



**Gisiri v Ng'era (Environment & Land Case 128 of 2018)  
[2023] KEELC 20941 (KLR) (13 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20941 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT & LAND CASE 128 OF 2018  
MN KULLOW, J  
OCTOBER 13, 2023**

**BETWEEN**

**JULIUS MASIA GISIRI ..... APPLICANT**

**AND**

**JULIUS RIOBA NG'ERA ..... RESPONDENT**

**JUDGMENT**

1. The Applicant filed an Originating Summons dated 24.10.2018 against the Respondent seeking a determination of the following orders;
  - i. That this Honourable Court do declare the Applicant to have acquired Adverse Possession of part of LR No. Bukira/bwisaboka/637 measuring 9.5 acres.
  - ii. That this Honourable Court be pleased to further order for excision of the portion measuring approximately 9.5 acres from L.R. No. Bukira/bwisaboka/637.
  - iii. That the Court do order that the Respondent pays the Costs of this Originating Summons.

**Applicant's Case**

2. The application is premised on the Supporting Affidavit of the Applicant herein sworn on the 23.10.2018. It is his averment that L.R. No. Bukira/bwisaboka/637 (hereinafter the suit parcel) was originally registered in name of Ngera Motongori (who is since deceased) in the year 1973. The land was later transferred and registered in the name of Maitaria Ngera Motongori who is also deceased and whose estate is represented by the Respondent herein.
3. The Applicant further avers that he and his family members have been in open, continuous and uninterrupted occupation and possession of the suit parcel for 34 years since 1984 which period is more than 12 years statutory period. He contends that he has extensively developed the suit parcel which is clearly fenced and demarcated and he has been planting crops and trees on the remaining portion.



4. It is therefore his claim that as a result of the said open and continuous occupation, he has acquired prescriptive rights over the said portion of land by dint of Adverse Possession and argued that he is entitled to be registered as an owner of the said portion.
5. During trial, the Applicant testified as PW1. It was his testimony that he has lived on the suit land since 1984 together with his family; he has developed the portion of the suit land, he has constructed a house, planted trees and has been cultivating maize, tobacco and sweet potatoes.
6. He further stated that the suit land was originally registered in the name of the Respondent's father, who is since deceased. That they both live on the suit land, he occupies a portion measuring 9.5 Acres while the Defendant who is his neighbor occupies the remaining portion. He thus maintained that his claim is in respect to the portion he occupies only.
7. He tendered into evidence PExh1 – 3 which were annexures to the Originating Summons as follows; copy of the Green Card in respect to parcel No. 637 as Pexh. 1, bundle of photographs as Pexh. 2 and 3 (a) – (e).
8. On Cross-examination, he conceded that there was a case filed at the Kisii High Court seeking his eviction but maintained that the same was dismissed and he has never been served with any eviction orders. With regards to parcel No. 509; it was his testimony that the same is owned by his father, Gisira Rioba and the same is occupied by his brothers. He reiterated that the suit land is his sole residence.
9. Joseph Magoigwa Machoku testified as PW2; it was his testimony that the Plaintiff is a clan member and has been living on the suit land since 1984, where he has constructed a house and has continued to cultivate. On cross-examination, he stated that the Applicant's father was buried on the suit land and that he was one of the elders who was called to settle the dispute between the two families.
10. Joseph Marwa Muniko testified as PW3. He stated that he was the former Area Chief. He reiterated that the land was originally registered in the name of the Respondent's deceased father. It was his testimony that the Applicant has been living on the suit land since 1984 and occupy a portion measuring about 9.5 Acres. That the suit land was divided and clearly demarcated between the Applicant and the Respondent who occupies the remaining portion.
11. On cross- examination; he stated that the suit land was divided between the two families in the year 1987 in the presence of the Respondent's father. He however conceded that that he had no document to show how the land was divided.

### **Respondent's Case**

12. The Respondent filed a Replying Affidavit sworn on 06.12.2018 in response to the claims raised in the Originating Summons. He stated that suit parcel was initially registered in his late father's name and following Succession Cause No. 8 of 2012 was transmitted to Maitaria Ngera Motongori who held the land in trust for the beneficiaries.
13. It was his claim that the Applicant, through the family Ketangiti Kisiri invaded a portion of the suit land measuring 9.5 Acres in the year 1984 and settled thereon by force. It was however his contention that his late father, Ngera Motongori, consequently instituted a suit against the family of Ketangita Kisiri through the firm of G.J Mainye & Co. Advocates, seeking orders of eviction against them vide Kisii High Court Civil Case No. 202 of 1985.
14. It is his contention that following the death of his father, they had to obtain of letters of administration and the suit is still pending to date. He thus argued that the Applicant cannot acquire the said portion of the suit land by virtue of adverse possession since there is still a case pending in a court of law.



