



**Kamau v Nazamdin (Environment & Land Case 37 of 2021)
[2023] KEELC 17738 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17738 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 37 OF 2021**

LN GACHERU, J

MAY 25, 2023

BETWEEN

JOSEPH MAINA KAMAU APPLICANT

AND

NAZAKTALI NAZAMDIN RESPONDENT

JUDGMENT

1. By an Originating Summons dated 6th November 2021, the Applicant sought for the following orders:-
 1. That the Applicant, Joseph Maina Kamau, is entitled to be registered as the proprietor and owner of plot number Murang'a Municipality Block 1/295 Mjini Plot Number 108 under Section 38 of the *Limitations of Actions Act* CAP 22 Laws of Kenya on the grounds that the Applicant has openly, peacefully, and as of a right been in exclusive possession, user and occupation of the whole of the plot as described since the year 1999 or whereabouts, that is to say for a period of over 12 years immediately the presentation of this Originating Summons in Court;
 2. That the Title to the subject plot described as Murang'a Municipality Block 1/295 Mjini Plot 108, in the name of the Respondent has been extinguished by the Applicant's adverse possession for the period of over 12 years under Section 17 of the *Limitations of Actions Act*;
 3. That the Applicant be thus registered as the legal owner of the plot herein which he does occupy, possess, use, and has built on and does reside therein with his family as their only home; and
 4. The costs of the summons.



2. The Originating Summons was supported by the Affidavit of Joseph Maina Kamau, the Applicant herein. It is the Applicant's disposition that he has been in exclusive, open, continuous, and uninterrupted possession and occupation of the Land Parcel No. Murang'a Municipality Block 1/295 Mjini Plot 108, (the suit property) since 1999. That he has now acquired the suit property by adverse possession, having taken possession, developed the suit property, and built his family home and has resided uninterrupted for over 22 years.
3. The Applicant averred that Fatuma Binti Haji (deceased) was the initial owner of the suit property, before it was transferred to the Respondent as the registered owner of the said property by virtue of a Confirmation of Grant in Succession Cause No 12 of 2012: - Estate of Fatuma Binti Haji (deceased). He further averred that he entered into a sale agreement with Mwanaidi Nyanzige Masoud(deceased) dated 6th July 1999, which the Respondent acknowledged.
4. Lastly, the Applicant contends that the Respondent has been attempting to defraud him by transferring the suit property to third parties. That he lodged a caution against the suit property, and that having legally purchased the suit property, and having taken possession, he enjoys exclusive proprietary rights over the suit property. Further, having acquired prescriptive ownership rights, the suit property ought to be registered in his name.
5. The Respondent opposed the Originating Summons through a Replying Affidavit dated 18th January 2022, in which he averred that the suit property was originally registered in the name of his grandmother Fatuma Binti Haji (deceased). The Respondent averred that on or about 6th July 1999, the Respondent's mother Mwanaidi Nyanzige (deceased), irregularly sold the suit property to the Applicant, without legal authority. The Respondent further averred that the Applicant did not take possession of the suit property immediately, but encroached on a small portion of the suit property after the Respondent acquired Grant of Letters of Administration and transferred the property to his name.
6. The Respondent contends that the Applicant has breached the sale agreement by failing to make full payment of the purchase price, which included payment of Municipal Council rent and rates. The Respondent further contends that he filed Muranga High Court Succession Cause No. 12 of 2014, against the Estate of Fatuma Binti Haji (deceased), whereby he was appointed Administrator and that he transmitted the suit property to himself in 2014 as the sole proprietor following Confirmation of Grant.
7. It is the Respondent's contention that the Applicant thereafter unlawfully entered into the suit property and took possession of a small portion. He further contents that the Applicant has not been in exclusive possession of the suit property as claimed for him to acquire the suit property by way of adverse possession. He also averred that the Applicant has encroached on the suit property and prays that the Court dismiss the instant Originating Summons and declares that the suit property belongs to the Respondent.
8. The matter proceeded for hearing by way of viva voce evidence on 19th December 2022, wherein the Applicant gave evidence for himself and called no other witness. Similarly, the Respondent gave evidence for himself and called no witness.

