follows:

“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.”

10. For applicants to be entitled to the above orders, they must meet the criteria set out in the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR as follows:
  - a) The person claiming land by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period.
  - b) The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
  - c) The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied.
  - d) The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable animus



possidendi, that is to say occupation with clear intention of excluding the owner as well as other people.

- e) Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.
- f) The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land.
- g) The possession must be continuous uninterrupted, unbroken for the necessary statutory period.
- h) The rightful owner or paper title holder against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period.
- i) The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.
- j) The land, or portion of the land adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. The absence of a plot or title number need not present any difficulty, nor should it be a bar to establishing a claim of adverse possession."

11. The Court of Appeal in the case of *Mtana Lewa vs Kabindi Ngala Mwangandi* [2015] eKLR quoted with approval the Indian case of *Karnataka Board of WAKF v Government of India & others* [2004] 10 SCC 779 in which it was held as follows:

"Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. (Emphasis added.)"

12. In the case of *Daniel Kimani Ruchine & others v Swift, Rutherford Co Ltd & another* [1977] eKLR it was stated as follows:

"...The standard of proof will be the ordinary one in a civil matter, namely on the balance of probabilities. The plaintiffs have to prove that they have used this land which they claim as of right: Nec vi, nec clam, nec precario (No force, no secrecy, no evasion). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by



any recurrent consideration; see *Wanyoike Gathure v Beverly* [1965] EA 514, 518, 519, per Miles J.”

13. It is my considered view that the Applicants have met some of the above preconditions but missed some crucial ones. Firstly, the applicants are claiming adverse possession based on their occupation of the suit property for a period of more 12 years beginning 2005.
14. Based on the evidence on record, I am not convinced that the applicants’ possession was adequate in continuity, publicity and extent as to be adverse to the true owner. As per their affidavits, they have been in occupation of the suit property since 2005; and that they ran a garage business on the suit property - firstly alone and then in partnership with PW3 and then as landlords of PW3.
15. However, no evidence was put forward to support these assertions. There was neither evidence of the presence of the garage nor of any payments made to them as rent by PW3. Further, the applicants claimed that they rented out the suit property to a church beginning 2017 to date. However, the lease that they have relied on was signed on December 1, 2018.
16. Further, the said lease states that ‘The agreement will be for a term beginning on December 1, 2018 and ending on March 5, 2019.’ That is a period of roughly three months. Essentially, out of the required period of twelve years, the applicants have proven on a balance of probabilities that they were in possession of the suit property for a period of three months only.
17. There are photographs on record dated September 14, 2020 showing the presence of a church on what I presume to be the suit property. In that case, one can say that the applicants have been in occupation of the suit property as landlords of the church for the period beginning December 1, 2018 and ending September 14, 2020. This is a few months short of two years which is still way below the stipulated statutory period of twelve years.
18. The applicants stated that the respondent’s physical address was unknown to them. However, for their claim of adverse possession to succeed, they needed to prove that the registered owner of the suit property had knowledge of their occupation. They did not lead any evidence to prove that there was actual or constructive knowledge of their occupation on the part of the Respondent.
19. Based on the foregoing, I find that the applicants’ claim for adverse possession fails. It is the finding of this court that the failure by the applicants to prove sufficient possession of the suit property for a continuous period of 12 years with the knowledge of the respondent is fatal.
20. For those reasons, the Originating Summons dated October 23, 2020 is dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF MARCH, 2023.**

**O. A. Angote**

**Judge**

**In the presence of;**

**Mr. Nganga for Applicants**

**No appearance for Respondents**

**Court Assistant - June**