15. It was further his claim that despite the Applicant being in open and continuous occupation of the suit land, the said occupation cannot be said to have been peaceful in light of the pending case vide No. 202 of 1985. He urged the court to dismiss the suit with costs.
16. The Respondent testified as DW1, he relied on his witness statement dated 28.05.21. It was also his testimony that the Applicant forcefully invaded the suit land in the year 1984 and built 2 semi-permanent houses. He reiterated that his deceased father instituted a suit against the Applicant immediately after his entry into the suit land in the year 1985; which suit is still pending before the court.
17. He produced the documents annexed to his Affidavit as Defense Exhibit marked DExh1 – 6 as follows; copy of Letter of Consent dated 27/08/2013 as Dexh. 1, Letter from the Chief dated 19/07/2018 as Dexh. 2, Letter dated 11/12/2002 as Dexh. 3, Copy of Green Card in respect to parcel No. 637 as Dexh. 4, letter dated 4/3/1988 as Dexh. 5 and Copy of Green Card in respect to parcel No. 509 as Dexh. 6 in further support of his case.
18. On cross- examination he confirmed that the Applicant lives on the suit land and has been in occupation since the year 1984 together with his family. It was also his claim that his deceased father did not allow the Applicant to enter the suit land and even filed a suit seeking to evict them. He however conceded that the Applicant continued living on the suit land and has remained therein to date.
19. Timona Mikwabe Monanka testified as DW2 and adopted his witness statement dated 28.05.2021 as his evidence in chief. On cross-examination, he restated that the Applicant invaded the suit land in the year 1984 and is still in possession and occupation thereof and has never been removed. It was also his testimony that the Respondent's father did not allow them to stay on the suit land.
20. He however maintained that the Applicant's occupation has never been peaceful owing to the pending suit instituted by the Respondent's father seeking to evict the Applicant from the suit land.

### **Analysis and Determination**

21. I have carefully read and considered the pleadings, the evidence adduced, rival submissions, authorities cited and the relevant provisions of law and finds that the issues arising for determination include;
  - i. Whether the Applicant has proved his claim on Adverse Possession;
  - ii. Whether the Applicant is entitled to the reliefs sought;
  - iii. Who should bear the Costs of the suit

### **I. Whether the Applicant has proved his claim on Adverse Possession**

22. The law on Adverse Possession is guided by the provisions of sections 7, 13, 16, 17 and 38 (1) and (2) of the [Limitation of Actions Act](#), section 7 of the [Land Act](#) and section 28 (h) of the [Land Registration Act](#). The combined effect of these sections is to extinguish the title of the proprietor of a land in favour of the adverse possessor at the expiry of 12 years of occupation of the suit land by virtue of Adverse Possession.
23. Adverse Possession sets off wrongfully and is intended to violate the original owner's right. An Applicant asserting a right of title based on adverse possession must demonstrate with convincing and persuasive proof that their use of the parcel in question was prohibited/non-permissive, open, with the knowledge of the actual land owner with the intention to dispossess and actual owner from the enjoyment of his land.



24. The Court of Appeal in Kisumu Civ App. No. 110 of 2016 Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] eKLR opined that a person claiming adverse possession must establish the following
- a. On what date he came into possession.
  - b. What was the nature of his possession?
  - c. Whether the fact of his possession was known to the other party.
  - d. For how long his possession has continued and
  - (e) That the possession was open and undisturbed for the requisite 12 years.
25. The registration of the suit land herein is not in dispute. It is common ground that the suit property is registered in the name of the Respondent's brother, who is since deceased; as administrator of the estate of their late father with effect from 20.08.2013. This fact was further supported by the PExh1 and Dexh4 produced by the Applicant and Respondent respectively. Thus, the suit property is registered in the name other than that of the Applicant; See Wilson Kazungu Katana and 101 others-versus-Salim Abdalla & Anor (2015) eKLR where the Court of Appeal observed in part that: -
- “ .... first, the parcel of land must be registered in the name of a person other than the applicant.....”
26. The other elements to be proved and demonstrated are possession ad occupation and whether the same was with the intention to dispossess. It is the Applicant's claim that he entered into the suit land in the year 1984 and has remained in occupation and use thereof to date, together with his family; he has constructed 2 houses on the land and has been cultivating maize, tobacco and sweet potatoes. These averments were confirmed by the Respondent at paragraph 5 of his Replying Affidavit and further buttressed by PW3, DW1 and DW2 in their testimonies in court. It is evident that the said possession and occupation was open, without secrecy, non-permissive but with the knowledge of the Respondent.
27. Consequently, it follows that time started running for purpose of limitation from the year 1984 when the Applicant entered the land and begun occupation and use of the thereof. The next question is whether the Applicant's occupation and use was with the intention to dispossess the actual owner (the Respondent's father and his estate) and whether the period of occupation was uninterrupted.
28. An Applicant is duty bound to demonstrate that his possession and occupation was with the intention to dispossess the actual owner; it has been held that mere exclusive possession even where the said possession is for more than 12 years does not necessarily amount to adverse possession.
29. The Applicant herein stated that he has constructed 2 houses on the suit land and has been cultivating maize, tobacco and sweet potatoes on the suit land. He produced Pexh. 2 and 3 in support of the said averments and the same was further confirmed by DW1 on cross-examination. The fact that the Applicant has developed the suit property and is using parts thereof for cultivation, is a demonstration of his intention to possess, animus possidendi, to the exclusion of the Respondent. This is therefore proof of exclusive control of the suit property by the Plaintiff which is an essential ingredient in establishing adverse possession.
30. The Applicant contends that his possession and occupation of the suit land has been continuous and uninterrupted, the Respondent claims that the said occupation was interrupted upon the filing of a suit in Kisii High Court vide Civil Case No. 202 of 1985 by his late father, seeking the eviction of the Applicant's family from the suit land. The Respondent however stated that the suit is yet to be



