



**Atandi v Masaka (Sued as the legal representative of the Estate of Mathew Masaka Otumbo) & another (Environment & Land Case 22 of 2019) [2023] KEELC 17675 (KLR) (24 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17675 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 22 OF 2019**

**M SILA, J**

**MAY 24, 2023**

**BETWEEN**

**JEREMIAH NYABONGOYE ATANDI ..... PLAINTIFF**

**AND**

**RUDIA KWAMBOKA MASAKA (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MATHEW MASAKA OTUMBO) ..... 1<sup>ST</sup> DEFENDANT**

**NYAKONI OTUMBO MAGETO ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. This suit was commenced through an Originating Summons filed on 26 June 2019. The summons have been taken out pursuant to the provisions of order 37 rules 7 and 14 of the [Civil Procedure Rules, 2010](#), and Sections 7, 37 and 38 of the [Limitation of Actions Act](#), Cap 22, Laws of Kenya. The applicant (hereinafter referred to as the plaintiff) seeks an order for a declaration that he has acquired title, by way of adverse possession, to a portion measuring 21m by 82m, out of the land parcel Nyaribari Chache/B/B/Boburia/8789 (hereinafter referred to as 'the suit land' or parcel No 8789) which land is registered in name of the respondents (hereinafter referred to as 'the defendants'). The defendants are biological brothers to the plaintiff. The summons is supported by the affidavit of the plaintiff wherein the plaintiff has *inter alia* deposed that he owns the parcel Nyaribari Chache/B/B/Boburia/4291 (parcel No 4291) and that due to an error, this portion of 21m by 82m came to be registered within the title of the suit land. He avers that he has occupied this portion from 1960 and that in 1973 he planted tea on it which he has been harvesting. The 1<sup>st</sup> defendant swore an affidavit to oppose the summons. Inter alia, he deposed that their father was married to five wives and that he subdivided his land among the five wives before his death. It is deposed that the plaintiff is from the second house which was allocated he land parcel No 4291 whereas they (defendants) are from the first house that was allocated the land parcel Nyaribari Chache/B/B/Boburia/2724. It is averred that they subdivided the parcel No 2724



into the parcels No 8789 and 8790. It is contended that they are the ones in occupation and that this is where they have their permanent residence. They aver that the plaintiff has his own land but wants to dispossess them from their property. Before the suit could be heard, the 1<sup>st</sup> defendant died and was substituted by his wife Rudia Kwamboka Masaka.

2. Directions were taken that the matter proceeds by way of viva voce evidence.
3. PW-1 was the plaintiff. He testified that he used to work for the Ministry of Public Works before retiring in the year 1996. He testified that his father had four wives and he affirmed being from the second house whereas the defendants are from the first house. He stated that his father divided his land to each house in 1960. He testified that the land he claims is land which his father gave him and that he has lived on it since 1960, and has planted tea, coffee and gum trees. He claimed to have planted the tea in 1962. He has title to the parcel No 4291. He testified that the dispute was referred to the Chief and Land Registrar who issued summons for a boundary dispute. He visited the site and made a report dated 28 May 2019 which report was produced as an exhibit. They also went before the sub-chief for resolution of the dispute. He called elders and they made a report which he also produced as an exhibit. Cross-examined, he asserted that the disputed land was given to him by his late father and there was no dispute in the manner in which he distributed his land. He contended that the defendants created their title from what his father gifted him and that it has boundaries which were placed by his father. He stated that he created a road demarcating his land into two and the disputed land is on the lower side of this road. He testified that upon dividing his land, his father was left with a small portion for himself, which is referred to as 'emonga.' This, he said was left to the 3<sup>rd</sup> house and he is not claiming it.
4. PW-2 was James Machogu. The father of the parties is his uncle. His evidence was that the manner in which their father distributed the land and the boundaries he put are intact to date. He testified that the registry index map is erroneous as it does not follow the boundaries as created by the father of the parties. He testified that the plaintiff has been using the disputed portion for a long time and has planted tea and that the defendants have never used it.
5. PW-3 was Alfred Machogu Mageto, a younger brother to the late father of the parties, thus their uncle. His evidence was also that his late brother placed boundaries on the land which are intact to date. He testified that the disputed land belongs to the plaintiff. He has never seen the defendants use this land.
6. PW-4 was David Lemaiyan, a surveyor working with the Ministry of Lands and Physical Planning. He testified that the parcel No 2724 was subdivided into the parcels No 8789 and 8790 and that there was a road at the tip of the parcel No 8789 though it does not pass through it. He affirmed that the site was visited on 16 May 2019 and the report dated 28 May 2019 made. He was however not present during the site meeting. He affirmed that there is a difference between what is on the ground and the map since the owner of the parcel No 4291 (plaintiff) utilizes part of the parcel No 8789 (the suit land) being a portion measuring 21m by 82m. This portion is on the lower side of the road.
7. With the above evidence, the plaintiff closed his case.
8. DW-1 was Rudia Kwamboka Masaka the wife to the late original 1<sup>st</sup> defendant, Mathew Masaka. Her evidence was that after her father in law (Mzee Otumbo) died, it was decided that whoever was occupying the lower side of the road should not move to occupy the upper side and vice versa. She stated that they are the ones on the lower side of the road while the plaintiff is on the upper side. She testified that there is tea on both upper and lower sides which was planted by her father in law. She stated that this lower side portion which is in dispute was preserved as 'emonga' and not apportioned to anybody. After her father in law died, the plaintiff continued plucking the tea on this lower side. She asserted that it is them who should be the ones plucking the tea and that they have informed the plaintiff to vacate but he refused. Cross-examined, she stated that the tea was planted a long time ago