Applicant's Case

9. PW1, Joseph Maina Kamau, adopted his Affidavit dated 6th November 2021, witness statement and a bundle of documents as part of his evidence in chief. He produced the list of documents as Plaintiff Exhibit 1. He urged this Court to allow his claim.



10. On cross-examination, he testified that he entered into the suit property in 1999, with documentation to support his occupation, including receipts for payment of rates. He further testified that he bought the suit property from Mwanaidi Nyanzige (deceased), when the suit property was still in Fatuma Binti Haji's (deceased) name. It was his testimony that he came to Court because he had purchased the suit property.
11. On re-examination, PW1 testified that he purchased the suit property from the Respondent's mother, Mwanaidi Nyanzige (deceased), in 1999 and paid Kshs. 90,000/= for the property as the agreed consideration. Further that the suit property belonged to Fatuma Binti Haji (deceased), the Respondent's grandmother. PW1 also testified that the vendor Mwanaidi Nyanzige (deceased), had Letters of Administration and that there was no other agreement after the Letters of Administration were issued. Lastly, he testified that he lives on the suit property.

Respondent's Case

12. DW1, Nazaktali Nazamdin, adopted his witness statement and a list of documents as part of his evidence in chief. He testified that he knew the Applicant and had seen his name on the Agreement entered into by his mother. Further that he had seen the Applicant on the suit property and that the Applicant built a temporary structure on the suit property in 2014. He further testified that that he obtained Letters of Administration
13. On cross-examination, DW1 testified that his mother was called Mwanaidi Nyanzige (deceased), and his grandmother Fatuma Binti Haji (deceased). He also testified that his mother sold the suit property for Kshs. 90,000/= to the Plaintiff in 1999, and that he had the sale Agreement. He further testified that his grandmother died before his mother, and that the suit property was left to his mother, before his mother later died.
14. He also testified that he filed for Letters of Administration and that the Applicant entered into the suit property in 2014, although he could not prove the same. Further that he found a house on the suit property in 2014, and that there was no structure in 1999. It was his further testimony that there were amenities on the suit property including water and electricity which his grandmother installed. He denied that the Applicant installed the amenities.
15. That he filed an acknowledgement letter dated 6th October 2005, which stated that the sale agreement dated 6th July 1999, would remain the same. It was his further testimony that he had not put up anything on the suit property, and that he resides in Murang'a town and he does not use the suit property.
16. On re-examination, DW1 testified that he was aware of the Agreement dated 6th October 2005, at which time the Applicant was not on the suit property. Lastly, he testified that the Applicant entered into the suit property in 2014.

Parties thereafter filed written submissions.

17. The Applicant through the Law Firm of Kirubi, Mwangi Ben & Co. Advocates filed his written submissions in support of his claim on 10th January 2023. He submitted that he had been in open and peaceful occupation of the suit property for over 12 years. That he purchased the suit property in 1999, and that the Respondent's title as owner had been extinguished by Applicant's adverse possession over the suit property. He further submitted that he took possession of the suit property in 1999, after purchase of the suit property and that he had enjoyed open and uninterrupted possession for over 23 years.



18. On the issue that the Applicant did not purchase the suit property from the registered owner Fatuma Binti Haji (deceased), the Applicant submitted that a claim of adverse possession is a claim in rem and not in person, such that the interest survives the death of the deceased owner, and the right continues against the person who acquires title in the land. He relied on the case of *Francis Kimani Gatbuita v Benson Irungu Njuguna* [2018] eKLR and *Githu v Ndeete* [1984] eKLR in which the Court held:

It is a prescriptive right or encumbrance that binds the land and runs against the registered owner (proper owner) in favour of the possessor. The mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person's adverse possession."

