



**Namfundoa v Nabibia (Environment & Land Case 2 of 2020)  
[2023] KEELC 19256 (KLR) (28 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19256 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE 2 OF 2020**

**EC CHERONO, J**

**JULY 28, 2023**

**IN THE MATTER OF AN APPLICATION FOR AN ORDER THAT THE LAND  
KNOWN AS KIMILILI/KIBINGEI/600 MEASSURING APPROXIMATELY 0.7 HA  
HAS BEEN ACQUIRED BY WAY OF ADVERSE POSSESSION BY JOSEPH**

**NAMAFUNDO**

**AND**

**IN THE MATTER OF SSECTION 38 OF THE LIMITATION OF ACTIONS ACT  
CHAPTER 22 LAWS OF KENYA**

**BETWEEN**

**JOSEPH NAMFUNDOA ..... PLAINTIFF**

**AND**

**ALPHONCE SIMIYU NABIBIA ..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. The plaintiff instituted this suit by way of originating summons dated 13<sup>th</sup> January,2020 seeking determination of the following questions and/or prayers: -
  - a. A declaration that the plaintiff has become entitled to be registered owner/proprietor of the land known as Kimilili/Kibengei/600 measuring approximately 0.7Ha or thereabout by adverse possession which the plaintiff has been in continues, quite occupation an uninterrupted possession for over twelve (12) years proceeding presentation of this suit.
  - b. That there be an order compelling the defendant to transfer the parcel of land known as Kimilili/Kibengei/600 measuring 0.07Ha or thereabouts in favour of the plaintiff and in the



event that he declines an order to issue directing the Deputy Registrar Bungoma law courts to sign transfer documents in favour of the plaintiff.

2. The defendant opposed the application via a replying affidavit sworn by Alphonse Simiyu Nabibia dated 17<sup>th</sup> January, 2022.
3. At the same time it arose that the defendant herein had similarly filed a suit through a Plaintiff in Kimilili CMCC ELC 31 of 2019 *Alphonse Simiyu Nabibia v. Joseph Namafundo* dated 29<sup>th</sup> July, 2019 seeking for the following orders;
  1. An order for eviction of the defendant, his servants, agents or anybody in connection with defendant and any relative from land parcel No. Kimilili/Kibingei/600.
  2. Costs of the suit
  3. Any other relief this honourable court may deem fit to grant.
4. The defendant therein filed a statement dated 4<sup>th</sup> September, 2019 denying the averments in the plaint and asserting that he has since become the owner of the suit property by virtue of adverse possession.
5. Vide Environment and Land Miscellaneous case no. 3 of 2020 parties sought to consolidate the current suit and Kimilili CMCC ELC 31 of 2019. By an order issued in Bungoma on the 8<sup>th</sup> June, 2020 it was agreed that by consent that Kimilili CMCC ELC 31 of 2019 be transferred to the Bungoma Environment and Land Court for purposes of consolidation with Bungoma ELC Case no. 2 of 2020 (O.S) and for further directions.
6. Directions were taken on 8<sup>th</sup> December, 2021 that the two matters be consolidated. That the Originating summons in Bungoma ELC Case No. 2 Of 2020 (O.S) be the plaint and the plaint in Kimilili CMCC ELC 31 of 2019 be the counter-claim and defence to the plaint and finally the applicant herein (Joseph Namafundo) be the plaintiff and the respondents (Alphonse Simiyu Nabibia) be the defendant. The parties filed their compliance documents under Order 3, 7 & 11 of the *Civil Procedure Rules* and the case proceeded for hearing on 1<sup>st</sup> March, 2023 and 26<sup>th</sup> April, 2023.

### **Plaintiff's Evidence And Submissions**

7. In support of his claim the plaintiff adopted the contents of his supporting affidavit dated 13<sup>th</sup> January, 2020 and witness statement dated 22<sup>nd</sup> March, 2022 as his evidence in chief. He equally adopted his list of documents dated 22<sup>nd</sup> March, 2022 in further support of his claim.
8. He stated that he was the son of one Idd Namafundo Kinyurus who occupied the suit land since 1966 until his passing in 1976 where he took over actual possession and occupation of the suit property and lived with his family. The plaintiff testified that he has resided in the suit property since and has constructed a house, he rears livestock and poultry and ploughs the land to his exclusive benefit. He produced photographs of the homestead as P-Exhibit 1-13 respectively. It was further his testimony that the land was initially registered in the name of one Micheal Nabibia Nandakanya who is the father of the defendant herein and upon his death the defendant was registered as the owner as a beneficiary. He produced a green card in respect of the parcel of land i.e. Kimilili/Kibingei/600 as P-Exhibit 14.
9. He plaintiff referred to his statement of defence in Kimilili 31 of 2019 and his lists of documents therein. It was his evidence that the defendant has never been in occupation of the land or had control over it in any way and that he has been in continuous possession of the suit land for over 12 years uninterrupted.