- and she found it there when she got married into the home which is about 60 years back. She affirmed that it is the plaintiff who has been harvesting this tea. She acknowledged that there had been sessions to resolve the dispute but she did not attend and does not know their outcome.
9. DW-2 was Elkana Nyakoni Otumbo, the 2<sup>nd</sup> defendant. His evidence was that the disputed portion was reserved by their late father for himself and it had tea on it. He stated that his father mentioned that whoever was occupying the upper side should not occupy the lower side and that whoever was plucking tea should only do so for a short duration of time then vacate it. He affirmed that it was the plaintiff who was plucking the tea but asserted that it was planted by their father. He claimed that the plaintiff was only to pluck it for a short time, 3 years, then vacate the land, but he has refused to do so. He affirmed that it was the plaintiff using the land and has occupied it for a long time. He however contended that the wishes of their father was that they should be the ones to own the land. Cross-examined, he stated that tea has been on the land for a long time and they have never harvested it. He stated that they asked the plaintiff to stop and took action by reporting him to the Chief, one Mogire, who is now deceased. He was present in the meeting held before the sub-chief but denied that the elders decided that the land should belong to the plaintiff. On one hand he claimed that the disputed portion was the 'emonga' though he later changed this to state that this was land distributed to them and did not constitute the 'emonga.'
  10. With the above evidence the defendants closed their case.
  11. I invited counsel to file written submissions which they did and I have taken these into account before arriving at my decision.
  12. This is a case for adverse possession and what the plaintiff needs to prove is that he has been in open, peaceful, uninterrupted possession, for a duration of at least 12 years, without the permission of the land owner. This is captured in the maxim *nec vi, nec clam, nec precario*, that is, without force, without secrecy and without permission. The portion in dispute forms part of land that is titled to the defendants. The plaintiff's case is that he has been in occupation of this disputed land since 1960 and that it forms part of the portion of land that their late father gifted him. He testified that he planted tea on this portion which he has been plucking all along. This evidence of the plaintiff was in fact corroborated by the defendants. They did affirm that the plaintiff is the one who has been plucking this tea all along and that they have never harvested it. They saw the plaintiff plucking this tea which means that his use of the land has been open and not in secrecy. The added that they told the plaintiff to vacate, but he declined, meaning that they have never given the plaintiff permission to use this land. I note that in his submissions, counsel for the defendants contended that the plaintiff lacked the requisite *animus possidendi*.
  13. I am not persuaded. The plaintiff has not been using this land just for the sake of it but on the assertion that this land belongs to him and forms part of what his father gifted him. He thus had the requisite *animus possidendi*, i.e the intention to acquire the land for himself to the exclusion of the whole world. Counsel for the defendants also referred me to the case of *Charles Kiplangat Bosuben vs Willy Kipkemoi Kigen & 2 others* (2016) eKLR, which was a case concerning loose arrangements within families, in the manner in which they use land as not being capable of advancing a case for adverse possession. The situation here is different. What we have are not loose family arrangements for use of land before it is distributed for their ownership. In our case, the evidence shows that the land was indeed distributed and titles issued. The rights of the parties were thus firmed up and anyone in possession of the land of the other is capable of presenting a claim for adverse possession.
  14. In my opinion the evidence is stark. The plaintiff has been using the suit land for a period of about 60 years. Nobody has ever interrupted his possession. His possession has been peaceful and open and



without any force. He has been in possession with full intention of exclusively having this land for himself to the exclusion of all others. He did not lease the land nor did the defendants permit him to use it. I am of opinion that the plaintiff has proved his case for adverse possession to this portion of 21m by 82m which is within the land parcel Nyaribari Chache/B/B/Boburia/8789. I order that this portion be hived off the parcel Nyaribari Chache/B/B/Boburia/8789 and title to it be given to the plaintiff, either separately, or to be added to the land parcel No Nyaribari Chache/B/B/Boburia/4291 as the plaintiff may choose, after which the Registry Index Map be amended accordingly.

15. The only issue is costs. Given the relationship of the parties, I make no orders as to costs.

16. Judgment accordingly.

**DATED AND DELIVERED AT KISII THIS 24 DAY OF MAY 2023**

**JUSTICE MUNYAO SILA**

**JUDGE,**

**ENVIRONMENT AND LAND COURT AT KISII**