19. The Applicant further submitted that he met the requirements to prove adverse possession as provided for under Section 7 of the *Limitation of Actions Act*. He relied on the case of *Kasuve v Mwaani Investments Ltd & 4 Others* [2004] eKLR 184, where it was held that:

In order to be entitled to land by adverse possession, the client must prove that he has been in exclusive possession of land openly and as of right without interruption for a period of 12 years after dispossession the owner or by discontinuation by the owner of his own violation."

20. Further, the Applicant submitted that in the event that he had proved adverse possession, he should be entitled to the orders sought and costs of the suit.

21. The Respondent through the Law Firm of L.M. Kinuthia & Associates Advocates, filed his written submissions opposing the instant Originating Summons on 6th February 2023. The Respondent submitted that the suit property was registered in the name of Fatuma Binti Haji (deceased), at the time of its sale on 6th July 1999, and therefore the vendor Mwanaidi Nyanzige Masoud (deceased), had no legal authority to transact over the suit property, thereby nullifying the sale agreement. Further that the Applicant failed to fulfil the conditions of the sale agreement.

22. The Respondent further submitted that he followed the lawful procedure in obtaining Grant of Letters of Administration, which were confirmed on 25th February 2014. The Respondent further submitted that the Applicant took possession of a portion of the suit property after it was transferred into his name as sole proprietor.

23. The Respondent relied on the case of *Christopher Kioi & Another v Winnie Mukolwe & 4 Others* (2018) eKLR, where in dismissing the Appeal the Court held as follows:

The appellants have laid great emphasis on the fact that Kituri did not use the suit property in his lifetime, but that in itself is not conclusive evidence of dispossession because where the owner has little or no use of his land, others may use it without that possession amounting to dispossession or being inconsistent with the owner's title."

24. This Court has considered the pleadings, the rival written submissions and the authorities cited by parties and affirms that the issues raised therein are as follows:

- i. Whether the Applicant has met the threshold for Grant of orders for adverse possession?
- ii. Who should bear the cost of the suit?

25. From the pleadings on record, it is not in dispute that Fatuma Binti Haji (deceased), was the initial registered owner of the suit property and that she died leaving her daughter Mwanaidi Nyanzige (deceased), as her only child. Further it is not in doubt that Mwanaidi Nyanzige (deceased), sold the



suit property to the Applicant through a sale agreement dated 6th July 1999. This Court has also established that the Respondent having taken Letters of Administration to the Estate of Fatuma Binti Haji (deceased) transferred the suit property to his name on 4th February 2014 through a Confirmation of Grant, which is the backdrop against which this suit is made.

26. It is the Applicant's claim that he has been in continuous, uninterrupted occupation, and possession of the suit property since 1999, a period of 24 years. The burden of leading the Court to ascertaining this lies with the Applicant to demonstrate that he has met the requirements for the Grant of an order of adverse possession as was held in the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, wherein the Court stated as follows:

The burden of proving title by adverse possession rests upon the person asserting it. This is to say the burden of proof is upon the person setting up and seeking to prove title by adverse possession (*Mamuji v Dar* [1935] 2 EACA 111, *Bwana v Ibrahim* [1948] 15 EACA 7; and Forbes, JA, in *Abdulkarim and another v Member for Lands and Mines and another 1* [1958] EA 436). He proves it on the usual standard of proof in civil cases namely, on a balance of probability. What does he prove? He proves three adequacies: continuity, publicity, and extent. For to prove title by adverse possession, it is not sufficient to show that some acts of adverse possession have been committed: the possession must be adequate in continuity, in publicity and in extent, to show that it is adverse to the rightful, paper title owner."

27. Claims under adverse possession are set out in several provisions of the *Limitation of Actions Act*. Section 7 of the *Limitation of Actions Act* places a bar on actions to recover land after 12 years from the date on which the right accrued. It states:

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."

28. Section 13 of the *Act* provides adverse possession as the exception to this limitation:

- (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."

29. Finally, Section 38 of the *Act* provides that:

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.”

30. The principle of adverse possession was more elaborately set out in the case of *Wambugu v Njuguna* [1983] KLR 172, where the Court held as follows:

In order to acquire by the 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 of which he intended to use it.

