



**Kirao & 5 others v Bakari & another (Environmental and Land Originating  
Summons 14 of 2013) [2023] KEELC 21097 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21097 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 14 OF 2013  
MAO ODENY, J  
OCTOBER 25, 2023**

**BETWEEN**

**SAMUEL KAHINDI KIRAO ..... 1<sup>ST</sup> PLAINTIFF  
KAHASO KAHINDI KIRAO ..... 2<sup>ND</sup> PLAINTIFF  
STEPHEN KENGA KIRAO ..... 3<sup>RD</sup> PLAINTIFF  
JAMES FONDO KIRAO ..... 4<sup>TH</sup> PLAINTIFF  
MARTIN KAZUNGU KONDE ..... 5<sup>TH</sup> PLAINTIFF  
JULIUS KINGI KIRAO ..... 6<sup>TH</sup> PLAINTIFF**

**AND**

**MWANAIKI ISLAM BAKARI ..... 1<sup>ST</sup> DEFENDANT  
MARTIN MUHUTSU JOHN TSUMA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By an amended originating summons dated December 4, 2014, the Plaintiffs moved the court seeking the determination of the following questions;
  - a. Are the plaintiff/applicants entitled to be declared as proprietors of 12 acres of the parcel of land known as Kilifi/Roka/1066 which they have acquired by adverse possession after staying and/or occupying and/or residing on parcel of land known as Kilifi/Roka/1066 which they have acquired by adverse possession after staying and/or occupying and/or residing on the parcel of land for a period of over 12 years.
  - b. Are the plaintiff/applicants entitled to be registered as the owners of the parcel of land known as Kilifi/Roka/1066 and be issued with a Title deed?



- c. Are the plaintiffs entitled to the costs of the suit?
- d. If the answer to 1A and 2A above is yes, a declaration that parcel of known as Kilifi/Roka/1066 belongs and be registered in the names of the plaintiff/applicants.

### **Plaintiffs' case**

2. PW1 Stephen Kenga Kirao adopted his Witness Statement dated 7<sup>th</sup> September 2016 as his evidence and produced as PEX 1-7 a bundle of documents as per the list of documents. It was his further evidence that his parents had two unsurveyed plots known as plot Nos. 1065 and 1066 whereby his brother was given plot No. 1065 to hold in trust for the family.
3. It was PW1's testimony that they stay on plot No 1066 where they have lived for more than 63 years.
4. PW1 also stated that they have been living with their families on the suit property for a period of over 15 years and that the registered owners have never stayed on the land hence they are entitled to the suit property by way of adverse possession.
5. On cross-examination, he told the court that the plot was registered in the name of Mwanaidi Islam Bakari who sold the same to Martin Tsuma who was registered in 1993. He further stated that they came to know that Martin Tsuma had been registered in 2002 when some land brokers wanted to sell the land.
6. PW1 stated that the land was fraudulently registered in Martin Tsuma's name and that they have not trespassed on plot No. 1066 where they reside.
7. PW2 Martin Kazungu Konde adopted his Witness Statement dated 7<sup>th</sup> March 2017 as his evidence and told the court that his father sold the suit land to him in 1989 whereby he built a house and a garage thereon at a cost of Kshs 5 Million hence he should be issued with a title deed. He produced as PEX 8-12 a bundle of documents as per the list of documents.
8. On cross-examination by Mr. Shujaa, PW2 stated that Plot No. 1066 is in Matsangoni Settlement Scheme, which was established in 1963 and that his father sold to him the land but he had not been registered as an owner. He also stated that the Defendants have trespassed on the suit land.
10. On cross-examination by Mr. Obaga, PW2 stated that Plot No 1066 was given to his brother to hold in trust for them as he had an ID.

### **Defence Case**

11. DW1 Martin Muhustu Tsuma the 2<sup>nd</sup> Defendant adopted his Replying Affidavit sworn on 8<sup>th</sup> June 2020 as well as his Witness Statement dated the same date as his testimony and produced as DEX 1-7. DW2 stated that he is the registered owner of the suit land having been registered as such on 1<sup>st</sup> October 1993. It was DW1's evidence that prior to that the land was owned by the Settlement Fund Trustee.
12. DW1 also testified that the 1<sup>st</sup> Defendant who was an allottee of the Settlement Fund Trustee sold to him the suit property and was issued with a title deed. DW1 further stated that he was an outright purchaser from the 1<sup>st</sup> Defendant whereby he paid all the charges and dues to the Settlement Fund Trustee.
13. It was DW1's evidence that the Plaintiffs were mere squatters on the suit land before the Settlement Scheme was established and that the cause of action could only accrue after the registration of the suit property and issuance of a title deed.



14. DW2 Kahaso Kahindi Kirao adopted her Witness Statement dated September 4, 2020 and stated that she is the wife Samuel Kahindi Kirao (deceased ) a resident of Matsangoni since 1968 when she was married.
15. DW2 further stated that Martin Kazungu Konde is her brother in law and when she got married Martin was staying on his father's plot No. 1065. That plot Nos. 1065 and 1066 had no proper demarcation but later on established the boundaries and discovered that Martin Kazungu Konde had built on plot No. 1066 instead of No. 1065.
16. On cross-examination by Mr. Shujaa, he told the court that Samuel Kahindi Charo is her late husband and was the registered owner of the suit property, further that she has never seen Martin Tsuma on the suit land.
17. DW3 Samuel Karisa Kahindi adopted his Witness Statement dated 4<sup>th</sup> September 2020 as his evidence and stated that it is not true that Martin Kazungu Konde bought the suit property. DW3 also stated that they have never been removed from the suit land since they took occupation.
18. On cross examination by Mr. Shujaa , DW3 stated that this was a Settlement Scheme and a person could only be allocated one plot. That his grandfather was allocated plot No. 1065 and got a title deed.
19. DW4 Reuben Kenga Ngari adopted his Witness Statement dated 4<sup>th</sup> September 2020 as his evidence and stated that he knew Samuel Kahindi Kirao (deceased)the father to the 1<sup>st</sup> Defendant since 1960.
20. He also stated that the parcel of land was distributed in 1963 whereby he was allocated plot No. 1067 and the deceased was given plot No. 1066 while plot No. 1065 belonged to Kirao Maziwa Ngombe.

