



REPUBLIC OF KENYA



KENYA LAW
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**Japhet v Micheni & another (Environment & Land Case E003 of 2021)
[2023] KEELC 17590 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17590 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT & LAND CASE E003 OF 2021**

CK YANO, J

MAY 31, 2023

BETWEEN

IRVINE MWENDA JAPHET PLAINTIFF

AND

WILBERFRCE MICHENI 1ST DEFENDANT

LISBETH KAIMURI 2ND DEFENDANT

JUDGMENT

1. The Plaintiff approached the court through the Originating summons dated 18th May, 2021 pursuant to sections 37 and 38 of the *Limitation of Actions Act*, section 28 of the *Land Registration Act* and Order 37 Rule 7 of the *Civil Procedure Rules* seeking the determination of the following questions:
 1. Whether the Plaintiff has been in actual, peaceful, continuous and uninterrupted possession of the entire L.R. No. Mwimbi/chogoria/4652 for a period exceeding 12 years.
 2. Whether the Defendants are the joint registered owners of L.R. NO. Mwimbi/chogoria/4652.
 3. Whether the Plaintiff has acquired an overriding interest by way of adverse possession over LR. NO. Mwimbi/chogoria/4652.
 4. Whether the proprietary rights of the previously registered owner over L.R. NO. Mwimbi/chogoria/4652 were extinguished upon the expiry of Twelve (12) years of the Plaintiff's occupation thereon.
2. The summons is supported by the affidavit of Irvine Mwenda Japhet, the Plaintiff sworn on 18th May, 2021 and further affidavit sworn on 18th June, 2021 in which he attached a copy of the extract of the register. The Plaintiff avers that the suit land was previously registered in the name of M'kanga M'rwito M'kanyinyiro with whom the Plaintiff had litigated a boundary dispute with and in which the District Land Disputes Tribunal directed the District Surveyor establish the boundaries between L.R.



Nos. Mwimbi/chogoria/492 and 513 which shared a common boundary. That LR. NO. Mwimbi/chogoria/492 was then registered in the Plaintiff's name while LR. NO. Mwimbi/chogoria/513 was registered in the name of the said M'kanga M'rwito M'kanyinyiro. That parcel No. Mwimbi/chogoria/513 was thereafter subdivided and gave rise to LR. NO. Mwimbi/chogoria/4222 and 4223 and No. 4223 was further subdivided into LR. Nos. Mwimbi/chogoria/4647 and 4652. That LR. NO. Mwimbi/chogoria/4652 was registered in the name of the said m'kanga m'rwITO M'kanyinyiro and fell on the disputed portion which the Plaintiff claims he occupies.

3. The Plaintiff states that the award of the tribunal could not be implemented owing to the subdivision of L. R. NO. Mwimbi/chogoria/513 and therefore the Plaintiff instituted Meru HcccNo. 152 of 2011 (OS) against M'kanga M'rwito M'kanyinyiRoclaiming adverse possession over L.R. NO. Mwimbi/chogoria/4652. That thereafter, the suit was transferred to Chuka Law Courts and registered as chuka elc case no.212 OF 2017(OS).
4. The Plaintiff further states that he commenced negotiations with the said M'kanga M'rwito M'kanyinyiroat the Deputy County Commissioner's Office with a view to reaching an amicable settlement, but never reached a settlement. That thereafter on 7.2.2018, the said suit was dismissed pursuant to the provisions of Order 12 Rule 1 of the Civil Procedure Rules which enabled the Defendants to acquire registration of the suit land in their names.
5. It is the Plaintiff's contention that he has been in occupation of the suit land for a period of about fifty years and that both the Defendants and M'kanga M'rwito M'kanyinyirohave never made any attempt to evict him from the land and therefore claims that he is entitled to be registered as the owner of the said land through the doctrine of adverse possession.
6. At the hearing, the Plaintiff testified as PW1 and adopted the contents of his affidavit sworn on 18th May, 2021 and a further affidavit sworn on 18th June, 2021. He was cross-examined and re-examined. He confirmed that there was a dispute between him and M'Kanga M'Rwito that began in 2009 and further confirmed that there was a Tribunal Case No. 24 of 2009. He also confirmed that the District Surveyor visited the land pursuant to an order of court and filed a report, though he stated that he was not aware of the report.
7. The Plaintiff called three witnesses to support his case. PW2 was Kaunda Douglas Muchunku who adopted his witness statement dated 18th January, 2022 as his evidence-in-chief and was cross-examined and re-examined. His evidence was that the Plaintiff has been in continuous and uninterrupted use of the suit land for many years.
8. PW3 was Humphrey Ntwiga Mwongera who also adopted his statement dated 18th January, 2022 as his evidence-in-chief and was cross examined and re-examined. He also testified that the Plaintiff has always utilized the suit land and assumed that it was part of the Plaintiff's land.
9. Bundi John M'Ndaka testified as PW4 and adopted his statement dated 18.01.2022 as his evidence-in-chief and was cross-examined and re-examined. His evidence was more or less the same as that of the other witnesses.
10. In response to the originating summons, the Defendants who are husband and wife filed a Replying Affidavit sworn by the 1st Defendant on 4th June, 2021. They admitted being the current proprietors of Lr. No. Mwimbi/chogoria/4652 which they purchased from M'kanga M'rwito M'kanyinyiro. The Defendants contend that they were given possession and are in exclusive occupation and use of the land from the time the same was transferred to them. That they established from the previous owner that the Plaintiff has been having disputes with him over the suit land. The Defendants have exhibited copies of pleadings and orders in those previous cases.



