



**Mwita & another v Administrators of the Estate of Weisiko Banchwa Kegocha & another
(Environment & Land Case 233 of 2017) [2023] KEELC 22655 (KLR) (27 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 22655 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 233 OF 2017**

**MN KULLOW, J
JUNE 27, 2023**

BETWEEN

JOHNSON CHACHA MWITA 1ST PLAINTIFF

MARITA GATI 2ND PLAINTIFF

AND

**ADMINISTRATORS OF THE ESTATE OF WEISIKO BANCHWA
KEGOCHA 1ST DEFENDANT**

PATRICE NYAMOHANGA BACHO 2ND DEFENDANT

JUDGMENT

1. The Plaintiffs instituted the instant suit vide an Originating Summons dated 28th February 2017, against the Defendants for a claim of adverse possession over suit parcel No. Bukira/Buhirimono/319, seeking the following orders;
 - a. That Plaintiffs have for a period in excess of twelve years acquired adverse possession of a portion of land parcel number Bukira/Buhirimono/319 measuring 1 acre and consequently the Defendant's title thereto in respect of the said parcel of land has been extinguished by virtue of Section 17 of the *Limitation of Actions Act*, Cap 21 Laws of Kenya.
 - b. That the Plaintiffs/Applicants be registered as the proprietors of a portion of land parcel number Bukira/Buhirimono/319 measuring 1 acre in place of the Defendant/Respondent in whose name the suit land is currently registered.
 - c. That the Defendant/Respondent do transfer a portion of land parcel number Bukira/Buhirimono/319 measuring 1 acre to the Plaintiff/Applicants forthwith and in default of the Defendants signing the transfer forms, the Deputy Registrar of this Honorable Court do sign, to execute and or endorse such papers/documents to effect the transfer.



- d. Costs be in the cause.

Plaintiffs' Case

2. It is the Plaintiffs claim that they have been in continuous, open, exclusive and uninterrupted occupation and possession of the suit property for a period of over 12 years. That as a result of the said occupation, they have acquired proprietary rights over the said portion of land by dint of Adverse Possession. It is their contention that they have lived on the suit property exclusively, openly and without the Respondent's permission since 1990.
3. PW1, Johnson Chacha Mwita, testified that he acquired and/or was given the suit land by his grandfather sometimes in the year 1987. That since the time, the land was being used for cultivation and planting trees by his father and his deceased brother, husband to PW2, had also cultivated trees on the land since.
4. He maintained that he has been in possession and use of the suit land since he was given the same which period is in excess of the 12 years' statutory period. He also produced the documents on his list of documents dated 12.3.2019 as exhibits in further support of his case as follows; bundle of photographs as Pexh. 1, copy of the crop compensation report as Pexh. 2, copy of the letter dated 15/3/2017 as Pexh.3, OB extract dated 13/11/2018 as Pexh.4 and a copy of the Certificate of Official Search as Pexh.5.
5. The Applicants testified that they have worked on and developed the suit land for more than 12 years. PW2, MARITA GATI, further testified that she was married to the brother of the PW1 since 1996, their matrimonial home has been situated on the suit property in a portion measuring 0.5acre while PW1 occupied the other half of the suit property. She also informed the Court that together with her now deceased husband, they planted trees on the land in 2000.
6. PW3, Jackson Chacha Nyakorima, testified to the effect that he had witnessed the Plaintiffs grandparents stay on the suit and had even conducted business with the grandfather as relates to trees grown therein as of 1979. He further witnessed when suit land was devolved to PW1 and his brother who was since deceased and is represented by the 2nd Plaintiff (PW2). The Plaintiff closed his case thereafter.

Defendants Case

7. DW1, Samuel Nyamohanga, gave sworn testimony on behalf of his father peter nyamohanga bachwa who had donned him Power of Attorney and was therefore competent to bring evidence on his behalf.
8. He maintained that the suit property was owned by his family registered under Weisiko Banchwa Kegocha. It was further his contention that he is the one who had planted the trees on the land and dismissed the Plaintiffs' claim of cultivating the land and planting trees. It was thus his claim that the Plaintiffs' case was aimed at dispossessing them of their rightfully owned property.

Analysis And Determination

9. Having considered and reviewed pleadings filed in court, the respective exhibits and submissions in totality, the issues that arise for determination are as follows: -
 - a. Whether the Plaintiffs have proved their claim of Adverse Possession?
 - b. Whether the Plaintiffs are entitled to the reliefs sought



I. Whether the Plaintiffs have proved their claim on Adverse Possession

10. 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](#).

11. 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 of the subject land is peaceful, open and continuous for a statutory period of 12 years and the said possession is adverse with an intention to dispossess the true owner thereof. 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.”

12. In *Joseph Wachira Mwangi v Johana Kamau Wambugu & Another* [2009] eKLR at Page 4, quoting directly the case of *Omukaisi Abulitsa v Albert Abulitsa Shitseswa*, in *Kakamega HCCC No 86 of 2005 (UR)* the Court observed that:

Section 38 of the [Limitation of Actions Act](#), Chapter 22 of the Laws of Kenya entitles a person to be registered as proprietor instead of the registered proprietor where such person establishes by evidence that he or she has become entitled to be registered on account of his or her occupation of the land, openly and continuously and without interruption and with the knowledge of the registered owner for a period of twelve years or more adversely to the title of the registered owner.