10. In his submissions presented by the firm of R.E. Nyamu & Company Advocates the plaintiff submitted that it was not in contention that the plaintiff was in actual occupation of the property, Counsel submitted that declaration that the Defendants declaration that the suit was sub judice in his defence, the defendant confirmed that there has been no previous proceedings against the plaintiff in regard the suit property. He submitted that the defendants have not tendered any evidence to show that one Micheal Nabibia ever instituted a suit against the plaintiff or his father Iddi Kinyurus before his passing. Counsel further submitted therefore that the suit parcel of land at the expiry of 12years from 1976 extinguished in favour of the plaintiff. It was submitted that the defendant did not have capacity to institute the complaints as evidenced in the documentary evidence produced as his father who was the registered owner at the time was still alive and as such they did not constitute as interference for the purposes of adverse possession.

### **Defendant's Evidence And Submissions**

11. In support of his claim the defendant adopted the contents of his replying affidavit dated 17<sup>th</sup> January, 2022 and witness statement dated 25<sup>th</sup> January,2022 as his evidence in chief. He equally adopted his list of documents attached to the replying affidavit as DExhibit1- 5
12. The defendant testified that he knew the plaintiff as his neighbor and the owner of Kimilili/Kibingei/599. He stated that he was born and raised in the suit property and that the plaintiffs father had been given a portion of the suit property to graze cattle by his father until his death in 1976 when trouble begun and the plaintiffs destroyed the boundaries. He testified that it was not true that the plaintiff had constructed over the suit property but that the plaintiff was only ploughing therein. He stated that he prays that the plaintiff be evicted from the suit property as it belonged to him.
13. In cross-examination the defendant stated that his father stopped using the suit property in 1960 where he allowed the plaintiff's father to occupy and graze his animals. He referred to his list of documents stating that the plaintiff's occupation of the suit property has not been peaceful and uninterrupted. He testified to the two letters by the area chief and Land registrar dated 23<sup>rd</sup> December,2004 and 23<sup>rd</sup> March, 2005 respectively where he complained about the plaintiff's trespass into Kimilili/Kibingei/600.
14. In his submissions presented by the firm of J.B. Otsiula & Associates Advocates the defendant discussed the provisions of Section 7 & 8 of the *Limitation of Actions Act*, Article 40 of the *Constitution*, 2010 and Section 24 of the *Land Registration Act*. Counsel submitted that the plaintiff failed to call a witness to testify in his favour of occupation of the suit property. He placed reliance in the case of *Gabriel Mbui v. Mukinda Marayana* (1993) Eklr where the court defined adverse possession and submitted that the plaintiff falls short of the said definition as he was not a stranger to the defendant as they shared a common boundary ti wit Kimilili/Kibengei/6000 and Kimilili/Kibengei/599.
15. Counsel further submitted that since the defendant's father allowed the plaintiffs father to use the parcel of land for grazing the same ought to be attributed to consent by the owner. He relied on the case of *Samuel Miki Waweru v. Jane Njeru Richu* Civil Appeal No. 122 of 2001. The defendant further submitted that since the parties were neighbors the evidence adduced points to boundary disputes and a claim for adverse possession cannot stand as was the case in *Gatimu Kinguru v. Muya Gathangi* (1976) Eklr 253. It was submitted that the threshold for the prayers sought by the plaintiff had not been met and the defendant quoted *Mtana Lewa V. Kabindi Ngala Mwagandi* (2015)Eklr. *Kimani Ruchure v. Swift Rutherford & Co. Ltd* (1980)KLR 10, *Maweu v. Liu Ranching & Farming Cooperative Society* 1985 KLR 430 and *Peter Njau Kairu v. Stephen Ndung'u Njenga & Another* C.A.57 Of 1997.



## Analysis and Determination

16. I have considered the originating summon(plaint) statement of defence, replying affidavit, exhibits, testimony by the parties as well as the applicable law. Flowing from the pleadings, proceedings, documentary evidence and submission of the parties, I have deduced the following as the probable issues for determination: -
- a. Whether the Plaintiff has been in adverse possession of the suit property for a period in excess of 12 years.
  - b. Whether the plaintiff is entitled to the reliefs sought.
  - c. Whether the defendant is entitled to and eviction order
  - d. Who should bear the costs of this suit?

