



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kiyai & 4 others v Muchina (Environment & Land Case 30 of 2020)  
[2023] KEELC 17388 (KLR) (16 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17388 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 30 OF 2020**

**JM ONYANGO, J**

**MAY 16, 2023**

**BETWEEN**

**KIMAGUT ARAP KIYAI ..... 1<sup>ST</sup> APPLICANT  
JANE JESANG TARUS ..... 2<sup>ND</sup> APPLICANT  
ISAAC KIPROP KEMBOI ..... 3<sup>RD</sup> APPLICANT  
SIMON KIPKORIR CHIRCHIR ..... 4<sup>TH</sup> APPLICANT  
ELIUD TIROP TOO ..... 5<sup>TH</sup> APPLICANT**

**AND**

**SAMUEL MATUNDA MUCHINA ..... RESPONDENT**

**JUDGMENT**

1. The applicants instituted this suit by way of originating summons seeking a declaration that they have acquired ownership of land parcel number Uasin Gishu/Ndalat/30 by adverse possession having been in continuous uninterrupted occupation thereof for a period exceeding 12 years. Each of the applicants swore a supporting affidavit indicating the period that they had been in possession of their portion of the suit property.
2. The 1<sup>st</sup> applicant averred that he bought a portion measuring 0.2 of an acre comprised in land parcel number Uasin Gishu/Ndalat/30 from the plaintiff in 2001 at a consideration of Kshs.20,000/= and has been in open, peaceful, continuous and uninterrupted possession of the said portion since then.
3. In her supporting affidavit the 2<sup>nd</sup> applicant deposed that she bought a portion measuring 0.1 of an acre from one Monica Maritim in 2008. Monica's husband had bought the said parcel from the plaintiff. She further deposed that she has been residing on the said parcel with her family since 2008.



4. On his part the 3<sup>rd</sup> applicant averred that he bought a portion measuring 4.4 acres of the suit property in 2002 at a consideration of Kshs.440,000/= and he has been living on the said parcel and tilling a portion of it since 2002.
5. The 4<sup>th</sup> applicant stated that he purchased a portion measuring 0.2 of an acre of the suit property at the sum of Kshs.135,000/= in 2012 though he has been in open, peaceful and uninterrupted occupation of the said parcel since 2006.
6. The 5<sup>th</sup> applicant averred that he bought a portion of the suit property measuring 0.2 of an acres at an agreed purchase price of Kshs.20,000 in 2002 and he has established his home thereon.
7. The area chief one David K. Lagat and a neighbor one Mathew K. Ng'elel also filed affidavits confirming that they knew the applicants and that they had been living on the suit property for more than 12 years.
8. The respondent filed a replying affidavit denying the applicants' claim and stated that the same was speculative and uncertain and had no juridical basis as they had not annexed a copy of the respondent's title.
9. The applicants responded to the replying affidavit by filing a further supporting affidavit sworn by Isaac Kipruto Kemboi, the 3<sup>rd</sup> applicant, annexing a copy of the Certificate of official search. In the said affidavit, he avers that the respondent has been aware of the applicants' occupation of the suit property as he agreed to sell it to them.
10. The case proceeded by way of viva voce evidence and both parties testified and called their witnesses after which they filed their respective submissions.

#### **Plaintiffs' Case**

11. Each of the applicants testified in line with their supporting affidavits and produced their sale agreements as plaintiffs' exhibits 1, 2, 4, 6 and 7. They each testified that they had been living on the suit property for more than 12 years. The 1<sup>st</sup> defendant also produced the green card in respect of the suit property as plaintiff's exhibit 5. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> applicants told the court that they bought their respective parcels of land in 2002 and they had been living on the said parcels since then without any interruption.
12. PW2 stated that she had lived on her portion of the suit property since 2008 when she bought it from one Monica Maritim whose late husband had bought the parcel from the defendant. She stated that she had lived on the suit property peacefully and with the knowledge of the respondent until July 2021 when she was evicted and her house was demolished.
13. PW 5 relied on his supporting affidavit. He testified that he bought a portion measuring 0.2 of an acre from a person called Thomas in 2012. He stated that he had lived on the suit property for 8 years but he was evicted in 2018.
14. PW6 who testified as a witness for the plaintiffs stated that he knew the plaintiffs, as they were his neighbours. He confirmed that the 1<sup>st</sup> plaintiff had bought a portion measuring 0.2 of an acre from the defendant in 2001. He stated that the 3<sup>rd</sup> plaintiff bought his land in 2002 while the 5<sup>th</sup> plaintiff bought his in 2001. He stated that the 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs were the only ones who were still occupying the suit property.
15. PW7 who introduced himself as a retired chief also relied on his affidavit. He stated that he knew all the plaintiffs and the defendants as the land in dispute was in his location. He confirmed that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs bought their land from the defendant in 2002. He told the court that the suit property



was registered in the name of the defendant and that the plaintiffs were evicted in 2020 pursuant to a court order but the 1<sup>st</sup> plaintiff returned to the suit property as he had been evicted by mistake. Upon being shown the order in Eldoret ELC Case No. 133 of 2014, he stated that the plaintiffs were not party to that case.