13. It is the Plaintiffs’ case that they have been in occupation and use of the suit land since 1990; the same having devolved from his grandfather, a fact which was confirmed by PW1 and PW3. It is the 1st Plaintiff’s claim that he has been in possession and use of the suit land measuring 1 Acre since the same devolved to him and he produced a bundle of photographs as Pexh. 1, 2 and 3 in support of the said assertions. In my mind, the existence of a homestead as pleaded by PW2, proved the intention to dispossess and exercise of dominium. Cultivating and planting trees is also conclusively proof of open, exclusive and uninterrupted possession and use thereof.

14. The Plaintiffs further contend that the said occupation and use has been open and uninterrupted for a period in excess of 12 years statutory period, a fact which was not challenged by the Defendants. Even though they maintained that the Plaintiffs have never been in occupation and possession of the suit land, they did not adduce any evidence either in the form of photographs or called witnesses to testify in support of their claims.

15. Further, DW1 maintained that he is the one who planted the trees on the suit land and dismissed the claims by the Plaintiff as an attempt to dispossess them of their rightful property. However, he did not



produce any evidence to challenge the contents of PExhibit 2 and 3. In the absence of any material evidence by the Defendants to support their assertions, I find that the same remain mere statements with no probative value.

16. I am guided by the Court of Appeal in the case of Johnson Kinyua v Simon Gitura Rumuri [2011] eKLR, as it upheld the earlier High Court findings as follows:

With regard to the extent of adverse possession, we think that possession of 8 acres of land for a period exceeding twelve years has been clearly established and that the respondent was in exclusive possession of the piece of land openly and as of right during all this time. With respect, this is all that a claimant is required to establish. In the face of the nature of the possession as described above including dwelling houses and permanent plants and the visible burial ground of the respondents parents in the disputed land, we think it is quite evident to us that the respondent used the land which he claims as of right: nec vi, nec clam, nec precario (no force, no secrecy, no evasion). It follows from the foregoing the appellant is deemed to have had either actual knowledge of the possession or had the means of knowing of the possession or occupation but did nothing about it by way of asserting the right of ownership (constructive knowledge). It is also not in dispute that the possession was never interrupted and was continuous for the entire period as prescribed. We are therefore satisfied that the superior court had properly addressed the issue of the fact of possession and also the applicable law.

17. In view of the foregoing, I find that the Applicants have proved their claim on adverse possession to the required threshold; they produced Pexh. 5 as proof that the land is registered in the name of the late Weisiko Banchwa Kegocho, whose estate is represented by the Defendants herein. They also produced Pexh. 1, 2, 3 and 4 as proof of their open, exclusive, non-consensual and uninterrupted possession and use of the suit land. The Defendants on the other hand did not produce any evidence in support of their claims and therefore the evidence produced by the Plaintiffs remain uncontroverted.

II. Whether the Plaintiff is entitled to the reliefs sought?

18. It is therefore my finding that the Plaintiff have sufficiently demonstrated that they have acquired prescriptive and overriding rights over the portion of the suit parcel measuring 1 Acre, by virtue of their occupation and use of the suit land from the year 1990. The said rights are adverse to the Respondents' rights over the same portion of land and are capable of registration.
19. Consequently, I find and hold that the plaintiffs have satisfactorily proved their claim on adverse possession over a portion of land measuring 1 Acre and are therefore entitled to the reliefs sought.

Costs

20. Costs generally follow the event. In this case, having held that the Plaintiffs have proved their case against the Defendants, I find that they are entitled to costs of the suit.

Conclusion

21. The upshot of the above is that the Plaintiffs have proved their claim on adverse possession and I accordingly allow the Originating Summons dated 28th February, 2017 on the following terms;
- i. A Declaration be and is hereby made that the Plaintiff have acquired Adverse Possession of a portion of L.R. No. BUKIRA/BUHIRIMONON/319 measuring 1 Acre by virtue of their possession for a period in excess of 12 years and consequently, the Defendants' title thereto



has been extinguished by virtue of section 17 of the *Limitation of Actions Act* Cap 22 Laws of Kenya.

- ii. A Declaration is further made that the Plaintiffs are entitled to be registered as owners of a portion of L.R. No. BUKIRA/ BUHIRIMONONO/319 measuring 1 Acre in place of the Defendants in whose name the suit land is currently registered.
- iii. The Defendants are hereby ordered to transfer 1 Acre of L.R. No. Bukira/Buhirimonono/319 to the Plaintiffs within 60 days from the date of this judgment. In default, the Deputy Registrar is directed to execute the transfer documents in favor of the Plaintiffs for a portion measuring 1 Acre to facilitate the registration of the same in the Plaintiffs' names.
- iv. The costs of this Application be borne by the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 27TH DAY OF JUNE, 2023.

MOHAMMED N. KULLOW

JUDGE

In presence of; -

No Appearance for the Plaintiffs

No Appearance for the Defendants

Court Assistant - Tom Maurice/Victor

