



**Kilalo v Njeki Agencies Limited (Enviromental and Land Originating Summons
10 of 2021) [2023] KEELC 22612 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 22612 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 10 OF 2021
EK MAKORI, J
SEPTEMBER 28, 2023**

BETWEEN

SAUMU OMAR KILALO APPLICANT

AND

NJEKI AGENCIES LIMITED RESPONDENT

JUDGMENT

1. The applicant seeks to be declared as the absolute owner of all that land Plot No 5054/271 Kilifi, CR 22165 having acquired the same by operations of the law under the aegis of the doctrine of adverse possession as against the titleholder Njeki Agencies Ltd who the respondents herein.
2. The claim is defended and the matter went to full trial, with one witness each testifying on both sides. The court directed that parties file written submissions – they did comply.
3. The applicant testified that she was born in 1968, grew up with her other siblings, and was brought up by her mother on the suit property. She has never known of any other home in her life.
4. Her mother who died in the year 2020 had not taken steps to legally acquire the land because she was illiterate. In the year 2013, the applicant took it upon herself to initiate steps to have the land registered in her name for her benefit and that of her siblings. She wrote to the National Land Commission and the County Physical Planning Officer Kilifi requesting that a consideration be made to have the land allotted to them. A reply was received with a promise that the issue was to be considered and the status of the land established.
5. There was a positive reply that the land was available for allotment to the applicant. On 16th March 2016, she wrote another letter seeking relevant documentation for the land to be regularized in favour of the family.



6. Upon the demise of her mother, the family and herself have been in exclusive possession of the land and she is of the view that the land has been acquired adversely and the court should make such declaration in her favour.
7. The respondent called one witness Peter Nganga – its Chief Executive Officer who testified that the respondent acquired the land in question in the year 1992 as per the grant, which was produced. The respondent further stated that it took possession of the land in 1993 and has been in use of it, paying necessary regulatory fees as required by the law and taking a loan with Equity Bank using the grant as security at a given point. The witness stated that the land was fenced and there had been farming until 2014 when it was stopped. According to the respondent, it is only recently that invaders stormed the land and took possession of it and efforts to remove them have been in vain. The structures placed on the land were done in 2017.
8. The issue that stands out for the determination of this court is whether the applicant has proved her claim under adverse possession.
9. The applicant contended that the claim has been proved stating that the applicant has been on the Suitland for over 55 years was born on the land and that her mother was living on it before she died aged 68 years. The applicant cited the case of Gabriel Mbui v Mukindia Maranya [1993]eKLR, Mbira v Gachuhi [2002] 1 EALR supporting the notion that the applicant had been in the suit land for over 12 years as required by statute.
10. On the issue of uninterrupted possession, the applicant said by the time the respondent was issued with the grant in 1992 she already was in possession for over 23 years. The cases of Gachumu Gatheru v Maina Kabuchwa ([2016] eKLR and Mtana Lewa v Kahindi Ngala [2015] eKLR are quoted on the manner possession has to be reckoned to prove adverse possession.
11. The respondent submitted that the applicant has no locus standi to bring up this matter having severally insinuated that she sued on behalf of the family of Mwanamgeni Hamisi Japai. No grant of representation was produced to clothe the applicant with the necessary locus standi to bring up this suit since the applicant stated her late mother to bring this suit had given her. Her mother had died; she needed letters of administration to have locus standi to sustain this lawsuit on her behalf and her other siblings. Towards that end, the case of Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama [2014] eKLR, is cited. In bringing this suit on behalf of her siblings the case of Kahindi Katana Mwangi & Another v Cannon Assurance (K) Ltd [2013]eKLR, as enunciating lack of capacity to do so for failure to attach any authority from her siblings.
12. On adverse possession, the respondent submitted that the applicant failed to attach the necessary title document and certificate of official search being impeached only displaying the first page of the grant. This offends the provisions of Order 37 Rule 7 of the Civil Procedure Rules and as supported by the authorities in Adbirashid Adan Hassan v The Estate of W H E Edgley [2022] eKLR, Ali Mwachhi Mulewa and 40 Others v Giuseppe Galgalo [2022] eKLR, Moses Chepkonga v Margaret Njoki Kinyanjui [2017] eKLR, Johnston Kinyua v Simon Gituara Rumuri [2011] eKLR, Easter Ndegi Njiru and Another v Leonard Gatei [2014] eKLR and Raphael Wangui and 2 Others v Josphine Wangui and Another [2022]eKLR.
13. On the 12-year uninterrupted stay on the suit property as the minimum threshold to achieve to impeach a title under the doctrine of adverse possession, the respondent just like the applicant cited the decisions in Mtana Lewa v Kahindi Ngala [2015] eKLR and Mbira v Gachuhi [2002] 1 EALR. However, the respondent submitted that the applicant did not achieve those aggregate years on grounds that no possession had been taken of the land since the respondent testified having