### **Defendant's case**

16. The defendant testified as DW1. He relied on his replying affidavit sworn on 26.9.2020 as his evidence in chief. He stated that he was the registered owner of the suit property having bought it in 1980 and he had a title deed for the same. He stated that after bought the land in 1980, he established his home on it and lived there with his family upto 1992 when he left owing to the post –election violence as he feared that he would be attached.
17. He stated that in 2013 some 10 people approached him and told him that each of them wanted to buy half an acre of his land but they never paid for it. He then sued them vide EldoretELCCase No. 133 OF 2014 and obtained an eviction order against them. He stated that the plaintiffs in this case were not among the persons who had approached him to buy his land. He denied having sold land to any of the plaintiffs. Upon being shown the sale agreements produced by the plaintiffs, he denied having entered into sale agreements with them and stated that the signature on the said agreements was not his. He stated that by the time the sale agreements were prepared, he had left the suit property. He stated that he had filed another case CMELC Case No. 127 of 2018 (formerly ELC Case No. 14 of 2018) in which he sought to evict people from his land. He said the plaintiffs had only occupied his land since 2013 and they could therefore not claim that they had occupied the suit property for a period of 12 years.
18. In cross-examination, he stated that the people who were evicted had been on his land since 2002 and they were evicted pursuant to an eviction order in ELD ELC Case No. 133 of 2014. He stated that he did not know the plaintiffs and he had never had any dealings with them. He said he was aware that the plaintiffs had applied to be joined in ELC Case No. 133 of 2014 but their application was dismissed. He stated that when he moved to Songhor in 1992, he exchanged his land with a person called Kirwa.
19. Andrew Komen, the Senior Court Assistant in charge of the ELC Registry testified as DW2. He produced the court file for ELC Case No. 133 of 2014. Samuel Matunde Muchina v Samwel Kiptoo Ruto and 9 Others. He stated that the case had been concluded and a judgment was delivered on December 5, 2019. He stated that a Notice of Appeal dated August 10, 2020 had been filed in the matter but he was not sure about the status of the Appeal. He stated that the plaintiffs in this case were not parties in ELC Case No.133 of 2014. He confirmed that 8 people had filed an application dated 22.1.20 seeking to be joined in the case but their application was dismissed.
20. After the close of the defendant's case, both parties filed their submissions.
21. Having considered the pleadings, evidence on record and the rival submissions the following issues arise for determination:
  - i. Whether the applicants have been in peaceful, open, continuous and uninterrupted possession of land parcel number Uasin Gishu/Ndalat/30 and whether they have acquired title to the said parcel of land by way way of adverse possession.
  - ii. Whether the applicants are entitled to the reliefs sought.

### **Analysis and Determination**

22. The doctrine of adverse possession in Kenya is embodied in sections 17,13 and 38 of the [Limitation of Actions Act](#).



Section 7 of the Act provides as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the action accrued to him or, if first accrued to some person through whom he claims, to that person”.

Section 13 provides that:

“A right to recover land does not accrue unless the land is in 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 a right of action to recover land accrues on certain dates and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes possession of the land”

Additionally section 38 provides as follows:

1. “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”
23. The courts have put the above provisions of the law and the doctrine of adverse possession into context. In the case of *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR Asike Makhadia JA observed that:

“Adverse possession is essentially a situation where a person takes possession of the land, asserts rights over it and the person having title to it omits or neglects to take action against such a person in assertion of his title for a certain period, in Kenya, 12 years.

...It is also a well -established principle that a party claiming adverse possession ought to prove that the possession was “nec vi, nec clam, nec precario” that is peaceful and continuous. The possession should not have been through force, nor secrecy and without the permission of the owner”

In the case of *Wambugu v Njuguna* [1983] eKLR the Court held that adverse possession contemplates two concepts: possession and discontinuance of possession...the proper way of assessing proof of adverse possession would 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 or she has been in possession for the requisite number of years”.

24. In the present case the applicants testified that they purchased various portions of the suit property from the Respondent or persons who had purchased their parcels from the Respondent and that they had occupied the said parcels of land for a period of more than 12 years. They produced copies of sale agreements and photographs of the houses they claimed they had constructed on the suit property. The respondent however denied that the applicants had been in occupation of the suit property since 2002 as he had sued those who occupied his land in 2002 vide Eldoret ELC Case No.133 of 2014 and obtained an eviction order against them. Pursuant to the said eviction order, he had evicted the persons occupying his land including the respondents. The respondents did not deny that they had been evicted though the 1<sup>st</sup> respondent stated that he had been evicted by mistake as he was not a party in ELC Case No. 133 of 2014.