The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”

31. This right to be adverse to land does not automatically accrue unless the person in who is this right has accrued takes action. Section 38 of the *Limitations of Actions Act* gives authority to the claimant to apply to Court for orders of adverse possession. In the Case of *Mtana Lewa v Kabindi Ngala Mwagandi* [2015] eKLR, the Court held:

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 nor 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.

Further, in the case *Mbira v Gachubi* [2002] 1 EALR 137: The Court stated as follows:

... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption...”

32. Therefore, to determine whether the Applicant’s rights have accrued, the Court will seek to determine the following issues:

- i. How did the Applicant take possession of the suit property?
- ii. When did he take possession and occupation of the suit property?
- iii. What was the nature of his possession and occupation?
- iv. How long has the Applicant been in possession?

33. It is trite that a claim for adverse possession is attached to land and not title, and it matters not who is the registered owner of the land, in this case whether it be Fatuma Binti Haji (deceased), or the Respondent. This was the position in *Maweu v Liu Ranching & Farming Cooperative Society* [1985]



eKLR, as quoted in Civil Appeal No 164 of 2011 *Gachuma Gacheru v Maina Kabuchwa* [2016] eKLR, where the Court held as follows:

Adverse possession is a fact to be observed upon the land. It is not to be seen in a title.”

33. This Court having laid the basis for the instant suit, will then proceed to delve into the issues outlined above.

34. The first issue relates to how the Applicant took possession of the suit property?

35. It is the Applicant’s case that he entered into the suit property in 1999, after signing a sale agreement with Mwanaidi Nyanzige (deceased), and paying Kshs. 90,000/= for the suit property as purchase price. The Respondent disputed this claim, stating that the Applicant took possession of the suit property in 2014. He further stated that the suit property belonged to Fatuma Binti Haji (deceased), before he inherited it as her sole heir.

36. The Applicant averred that he had been in exclusive, open, continuous, and uninterrupted possession and occupation of the suit property for a period in excess of 12 years.

37. The burden of leading the Court to ascertaining this lies with the Applicant as provided under Sections 107, 108 and 109 of the *Evidence Act*. This Court concurs with the holding in Nairobi Civil Case 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.”

38. The second issue related to the possession and occupation of the suit property? The Court notes that the Applicant alleges to have gained entry into the suit land in 1999, and to have been in occupation of it for about 22 years. He established that he gained entry in the suit property after signing a sale agreement in 1999. The Respondent however disputed this claim stating that the Applicant moved into a small portion of the suit property in 2014.

39. This Court can confirm from the evidence produced and the Applicant pleadings that the Applicant entered into a sale agreement with *Mwanaidi Nyanzige (deceased), for the sale of the suit property. The Applicant averred that he entered into the suit property thereafter but failed to register the transfer following the death of the vendor. This Court having examined the sale agreement, which is also acknowledged by the Respondent, finds that it corroborates the Applicant’s claim.

40. The third issue relates to the nature of the Applicant’s possession and occupation. It is trite that for a claim for adverse possession to suffice the claimant must demonstrate that possession was non-permissive and non-consensual and without license. This was upheld in the case of *Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others* [2018] eKLR, where the Court enumerated the required elements to prove adverse possession as follows:

Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, nec vi nec clam nec precario.”