taken possession of it, carried farming activities on the land until 2014 or thereabouts, which can be supported by a loan facility taken from Equity Bank using the title as collateral. Besides the land, the applicant is talking about was ‘an unsurveyed plot near Public Works Camp – Kilifi Township’ – which definitely cannot be suitland. Further the applicant talks of the demise of her mother in the year 2020 and having been authorized to deal with the land by her mother from that time which means 20 years started running from 2020. According to the respondent, the applicant took possession of the suit property in 2020 upon the demise of her mother. The respondent contended that the grant was issued in the year 1992, and possession was taken. Farming was done up to about 2014 and in or about 2017 during electioneering, some squatters violently got into people the suit property. Efforts to evict them have proved futile.

14. I have considered the materials and submissions placed before me by both parties in this suit.
15. On the preliminary issue of lack of locus standi by the applicant to sustain this lawsuit on behalf of her siblings and her late mother, the applicant was clear that her entire family including herself starting with her mother who died in 2020, having lived on that land for over 59 years and herself aged 55 years have been living on the suit land uninterrupted. She took the initiative to originate this suit and follow up the land as a family land as of right and her own right. Contrary to the submissions by the respondent, in my view, she has locus standi to commence the suit as an individual without the consent of her siblings and without letters of administration to represent the estate of her late mother.
16. The next issue raised is whether the applicant failed to attach the title, which is under scrutiny. The respondent averred she only attached an extract of the 1st page of the grant and she also did not attach a copy of the search certificate to show who owns the land the rationale being as expressed in the authorities cited by the respondent and as held for example by Wabwoto J. - in *Adirashid Adan Hassan v The Estate of W H E Edgley* [2022]eKLR:

“Secondly, the effect under Section 17 of the *Limitation of Actions Act* would be to extinguish the title, therefore there is need for reference or production of a copy of a title. A claim for adverse possession must be brought against the registered proprietor since it seeks a declaration that the proprietor’s title has been extinguished by prescription. It follows therefore that the proceedings must be in respect of the correct parcel of land and whose ownership is verified by an annexed extract of title in terms of Order 37 rule 7 of the Civil Procedure Rules. In the instant case, the Applicant only adduced a deed plan as Applicant’s Exhibit 2 which is inconclusive proof of ownership of the property. In determining the issue of adverse possession, this Court cannot extinguish an ‘non-existence and unknown title.’”
17. In the further supporting affidavit deposed by the applicant dated 3rd December 2021, the applicant has annexed a grant in respect to CR 22165 dated 30th January 1992 showing the respondent as the title holder of the suit property. She had earlier in her supporting affidavit to the OS dated 17th June 2021. I reckon that initially, she had attached the 1st page of the grant which she rectified in her further affidavit aforesaid. The submissions by the respondent on this point therefore are misleading.
18. Both the applicant and the respondent correctly submitted the threshold to be achieved for adverse possession to attach. There has been quite a lot litigated in our courts touching on adverse possession, particularly from our coastal region given absent property owners. The law seems to have crystallized what one needs to prove to succeed in a claim of adverse possession. The burden of proof in a claim



of adverse possession rests with the applicant I place my reliance on the sentiments of Kuloba J. (as he then was), in *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”

19. The principle of adverse possession is well captured under the *Limitation of Actions Act*. Section 7 of the said Act places a bar on actions to recover land after 12 years from the date on which the right accrued. Further section 13 of the same Act, provides that adverse possession is the exception to this limitation:

- “(1) (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 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.”

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.”

20. The principle of adverse possession was more elaborately set out in yet another case - *Wambugu v Njuguna* [1983] KLR 172, where the Court held that:

“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.”

In addition:

“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.”

21. The applicant claims she has lived in the suit property all her life she is now 55 years old. The possession has been uninterrupted. Her mother too lived here till her demise for over 59 years since 1962. She took it upon herself to follow the titling of the land by writing to the National Land Commission and the County Physical Planning Offices Kilifi. It would seem the same yielded nothing.
22. Meanwhile it was discovered later the suitland had been allotted to the respondents in 1992. The respondents say they took possession immediately and commenced farming up to about 2014. Took loan using this land and during the 2017 electioneering period some squatters invaded the land – efforts to move them out have been futile. Respondent produced nothing to show actual occupation, farming, or any structure built over time on this land, or even photographs to show the occupation of squatters on this land. When cross-examined on why they have not commenced eviction proceedings the answer was that their lawyers were working on it.
23. The following documentary evidence was produced by the respondent – the grant issued in 1992, certificate of incorporation, receipt for payment of rates in the year 2013, demand letter on payment of rent arrears dated 16th September 2016, postal search and discharge of charge in respect to the suit property upon payment of the Equity loan, receipt of payment of rent arrears for 2017 to 2021 amounting to Kshs 86,000 paid on 10th of August 2021.
24. Nowhere in evidence did the respondent show actual possession of the suit property since allotment in the year 1992 and or any efforts to remove any ‘squatter’ from the land.
25. The respondent argued that the suit land we are dealing with is different from what is being litigated but concluded that squatters invaded the land in 2017 electioneering year. As stated there is nothing to show that squatters invaded the land in that year and not earlier.
26. The applicant has shown that she has been on this particular land since her birth. Nobody has ever attempted to evict her or her family. Initially, it would seem this was public land that was allocated to the respondent in the year 1992. Having been public land there was no guarantee it was to be allocated to her or her family this was discussed in the case of Ravindranath Dahybhay Bhagat v Hamisi Harod & 5 others[2014]eKLR, as per Angote J:

