



**Mudavadi v Ochola & 2 others (Environment & Land Case  
736 of 2017) [2023] KEELC 17374 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17374 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT & LAND CASE 736 OF 2017**

**MN KULLOW, J  
APRIL 27, 2023**

**BETWEEN**

**CLARIS K. MUDAVADI ..... APPLICANT**

**AND**

**RAPHAEL OLOO OCHOLA ..... 1<sup>ST</sup> RESPONDENT**

**EZEKIEL OTIENO OCHOLA ..... 2<sup>ND</sup> RESPONDENT**

**BENSON OLIANGA ORIARO ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Applicant herein commenced this suit by way of an Originating Summons dated 11/07/2017 and Amended 17<sup>th</sup> November, 2021 against the Respondents for a determination of the following Issues: -
  - i. Whether the subdivision of the original land parcel L.R. No. Suna West/ Wasweta II/490 and transfer of portion known as L.R. No. Suna West/ Wasweta II/2961 and later L.R. No. Suna West/ Wasweta II/6317 measuring 2.37 Ha from the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant and subsequently the 3<sup>rd</sup> Defendant leading to closure of the original title affected the occupation of the Plaintiff who was in occupation since 1990.
  - ii. Whether the Defendant's rights to recover a portion measuring 0.70 Ha in total of L.R. No. Suna West/ Wasweta II/6317 currently registered in the 3<sup>rd</sup> Defendant's name is barred under the *Limitation of Actions Act* Cap 22 Laws of Kenya and the 3<sup>rd</sup> Defendant's title thereto extinguished on account of Adverse Possession by the Plaintiff, which Adverse Possession has been for a period exceeding 12 years and the same has been open, peaceful, continuous and uninterrupted.
  - iii. Whether upon finding in favor of the Plaintiff in Paragraph (ii) above herein, the Plaintiff is entitled to be registered as an owner of the portion he has acquired by way of Adverse



Possession which portion measures 0.70Ha in total of L.R. No. Suna West/ Wasweta II/6317 which measures 2.7Ha.

- iv. Whether upon being registered as owner of portion of L.R. No. Suna West/ Wasweta II/6317 measuring 0.70Ha on 23<sup>rd</sup> May 2017, the 3<sup>rd</sup> Defendant holds the 0.70Ha thereof in trust for the Plaintiff who had long acquired the title thereof by way of Adverse Possession.
  - v. Whether the 3<sup>rd</sup> Defendant should therefore be ordered to transfer 0.7Ha of L.R. No. Suna West/ Wasweta II/6317 to the Plaintiff and in default the Deputy Registrar to execute the subdivision and transfer documents in favor of the Plaintiff.
  - vi. Whether the Defendants should be permanently restrained by way of permanent Injunction from interfering and/or trespassing onto the portion of L.R. No. Suna West/ Wasweta II/6317 which portion measures 0.70Ha and has been acquired by the Plaintiff by way of Adverse Possession.
  - vii. The costs of this Application be borne by the Respondents.
  - viii. This court do make an Order for Interest on costs.
  - ix. This court do make any other Order deemed just and expedient in the circumstances.
2. The Originating Summons is premised on the 22 grounds on its face and on the Plaintiff's Supporting Affidavit sworn on even date. She avers that she bought a portion of land measuring approx. 070Ha from the 1<sup>st</sup> Respondent in the year 1990. That the suit property was originally L.R. No. Suna West/ Wasweta II/490 before it was subdivided into several other parcels and the original title closed. A Survey was done on 8/3/2021 to establish which parcel was in dispute and a Report dated 13/3/2021 filed to that effect. The Report revealed that the parcel in dispute was L.R. No. Suna West/ Wasweta II/6317 registered in the name of the 3<sup>rd</sup> Defendant.
  3. It is her claim that she has been and remained in occupation of the said parcel of land measuring 0.70Ha for a period of over 12years despite the numerous subdivisions on the original title. She further contends that she has cultivated and erected structures on the said portion of land and her occupation and use has been open, continuous and uninterrupted. He thus urged the court to grant the prayers sought.
  4. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a Replying Affidavit sworn by the 2<sup>nd</sup> Respondent on 31/07/2017, on his own behalf and on behalf of the 1<sup>st</sup> Respondent. It is his contention that the original land parcel L.R. No. Suna West/ Wasweta II/490 was registered in the name of the 1<sup>st</sup> Respondent. He denied the allegations by the Applicant of buying the suit parcel from the 1<sup>st</sup> Respondent and maintained that by the year 1990; the land was not registered in the name of the 1<sup>st</sup> Respondent and thus he had no rights capable of being transferred to the Applicant.
  5. It is further his claim that the said land was transferred to the 1<sup>st</sup> Respondent on 17/05/1999; 9 years after the alleged transaction. He contends that at the time of the alleged agreement he was a minor and thus had no capacity to witness any legal transaction.
  6. It is his case that the applicant has never resided nor been in possession of the suit parcel and hence the issue of uninterrupted possession and occupation cannot arise. Consequently, he maintained that the claim of adverse possession cannot accrue against him or the 1<sup>st</sup> Respondent and urged the court to dismiss the claim with costs.