### Whether the Plaintiff has been in adverse possession of the suit property for a period in excess of 12 years.

17. Section 7 of the Limitations of Actions Act provides as follows:-
- (a) “ An action to recover land 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.”
18. After the expiration of 12 years, a party may approach the High Court under section 38 of the Limitation of Actions Act for a declaration that the property has devolved to him in accordance with the doctrine of adverse possession.
19. Section 38(1) of the Act states as follows;
- Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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 a proprietor of the land.”
20. Adverse possession or homesteading is a doctrine founded in law that allows a person who has unlawfully occupied another person’s land for a continuous period of at least twelve years to legally apply for the rights over the property.
21. The Court of Appeal in the case of Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & Another [2015] eKLR sought to define what constitutes adverse possession. The court stated as follows:-
- From all these provisions, what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.
22. This concept of adverse possession has been the subject of many discourses and decisions of this Court. Suffice to mention but two, Kasuve v Mwaani Investments Limited & 4 others [2004] 1KLR 184 and Wanje v Saikwa (2) (supra). In the first decision, the court was emphatic that in order to be entitled to



land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of twelve years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition.

23. In the Wanje case, the Court went further and took the view that in order to acquire by Statute of Limitations a 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 and that what constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.
24. Further, the court opined that a person who occupies another's person's land with that person's consent, cannot be said to be in adverse possession as in reality he has not dispossessed the owner of the land and the possession is not illegal.
25. What these authorities are emphasizing is that for one to stake a claim on a parcel of land on the basis of adverse possession, he must show that he entered the parcel of land more or less as a trespasser as opposed to by consent of the owner. In other words, his entry must be adverse to the title of the owner of the land. It is also possible to enter the land with the consent of the owner, but if the owner at some point terminates the consent and the applicant does not leave but continues to occupy the land and the owner takes no steps to effectuate the termination of the consent for a period of twelve years after then, such applicant would be perfectly entitled to sue on account of adverse possession.
26. Besides adverse entry into the land, the applicant must also demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner. The occupation must be open, uninterrupted, adverse to the title of the owner, adequate, continuous and exclusive as already stated. The burden of proving all these is on the person asserting adverse possession. So that a claim of adverse possession would not succeed if the entry to the land was with the permission of the owner and remains that way throughout, or before the permission is terminated or if before the expiry of the period, the owner of the land takes steps to assert his title to the land. In the case of *Samuel Miki Waweru v Jane Njeri Richu*, Civil Appeal No. 122 of 2001, (UR), this court delivered the following dictum:

“...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in *Jandu v Kirpal* [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted...”

27. From the above decision and numerous other decisions by the superior courts, it is clear that, for a party seeking to be declared as having acquired another person's land by adverse possession, must prove that they have been in open, continuous non- permissive and exclusive possession of the land in question for a at least twelve years.
28. Exclusive possession was defined in the case of *Gabriel Mbui v Mukindia Maranya* [1993] e KLR where the Honourable Court held that: -

Exclusive possession means that the exercise of dominion over the land must not be shared with the disseized owner, the land being in actual possession with intent to hold solely for the possessor to the exclusion of others.”

29. The plaintiff in his testimony stated that he took possession and occupation of the suit land in the year 1976 when his father who had previously been in possession of the land died. He testified that he has



constructed his house and several other structures on the suit property. He further testified that he is engaged in farming, livestock keeping and poultry farming as well. The defendant on the other hand confirmed that the plaintiff is in actual possession of the suit property ploughing it and even leasing it to third parties.