“A squatter occupying government land is not entitled as of right to the piece of land that he occupies although he is supposed to be given the first priority during the demarcation and surveying process. The Respondents were not given title documents by the Settlement Fund Trustees although they say they were on the piece of land during the demarcation and surveying process. Instead, it is Mr. Mughanga who was allocated the suit property and he went ahead to charge it to the Bank of Baroda.

A situation like the current one arose in the case of Michael Githinji Kimotho vs. Nicholas Murathe Mugo, Civil Appeal No. 53 of 1995 in which the Court of Appeal held as follows:

“If the appellant had been in occupation of the suit land as a squatter without any right or title to the suit land in his favour, he was obviously in no position to resist the respondent’s claim. Though the Appellant had a long time been in occupation of the suit land which was government land before it was allocated to the Respondent, this would not have helped him in resisting the Respondent’s claim where the latter is registered as owner of the land. Similarly, if he, the Appellant, had carried out any development on the suit land, he did so at his own peril and he could not expect any compensation in that respect. Even if



for argument's sake the suit land had been erroneously allocated to the Respondent, the Appellant as a squatter in the suit land had no locus standi and the so-called erroneous allocation could not be an answer to the Respondent's claim for his eviction. His position as a trespasser could not have given him any protection against the respondent's claim for possession as the registered owner of the suit land."

I am in agreement with the holding in the above case. Indeed I am bound by the decision save to say that if a party proves that a title document was issued unlawfully then the court is duty-bound pursuant to the provisions of Article 40(6) of *the constitution* to nullify such a title."

27. The scenario we have here is that this land changed hands from government land to private land. It was never allocated to the applicant or her family in 1992 or any other time, instead it was allocated to the respondent. Time for purposes of adverse possession started running in 1992. See the holding by the Court of Appeal in *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR:

"Until 1994 the property was Government land hence the period before 1994 does not account for the period to be computed in arriving at the statutory 12 years as there cannot be a claim of adverse possession against public land. See *Wambugu v. Njuguna* [1983] KLR 172. The relevant period would therefore be between 1994, the date of registration of the appellant as the proprietor, and 2008 when the suit was filed. That period, in aggregate, translates to 14 years which is the period the respondent can legitimately base his claim."

28. The respondent took no steps to remove the "squatters" who may have been on the land. By the time of filing suit since the respondent got the title it was over 29 years. The respondent should have commenced evictions immediately after it got the grant. This did not happen.

29. The conclusion then is that the respondent albeit paying statutory and regulatory rents and rates failed to exercise diligence in inspecting the property and finding who was in occupation. Its title will stand extinguished by the operations of the law. (See the decision in the *Chevron (K) Ltd Case* (supra)), where the court held:

We are equally satisfied from the evidence that, by building structures on the suit premises without obtaining permission from the appellant, as described earlier in this judgment, the respondent manifested animus possidendi, a clear mind and intention of dealing with the suit premises as if it was exclusively his and in a manner that was in clear conflict with the appellant's rights. The appellant was, as such dispossessed of the suit premises by those acts. The respondent's acts were nec vi, nec clam, nec precario (that is, neither by force nor secretly and without permission).

We remind ourselves of the rationale of this method of acquiring land by adverse possession as explained in the following passage from the decision in *Adnam v Earl of Sandwich* (1877) 2QB 485.

"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 "

30. The upshot is that:



- a. The applicant be and is hereby declared as the proprietor of land parcel Plot No 5054/271 Kilifi, CR 22165 measuring approximately 0.6702 Ha. having acquired it by adverse possession.
- b. The applicant be and is hereby declared to be registered as the absolute owner of the land in question.
- c. A permanent injunction be and is hereby issued restraining the respondent from alienating, sub-dividing, taking possession, selling, transferring, charging, or in any manner whatsoever interfering with the said land occupied by the applicant.
- d. Cost of the suit be borne by the respondent.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28TH DAY OF SEPTEMBER 2023

E. K. MAKORI

JUDGE

In The Presence Of:

Mr. Waweru For The Respondent

Court Clerk: Happy

In The Absence Of:

M/s Otieno For The Applicant