25. Learned counsel for the respondent submitted that the Applicants could not succeed in their claim of adverse possession as they stated that they had entered the suit property pursuant to sale agreements. He relied on the case of *Mombasa Teachers Cooperative Savings & Credit Society v Robert Mubambi Katana & 15 others* (2018) eKLR for the proposition that a person seeking to acquire title to land by adverse possession must prove non-permissive or non-consensual use or occupation of the land for an uninterrupted period of 12 years. It was his contention that since the applicants implied that they had entered the suit property with the consent of the owner, they did not meet the threshold for adverse possession.
26. Counsel also took issue with the fact that that the Applicants had not specified the size of their portions in their pleadings. Indeed, the main prayer in the Originating Summons is:
- a. “That the Applicants be declared to have acquired ownership of land parcel number Uasin Gishu/Ndalat/30 acquired prescriptive rights through adverse possession having been in continuous, uninterrupted occupation for a period exceeding 12 years (sic)
27. Regarding the Plaintiff’s mode of entry into the suit property pursuant to a sale agreement the court relied on the case of *Richard Wefwafwa v Ben Munyifwa Songoi* [2020] eKLR the court observed as follows:
- Comparatively the Supreme Court of India in *Mohan Las v Irza Abdul Gaffar* 1996 faced with an inconsistent claim of title by agreement and possession stated that since the Appellant admitted he came into possession of the land lawfully under an agreement and continued to remain in possession till the date of the suit, the plea of adverse possession was not available to the Appellant. That having come into possession by agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession during the entire 12 years.
28. From the evidence on record, it is clear that the plaintiffs entered the suit property to pursuant to sale agreements which were denied by the defendant. That therefore means that they had no intention of dispossessing the defendant. The mere fact that he stayed away from his land following the 1992 post-election violence does not mean he was dispossessed.
29. In *Alfred Welimo v Mulaa Sumba Barasa* CA No. 186 of 2011 the Court of Appeal expressed itself as follows:
- “It is trite that adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it ; for as Robert Megarry aptly observed in his Megary’s Manual of the Law of Property, 5<sup>th</sup> Edition Page 490; the owner may have little present use for the land and that land may be used by others without the users demonstrating a possession inconsistent with the title of the owner. So the mere fact that the appellant abandoned possession of the suit property and went to live at Ndalal scheme by and of itself does not establish adverse possession. The abandonment of possession must be coupled with the respondent taking possession of the land with animus possidendi ( the intention to possess) and asserting thereon rights that are inconsistent with those of the appellant as the owner of the land”
30. As a matter of fact the defendant filed suit vide ELC Case No.133 of 2014 and obtained judgment against some of the people who had been occupying the suit property in his absence. Even though the plaintiffs were not parties to the suit, they admitted that they had been evicted pursuant to the said judgment. That goes to show that the defendant all along intended to reassert his title to the suit



property. The mere fact that the Plaintiffs occupied the suit property for a period over more than 12 years does not per se, amount to adverse possession as the defendant set in motion the process of evicting the persons occupying his land by filing several suits.

31. The other challenge is that plaintiffs did not plead the size of the parcels they are claiming. Granted that they stated the size in their supporting affidavits, the prayers in the Originating Summons merely refers to parcel number Uasin Gishu/Ndalat/30 without identifying the size that each of the Plaintiff's is claiming.
32. In the case of *Stephen Mwangi Gatunge v Edwin Onesmus Wanjau (Suing in her capacity as the administrator the estates of Kimingi Wariera and Mwangi Kimingi Deceased)* [2022] eKLR the court held that:

“For a claim of adverse possession to issue, it is important that the said land is clearly identified as was held by the Court of Appeal in *Wilson Kazungu Katana & 101 others v Bakshwein & another* [2015] eKLR where the Court observed :-

“The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of *Githu v Ndele* [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, size and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them”

33. It is trite that parties are bound by their pleadings and failure to specify the size of the portions claimed by the plaintiffs' makes it difficult for the court grant the prayers sought.
34. In view of the foregoing analysis the plaintiffs have failed to prove their case on a balance of probabilities and the same is hereby dismissed with costs to the Defendant.

**DATED, SIGNED AND DELIVERED VIRTUALLY VIA MS TEAMS PLATFORM THIS 16TH DAY OF MAY 2023.**

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**J.M ONYANGO**

**JUDGE**

**In the Presence of;**

**1.Miss Chelimo for Mr. Yego for the Plaintiff**

**2.Mr. Mogambi for the Defendant**

**Court Assistant: A. Oniala**