7. The 3<sup>rd</sup> Respondent filed a Replying Affidavit sworn on 08/02/2022. He averred that that he is the registered owner of the suit land No. 6317 measuring approx. 2.37Ha and arising from LR.No. Suna West/Wasweta II/490. It is his claim that he entered into a sale agreement on 06/05/2017 for the purchase of a portion of the suit land measuring approx. 2.37Ha and upon subdivision, he was registered as the owner of the suit land herein.
8. He further contends that sometimes in 2017, he was informed by the 2<sup>nd</sup> respondent that the Applicant had trespassed into a portion of his land parcel and had gone ahead to construct structures, planted trees and did farming on it. As a result, he filed Migori ELC No. 806 of 2017 against the Applicant, the suit was later transferred to the lower court and registered as Migori CMELC No. 50 of 2019 for hearing and determination. It is his claim that the said case was determined in his favor and the Applicant herein was declared a trespasser and an Order of Eviction issued.
9. It was also her contention that from the history of the suit land; by the year 1990, the land was not registered in the names of the 1<sup>st</sup> Respondent and as such he had no rights capable of being transferred to the Applicant. He maintained that the Applicant has never been in possession of the suit land and urged the court to dismiss the claim.

### **Trial**

10. The matter proceeded for hearing of the Plaintiff's case on 23.06.2022. The Plaintiff testified as PW1. She also produced the documents in her List of Documents filed on 14/7/2017 as PExhibits 1 – 5 and the documents in his Further List of Documents as PExhibits 6 – 13 in further support of her case.
11. It was her testimony that she purchased a portion of the suit land measuring 0.70Ha from the 1<sup>st</sup> Respondent in the year 1990. That even though no title deed was processed in her favor, he entered the land and has been occupying and using the same since the year 1990 to date. She contends that despite the several subdivisions of the original land parcel, she has remained in occupation and use of the said portion of land parcel No. 6317, now registered in the name of the 3<sup>rd</sup> respondent.
12. On cross-examination, she conceded that there was a lower court case CMELC No. 50 of 2019 in which she was found to be a trespasser but she stated that she has since appealed against the said judgment and the appeal is still pending for determination.
13. He however denied the allegations that he entered the land in the year 2017 and maintained that he has been living on the suit land since the year 1990.
14. The matter thereafter proceeded for Defence Hearing on 15/11/2022. The 2<sup>nd</sup> Defendant testified as DW1 and he produced the annexures on the said Replying Affidavit as DExhibits 1 – 7 in support of his case.
15. It was also his testimony that the land was sold to the Plaintiff in the year 1990 and at the time of the sale, the land was registered in their late father's name. They instituted succession proceedings and all the beneficiaries were given their respective shares. It was his claim that the portion in dispute formed part of his rightful share of inheritance, he processed the title deed thereto and later sold the land to the 3<sup>rd</sup> Defendant and one George Oiro.
16. Even though he acknowledged that the Plaintiff purchased her portion of land from the 1<sup>st</sup> Respondent, he maintained that the said portion remained vacant and undeveloped until sometimes in year 2017, when the Plaintiff constructed a house.



17. On cross-examination; he conceded that a portion measuring 0.70Ha was sold to the Applicant and she dug a pit latrine. He further stated that the 1<sup>st</sup> Respondent could only sell his portion to the Applicant and reiterated that the portion in dispute was his rightful share. He confirmed the sale to the 3<sup>rd</sup> Respondent in the year 2017 even though he conceded that he could not recall the exact parcel number sold.
18. The 3<sup>rd</sup> Respondent testified as DW2; he stated that he bought the parcel of land from the 2<sup>nd</sup> Defendant and he was thereafter registered as the owner and given the title deed. However, when he visited the land he saw a new house and he was told that the house belonged to the Plaintiff.
19. He filed a suit on trespass against the Plaintiff. The case was heard and determined in his favor and the Plaintiff was declared a trespasser and an eviction order issued. He maintained that in 2017 when he purchased the land the same was vacant.
20. On cross-examination, he conceded that he has never been in physical occupation of the land since he purchased it. He further stated that he saw a semi-permanent structure on the land but there were no trees. He confirmed that he was not around when the plaintiff took possession of the land.
21. Upon close of the defence case, I issued directions on the filing of final submissions. Both parties filed their rival submissions and authorities which I have read and taken into account in arriving at my decision.