41. The Court finds that the Applicant acquired possession of the land through a sale agreement dated 6th July 1999. It is clear from the above analysis that a claim based on a sale agreement cannot be issued since the vendor's consent and permission is obtained before one can gain ingress into the land.
42. However, every rule has an exception and the Court in Nairobi App No. 73 of 1982: - *Public Trustee v Wanduru Ndegwa* [1984] eKLR found that Limitation of action begun running from the date of final payment. In the case *Hosea v Njiru & Others* [1974] EA 526, Simpson J, following *Bridges v Mees* [1957] 2 All ER 577, held that once payment of the last instalment of the purchase price had been effected, the purchaser's possession became adverse to the vendor and that he thenceforth, by occupation for twelve years, was entitled to become registered as proprietor of it.
43. In the present case, the Applicant became adverse to the land after payment of the Purchase price in full as required to complete the sale as per the agreement. For purposes of computing time for a claim of adverse possession to issue, this Court will be guided by the Agreement which acknowledges full payment of the purchase price on 6th July 1999. In the case of *Public Trustee v Wanduru* [1984] KLR 314, the Court of Appeal relying on an English case of *Bridges v Mees* [1957] 1 Ch.475, that was cited with approval in **Mwangi Githu v Livingstone Ndete and others*, CA No. 24 of 1979, held that a purchaser in possession of land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run as against the vendor. This principle was further articulated by this Court in *Jaswantkumarba Benesingh Jetbwa v Postal Corporation of Kenya* [2015] eKLR where the Court explained that:

It is however necessary to distinguish between a purchaser in possession under an agreement of sale pending completion and a purchaser in possession, who has paid the whole of the purchase price, pending registration of transfer so far as it relates to when the time starts running for purposes of adverse possession. This distinction was clearly brought out in *Wambugu v Njuguna* (supra). There, it was held that where a claimant is in exclusive possession under a contract of sale pending completion, he is in possession with leave and licence of the vendor and possession can only be adverse once the contract is repudiated or rescinded (see also *Mungania v Imanyara* (supra)).

44. It was further held that where a claimant is in exclusive possession under a contract of sale, the claimant's possession is deemed to have become adverse to that of the owner after payment of the last instalment of the purchase price. Where, however, the purchaser is put in possession after paying the full purchase price, his possession becomes adverse to that of the vendor when he took possession for that is the time when vendor's possession was discontinued (*Public Trustee v Wanduru*, (supra).” [Emphasis]
45. The upshot of the above is that time for purposes of computing the period that the Applicant has been adverse started running from 6th July 1999. Therefore, it follows that as at the time of filing the instant suit on 6th November 2021, the Applicant had been adverse to the suit property for about 22 years.
46. This Court finds that the Applicant to have been in possession of the suit land for over 22 years since 1999, and that he had developed the suit property through the evidence adduced including photographs indicating structures, a letter for electricity supply dated 25th March 2015, and a Valuation Report over the suit property.
47. In addition, the Applicant's evidence corroborated and substantiated his averments about the nature of his possession. The Applicant testified that he purchased the suit property, but that the vendor died before he could transfer the suit property to his name.



48. To this end, this Court finds and holds that the Applicant has on a balance of probability, established that he meets the threshold for the Grant of Orders for adverse possession.
49. Order 37 Rule 7 of the *Civil Procedure Rules* provides mandatory provisions for a claim of adverse possession including that an application for adverse possession be accompanied with a title deed extract.
50. The Applicant has attached a copy of a certificate of Confirmation of Grant which provides conclusive proof of ownership indicating that the Respondent inherited as the sole proprietor the suit property identified as Plot No. Mjini/108 Murang'a, and a corresponding official search document indicating that the suit property is registered in the Respondent's name.
51. As for costs, these normally follow the events, and the successful party is awarded costs. The Applicant herein is the successful party and the Court finds no reasons not to exercise its discretion in his favour.
52. Having carefully considered the available evidence, the Court finds and holds that the Applicant has proved his claim as contained in the Originating Summons dated 6th November 2021 on the required standard of balance of probabilities.
53. For the above reason, judgment is entered for the Applicant herein Joseph Maina Kamau against the Respondent as prayed in the Originating Summons dated above, in terms of prayers No. 1,2,3, and 4.
It is so ordered.

DATED, SIGNED AND DELIVERED IN MURANG'A THIS 25TH DAY OF MAY,2023.

L. GACHERU

JUDGE

25/5/2023

Delivered online in the presence of;

Mr Mwaniki H/B Mwangi Ben for the Plaintiff/Applicant

N/A for Defendant/Respondent

Joel Njonjo Court Assistant

L. GACHERU

JUDGE