11. The 1st Defendant testified on behalf of the Defendants and called one witness. The 1st Defendant adopted the contents of his Replying Affidavit and statement dated 10th March, 2022 as his evidence-in-chief, and produced the documents as D.Exh. 1- 8 and was cross-examined and re-examined. His evidence is that the Plaintiff occupies and is the registered owner of parcel No. Mwimbi/chogoria/492 while the Defendants are the registered owners and occupy parcel No. Mwimbi/chogoria/4652. He also pointed out that there was a boundary dispute between the Plaintiff and M’Kanga M’Rwito in which the court ordered a surveyor to visit the two parcels to establish their boundaries and filed a report produced as D. Exhibit 6.
12. DW2 was Phineas Njagi Ndubi who adopted his statement dated 10th March, 2022 as his evidence-in-chief and was cross-examined and re-examined.
13. After the close of the Defendants case, both parties filed written submissions through their advocates on record and which I have read and considered.
14. Having considered the pleadings, the evidence and the submissions, the issue for determination is whether the Plaintiff is entitled to the suit land by adverse possession.
15. Adverse possession is a common law doctrine under which a person in possession of land owned by someone else may acquire valid title to it. In Kenya, this doctrine is found in section 7 and 17 of the [Limitation of Actions Act](#) which provide as follows:
 7. 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.
 17. Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including redemption action) the title of that person to the land is extinguished.”
16. The law on adverse possession is now well settled and the ingredients have been discussed in many cases by superior courts. In the case of *Kweyu vs Omutu* (1990) KLR 709, the Court of Appeal stated thus:

“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous when such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (Colour of title is that which a title in appearance, but not in reality). Adverse possession is made out by the co-existence of two distinct ingredients:

the first, such a title as will afford colour; and second, such possession under it as will be adverse to the right of the true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms (“claim or colour of title”) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land for the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant’s use, done publicly and notoriously.”



17. In *Wambugu –vs- Njuguna* (1983) KLR 173, the Court of Appeal restated those principles when it held inter alia as follows:
1. The general principle is that until the contrary is proved, possession in law follows the right of possession.
 2. In order to acquire by statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The Respondent could and did not prove that the Appellant had either been dispossessed or had discontinued possession of the suit land for a continuous statutory period of twelve years as to enable him, the Respondent, to title to that land by adverse possession.
 3. The *Limitation of Actions Act*, on adverse possession, contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or had discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”
18. The ingredients were also recently discussed by the Court of Appeal in the case of *Mtana Lewa vs Kabindi Ngala Mwangandi* [2015] eKLR where Makhandia JA stated as follows:
- “Adverse possession is essentially a situation where a person takes possession of land and asserts right 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 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.”
19. In this case, the Plaintiff’s evidence is that he has been in actual peaceful continuous and uninterrupted possession of the suit land for a period exceeding 12 years. From the evidence on record, it is not in dispute that the suit land shares a boundary with the Plaintiff’s land parcel No. Mwimbi/chogoria/492. It is also clear that the Plaintiff and the original owner of parcel No. Mwimbi/chogoria/513 (one M’kanga M’rwito M’kanyiyiro) had previous litigations over a boundary and the District Surveyor was directed to establish the said boundaries and did file a report establishing the boundaries of the two parcels of land. L.R. NO. Mwimbi/chogoria/513 which was originally in the name of M’kanga M’wito M’kanyiyirowas subdivided and further subdivided into various parcels, including the suit land L.R. NO. Mwimbi/chogoria/4652 which was sold and transferred to the Defendants. Clearly, from the pleadings and evidence, it is clear from the previous disputes that the Plaintiff did not have a peaceful occupation of the suit land. The Plaintiff cannot claim to have had a peaceful and continuous occupation and possession when the material on record point to a long standing boundary dispute, dating back to the year 2009.
20. Moreover, the Defendants only became the registered owners of the suit land on 11th February, 2021 and this suit was filed on 19th May, 2021. There is also no evidence to show that the Plaintiff was in possession and occupation at the time the Defendants obtained possession from the person who sold them the land. And even if the Plaintiff was in possession, the same was not peaceful and adequate in continuity, in publicity and in extent to show that possession was adverse to the title of the original



owner of the land. This is because there were disputes over the boundaries of the Plaintiff's land and the suit land and therefore the previous owner was clearly trying to assert his title over the land.

21. In all the circumstances, and considering all the evidence on record the Plaintiff has not proved his case on a balance of Probabilities. Consequently, the Plaintiff's case is hereby dismissed with costs to the Defendants.

JUDGMENT SIGNED, DATED AND DELIVERED AT CHUKA THIS 31ST MAY, 2023.

In the presence of:

C/A: Martha

Muriithi for Plaintiff

Mrs Muia for Defendants

C. K. YANO,

JUDGE.