### **Analysis And Determination**

22. Having considered and reviewed pleadings, the respective exhibits and submissions in totality, the issues that arise for determination are as follows: -
  - a. Whether the suit herein is Res Judicata.
  - b. Whether the Plaintiff has proved his claim of Adverse Possession.
  - c. Whether the Plaintiff is entitled to the reliefs sought.

#### **A. Whether the suit herein is Res Judicata.**

23. The Respondents herein contend that the suit is Res Judicata on account of Migori CMELC No. 50 of 2019. It is the 3<sup>rd</sup> Respondents claim that he sued the Applicant herein for trespass into the suit parcel No. 6317 registered in his name. The case was heard on merit and a determination made in his favor, whose effect was to find that the Applicant herein is a trespasser and an order for eviction was issued against her.
24. The Applicant on the other hand did not dispute the existence of the previous lower court case in respect to the same subject matter or the judgment entered thereon but only stated that she had since lodged an Appeal against the said Judgment which was still pending for determination.
25. Res judicata goes to the root of a case and touches on the jurisdiction of a court to hear and determine a claim. Section 7 of the *Civil Procedure Act* provides that no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.
26. This court has taken the liberty to call for the said lower court file and I do note that the issues directly and substantially in issue in the said suit were majorly on trespass while the main issue in dispute in the



present suit is on adverse possession and whether the Applicant has acquired adverse rights over the suit land on account of her occupation of the same for a period of 12 years.

27. As I have held in previous cases; Magistrates Courts are not vested with the requisite jurisdiction under the Limitations of Actions Act to hear and determine claims of adverse possession. Be as it may, from a cursory look at the statement of defence in the said matter, I note that the same did not contain any counterclaim directly claiming adverse possession and therefore the trial court in issuing his judgment in final determination only addressed the issue of trespass on merit.
28. In conclusion therefore, I accordingly find that the suit herein is not res judicata and I will proceed to address the remaining issues.

#### **B. Whether the Plaintiff has proved his claim on Adverse Possession.**

29. The legal framework for adverse possession is provided in Sections 7,13, 17 and 38 (1) and (2) of the Limitation of Actions Act and Section 28 (h) of the Land Registration Act.
30. The law on adverse possession is now well settled and I do not seek to reinvent the wheel. A party claiming adverse possession must prove that his possession is peaceful, open and continuous for a statutory period of 12 years and the said possession is adverse to the true owner. Makhandia, JA in *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR in describing the doctrine of adverse possession held as follows: -

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act, which is in these terms: -

“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.”

31. The Applicant contends that she has been in occupation and use of the suit land, having purchased a portion of the land measuring 0.70Ha from the 1<sup>st</sup> Respondent. He produced a copy of the said sale agreement as Pexh 1. It is her claim that upon the said sale, she entered the suit land and took occupation. It was her testimony that she constructed her house and planted trees on the land.
32. The Respondents on the other hand disputed the said sale between the Applicant and the 1<sup>st</sup> Respondent in their respective Replying Affidavits and maintained that there was no such sale. However, in their testimonies in court, DW1 confirmed that the land was sold to the Applicant by the 1<sup>st</sup> Respondent but maintained that the suit land formed part of his rightful share as a beneficiary. DW2 also conceded that there was sale but denied being aware of the portion sold or when the Applicant took possession.



33. It is trite law that in a claim of Adverse Possession, occupation must be non-permissive and/or non-consensual. However, the Court of Appeal in Samuel Miki Waweru vs. Jane Njeru Richu, Civil Appeal No. 122 of 2001 held that: -

“...it is trite law that a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in *Jandu v Kirpal* [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted...”

34. It is not in dispute that the Applicant’s initial entry into the suit land was vide a sale between the Applicant and the 1<sup>st</sup> Respondent; which was reduced in writing as per Pexh 1. Both parties agreed that a parcel of land was sold to the Applicant by the 1<sup>st</sup> Respondent. However, the validity of the said sale and whether or not any interest and/or a good title was passed to the Applicant as a result of the sale by the 1<sup>st</sup> Respondent, is not an issue for determination in the present claim of adverse possession.