### **Plaintiffs' submissions**

21. Counsel for the Plaintiff reiterated the evidence on record and submitted on the ingredients of adverse possession. Counsel stated that for a party to succeed in a claim of adverse possession, such party must prove that he or she has been in occupation for a period of 12 years uninterrupted.
22. Counsel cited the cases of *Jeffwa Nyale Kiti v Sugrabbhai Mulla Mohamed Ali*, Mombasa HCCC No.151 of 2003 (OS); *Christine Nyamalwa v Syad Walayatsha & Another*, Mombasa HCCC No. 134 of 2004(OS); *Fatuma Ahmed & 3 Others v Hassan Teje & 2 Others*, Mombasa HCCC No. 96 of 2005(OS); *Laleine Mirjangi Suleiman v Abdullahusein Mohamed Ali Norbhai*, Mombasa HCCC No. 237 of 2011 (OS); and, *Salim v Boyd & Another* [1971]EA 552, on adverse possession and submitted that the Plaintiffs had proved that they are entitled to be registered as owners.

### **2nd Defendant's Submissions**

23. Mr. Shujaa, Counsel for the 2<sup>nd</sup> Defendant submitted that from the Plaintiffs 'evidence it shows that when they entered the suit property they were not aware of that the property was registered in the 2<sup>nd</sup> Defendant's name until 30<sup>th</sup> September 2002.
24. Counsel also stated that the suit was filed on 30<sup>th</sup> January 2013 which is a period of 11 years and that the 12 year period for a claim for adverse possession had not crystallized.
25. Mr. Shujaa stated that it is trite law that time does not run merely because the owner of the land has not used it or that the land is vacant as it rests on the de facto use and occupation of the land by the intruder.
26. Counsel relied on the cases of *Titus Kigoro Munyi v Peter Mburu Kimani* [2015] eKLR and *Haro Yonde Juaje v Sadaka Nzengo Mbauro & Another*, Malindi ELC No. 106 of 2007 (OS), where the court



held that a Plaintiff cannot succeed in a claim of adverse possession where he/she does not recognize the Defendant's title.

### **Analysis And Determination**

27. From the pleadings and the evidence before the court, the only issue for determination is whether the Plaintiffs have proved that they are entitled to the suit property by way of adverse possession.

28. The ingredients of adverse possession are well settled. The law on adverse possession is provided for under the *Limitation of Actions Act*. Section 7 of the Act provides:

“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. Section 13 “(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 the purposes of 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”.

29. Section 17 extinguishes the rights of a registered owner where there is a successful claim for adverse possession. Section 38 on the other hand provides;

“(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.”

30. In the case of *Gabriel Mbui v Mukindia Maranya* [1993]eKLR, the Court held that:

“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”

31. Similarly in the case of *Wambugu vs Njuguna* [1983] KLR 172, the Court held that:

“In order 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.”



32. Looking at the above provisions and the evidence by the Plaintiffs it is clear that this is a case of disputed ownership where the Plaintiffs claim that the land belonged to them through allocation and that the 2<sup>nd</sup> Defendant acquired the land through fraud.
33. The Plaintiffs' are also not speaking from the same script. PW1 stated that their parents got 2 plots namely 1065 and 1066 and that the brother PW2 was given plot No. 1065 to hold in trust for the family. PW2 gave evidence and stated that his father sold to him plot No. 1066 in 1989. This is contradictory evidence.
34. Further it is on record that the Plaintiffs claimed that the 2<sup>nd</sup> Defendant has not been in occupation of the suit land. In India Supreme Court decision in the case of *Kamataka Board of Wakf v Government of India & Others* [2004] 10 SCC 779 the court stated thus:-
- “In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time will not affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continues. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”
35. It is trite that non-use of a property by the owner even for a long time will not affect his title, but the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. The Plaintiffs have not shown that they dispossessed the owner or intended to dispossess the owner.
36. The Plaintiffs' have challenged the title issued to the 2<sup>nd</sup> Defendant whom they alleged that when they went to follow up the issuance of title in their name they found out that it had been issued to the 2<sup>nd</sup> Defendant.
37. In the case of *Haro Yonde Juaje v Sadaka Nzengo Mbauro & Another*, Malindi ELC No. 106 of 2007 (OS), the court held as follows:-
- “I do not think prima facie, that the Plaintiff can succeed in a claim of adverse possession where, firstly, he does not recognise the title of the 1st Respondent because according to him, that title is a nullity and secondly when he does not show he dispossessed the 1st Respondent of his land or discontinued the 1st Respondent's possession.”
38. In a case of adverse possession, a party claiming land through the doctrine of adverse possession must first acknowledge the title before moving on with the proof of the claim. If you are alleging fraud then you should sue the titleholder and plead the particulars of fraud.
39. I will not belabor much in going into other issues whether the Plaintiffs have been in uninterrupted, continuous, peaceful occupation of the suit land with the contradictory evidence by the Plaintiff on record.
40. The Upshot is that the Plaintiffs have failed to prove that they are entitled to be registered as owners of the suit land by way of adverse possession. The suit is therefore dismissed with costs to the Defendants.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 25<sup>TH</sup> DAY OF OCTOBER 2023.**



**M.A. ODENY**

**JUDGE**

**NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.**