30. From the photographic evidence tendered by the plaintiff, it is clear that the Plaintiff has been in exclusive possession and control of the suit land and demonstrated his animus possidendi in developing the same by building of a permanent house and cultivating thereon. He stated that he has been doing the same since 1976 to date openly, continuously and without interruption by anyone. He testified that upon the death of Micheal Nabibia his son the defendant herein took out letters of administration and later registered the property in his name without his involvement and as such the registration was a nullity without any legal effect as title over the suit land had already extinguished by operation of the law.
31. The plaintiff in his evidence on oath stated that he took possession and occupation of the suit property in 1976 and has been living thereon openly and continuously without interruption by the defendant to-date. On the other hand, the defendant while claiming owners consent testified that the plaintiff's father was in occupation of the land with the consent of his father who allowed him to graze on the land and take care of it. However, these two men are since deceased with the plaintiff's father passing on in 1976 and as such the mutual agreement/consent terminated upon death. There was no evidence adduced to the effect that the defendant's father or the defendant himself renewed the mutual agreement with the plaintiff herein.
32. The defendant produced letters dated the years 2004 and 2005 in support of his claim that the plaintiff's occupation has not been peaceful and uninterrupted. The plaintiff on the other hand stated that even prior to these letter he had been in occupation of the land for a period of 28 years and that by this time title over the parcel had already extinguished by operation of the law and after the said letter he remained in occupation for 14 years before the defendant instituted a suit for eviction (Kimilili SPM ELC 31 of 2019).
33. The High Court in the case of *Kabindi Ngala Mwagandi v Mtana Lewa* [2014] eKLR considered the rationale of the doctrine and stated as follows:-

The doctrine of adverse possession has been topical and controversial for a long period. The rationale for the law of limitation for and against the recovery of land has been varied. Neuberger J in the case of *Pye(Oxford) Holdings Ltd v Graham*(2000) ch 676 stated as follows:

“A frequent justification for limitation periods generally is that people should not be able to sit on their rights indefinitely. However, if as in the present case the owner of land has no immediate use of it and is content to let another person trespass on the land for the time being, it is hard to see what principle of justice entitles the trespasser to acquire the land for nothing. I believe the result is disproportionate, because it does seem draconian to the owner, and a windfall for the squatter.”

34. On the hand in *Adnam v Earl of Sandwich*(1877) 2 QBD 485, the court held as follows;

“The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as



to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties.”

35. Closer home, the East Africa Court of Justice (EACJ) in the case of *Attorney General of Uganda v Omar Awadh & 6 Others*(2013) eKLR held as follows;-

“Both justice and equity abhor a claimant's indolence or sloth. Stale claims prejudice and negatively impact the efficacy and efficiency of the administration of justice. The overriding rationale for statutes of limitations, such as the time limit of Article 30(2) of the *EAC Treaty* is to protect the system from the prejudice of stale claims and their statutory effect on the twin principles of legal certainty and of response.”

36. It is therefore the view of this Court that the right to Adverse Possession accrued and vested in the Plaintiff as at 1988 this being 12 years after 1976 so much so that by the year 2012 when the Defendant is changing the title in his name, title had been extinguished in favour of the Plaintiff and he therefore held the title to the suit land in trust for the Plaintiff. There is no evidence that the Defendant ever retook possession of the suit land or part of it nor that he successfully removed or ousted the Plaintiff from the possession of the suit land. The Court is of the view that the chief letter dated 23<sup>rd</sup> December,2004 and the notice of determination of disputed boundary by the District Land Registrar's letter dated 16<sup>th</sup> February,2005 did little to stop time from running nor dislodge the Plaintiff from the suit land.

#### **Whether the plaintiff is entitled to the reliefs sought.**

37. The upshot is that the Plaintiff has proved his case on a balance of probabilities and is therefore entitled to the orders sought.

#### **Whether the defendant is entitled to and eviction order.**

38. The upshot is that the defendant's claim for eviction orders against the plaintiff fails.

#### **Who should bear the costs of this suit?**

39. It is trite that costs follow the cause unless the court, for good reason directs otherwise. I have no good reason to depart from ordinary. I therefore order costs to be borne by the defendant.

Final orders

- a. A declaration that the plaintiff has become entitled to be registered owner/proprietor of the land known as Kimilili/Kibengei/600 measuring approximately 0.7Ha or thereabout by adverse possession which the plaintiff has been in continuous, quiet occupation an uninterrupted possession for over twelve (12) years proceeding presentation of this suit.
- b. That there be an order compelling the defendant to transfer the parcel of land known as Kimilili/Kibengei/600 measuring 0.07Ha or thereabouts in favour of the plaintiff and in the event that he declines an order to issue directing the Deputy Registrar Bungoma law courts to sign transfer documents in favour of the plaintiff.
- c. The costs shall be in favour of the plaintiff.

Orders accordingly.

**READ, DELIVERED AND SIGNED IN THE OPEN COURT AT BUNGOMA THIS 28<sup>TH</sup> DAY OF JULY, 2023.**



**HON E. C. CHERONO**

**ELC JUDGE**

In the presence of

Mr. Nyamu for plaintiff-present

Defendant/Advocate-absent.