35. From the aforementioned case laws, it is clear that where an Applicant is in exclusive possession of the suit land with consent or pursuant to a sale agreement, the said possession will only become adverse upon the expiry of the said license. In this case, time for adverse possession begun to run upon the lapse of the 6 months’ period for failure to strictly comply with the provisions of section 6 of the *Land Control Act* by obtaining the requisite Land Control Board Consent and which made the said transaction void. Thus, time for adverse started running from the year 1991 and at the time of filing the suit the Applicant had been in occupation and use of the land for a period of 26 years which period is in excess of the statutory 12 years.

36. Having addressed the Applicant’s initial entry, it is important to consider whether his possession and use of the said portion of land was continuous for an uninterrupted period of 12 years and further whether there was dispossession of the true owner.

37. Dispossession of the true owner has been defined as committing acts which are inconsistent with the enjoyment and use of the land by the person entitled, for the purpose for which he had a right to use it. It is the Applicant’s claim that pursuant to the said purchase, she entered the land and took occupation, she has constructed a house and planted trees thereon. She produced bundle of photographs as Pexh 3 as proof of the said occupation and use of the land in dispute.

38. DW1 claimed that the land was vacant and undeveloped by the year 2017 when he sold the same to DW2 and maintained that the Applicant has never been in occupation or use of the suit land. However, during cross- examination, he conceded that the Applicant had dug a pit latrine and planted trees on the suit land. DW2 also confirmed that he has never been in physical occupation of the suit land since he purchased it. He also testified in part that;

“when he visited the land, he saw a new house”

39. From the testimonies and the evidence adduced in court, it is not in dispute that the Applicant has been in occupation and use of a portion of the suit land. The said occupation and use became adverse in the year 2003 before the said land was transferred to the 2<sup>nd</sup> Respondent’s name and subsequently sold and registered in the 3<sup>rd</sup> Respondents name. Thus, at the time of selling the land to the 3<sup>rd</sup> Respondent, the Applicant had already acquired prescriptive rights capable of registration and she remained in possession despite the said sale. A claim for adverse possession runs against the land and the mere change of ownership of land which is occupied by another person under adverse possession does not



interrupt such person's adverse possession. (See Court of Appeal case of Githu v Ndeete [ 1984] KLR 776.)

40. It is therefore my finding that the Applicant has sufficiently demonstrated that he has acquired prescriptive and overriding rights over the portion of the suit parcel measuring 0.70Ha, by virtue of his possession and occupation of the suit land from the year 1991. The said rights are adverse to the Respondents' rights over the same portion of land.
41. Consequently, I find and hold that the plaintiff has satisfactorily proved his claim on adverse possession over a portion of land measuring 0.70Ha to warrant the grant of the reliefs sought.

### **Conclusion**

42. The upshot of the above is that the Plaintiff has proved his claim on adverse possession and I accordingly allow the Amended Originating Summons dated 17<sup>th</sup> November, 2021 on the following terms;
  - i. A Declaration is hereby made that the Respondents' rights to recover a portion measuring 0.70 Ha in total of L.R. No. Suna West/ Wasweta II/6317 currently registered in the 3rd Respondent's name is barred under the *Limitation of Actions Act* Cap 22 Laws of Kenya and Accordingly, the 3rd Respondent's title thereto extinguished on account of Adverse Possession by the Applicant, which Adverse Possession has been for a period exceeding 12 years.
  - ii. A Declaration is further made that the Applicant is entitled to be registered as an owner of the portion, measuring 0.70Ha to be excised from L.R. No. Suna West/ Wasweta II/6317, having acquired title thereto by way of Adverse Possession.
  - iii. The 3rd Respondent is hereby ordered to transfer 0.7Ha of L.R. No. Suna West/ Wasweta II/6317 to the Applicant within 45 days from the date of this judgment. In default, the Deputy Registrar is directed to execute the subdivision and transfer documents in favor of the Applicant for a portion measuring 0.7Ha to facilitate the registration of the same in the Applicant's name.
  - iv. An Order of Permanent Injunction is hereby issued restraining the Respondents from interfering and/or trespassing onto the portion of L.R. No. Suna West/ Wasweta II/6317 measuring 0.70Ha having been acquired by the Applicant by way of Adverse Possession.
  - v. The costs of this Application be borne by the Respondents.

**DATED, SIGNED and DELIVERED Virtually at MIGORI on 27th day of APRIL, 2023.**

**MOHAMED N. KULLOW**

**JUDGE**

**In presence of; -**

.....**for the Plaintiff**

.....**for the Defendant**

**Court Assistant - Tom Maurice/Victor**