finally settled owing to the death of his father and maintained that the Applicant cannot claim adverse possession since time stopped running upon the filing of the said suit.

31. The contention that therefore arises is whether 12 years statutory period have accrued in favour of the Applicant to grant him prescriptive rights and overriding interests over the suit land. The Applicant in response to the averments by the Respondent of a pending suit, stated that the said suit was dismissed and that he has never been served with any Order of Eviction.
32. It is now settled that time for adverse possession will stop running where a true owner brings an action to recover the disputed land. In Malindi CoA Civil Appeal No. 29 of 2016: - Peter Kamau Njau vs Emmanuel Charo Tinga [2016] eKLR the Court held:

“in order to stop time which has started running, it must be demonstrated that the owner of land took positive steps to assert his right by, for instance taking out legal proceedings against the person on the land or by making an effective entry into the land.
33. Having established that limitation period for adverse possession may be stopped from running, the question that follows is whether the filing of Kisii HCCC No. 202 of 1985 stopped time from running? The Applicant contends that the said suit was dismissed and further that he has never been served with any order of eviction and has remained on the land since 1984 to date.
34. The Respondent on the other hand claims that the said suit was instituted by his late father in the year 1985 and at the time of his death, the same had not been settled. It was his contention that they lacked the requisite capacity to proceed with the case before obtaining Letters of Grant of Representation, until the year 2018 hence the delay in concluding the matter. He maintained that the case is still pending for determination and no prescriptive rights would legally accrue to the Applicant with regards to the suit land.
35. While this Court finds that indeed time stopped running upon the filing of the suit in Kisii HCCC No. 202 of 1985; there is no compelling evidence as to the existence of the pending case as alleged by the Respondent. From the evidence adduced in court, the last known information/ position relating to the said case is the letter from the Advocate dated 11/12/2002 produced as Dexh. 5. Other than the letters from their then Advocate, G.J MAINYE & Co. Advocates, adduced as Dexh. 3 and 5; no pleadings or document from the court pertaining to the case HCCC No. 202 of 1985 was furnished before this court, to enable the court clearly ascertain the averments made by the Respondent. There is no evidence to show that there were any orders issued, eviction or otherwise against the Applicant or his family.
36. To this end, this court finds that there is no proof of any pending case and since the last known position was in the year 2002, I will proceed to presume that the said suit was indeed dismissed pursuant to the provisions of Order 17 Rule 2 of the Civil Procedure Rules, 2010. The Respondent confirmed the inactivity in prosecuting the case when he testified that they could not pursue the case after the death of their father since they had no letters of administration to sue on behalf of his estate until the year 2018.
37. I therefore find that the continued occupation and use of the suit land by the Applicant from the year 2002 to the year 2018, at the time of filing the instant suit is 16 years which period is in excess of the 12 years' statutory period. The period of adverse possession therefore had already crystallized at the time of filing the suit.
38. It is on record that the Plaintiff has been in continuous open and uninterrupted possession of the suit land. There is no evidence to suggest that the Defendant sought or retook possession or the Plaintiff relinquished possession to the Defendant either from the year 1984 or from the year 2002 or at all. To



this end, I find that the Plaintiff has satisfactorily demonstrated that he has been in actual occupation and use of the suit land for more than 12 years, with the intention to dispossess. As a result of the said possession and occupation, he has acquired prescriptive rights and overriding interests over the suit land capable of registration.

39. The totality of the evidence above is that the Plaintiff has proved all elements of adverse possession to the satisfaction of this court.
40. Having held that the Applicant has proved her claim to the required standard, I consequently find that he is entitled to the reliefs sought in the Originating Summons.

### **Costs**

41. The general rule is that costs follow event. In this case, having held in favor of the Applicant, I consequently find that he is entitled to costs of the suit.

### **Conclusion**

42. The upshot of the above analysis is that the Plaintiff's claim is merited and I accordingly allow the Originating Summons dated 24.10.2018 on the following terms;
  - a. A declaration be and is hereby made that the Applicant has acquired Adverse Possession of part of L.R. No. Bukira/bwisaboka/637 measuring 9.5 acres.
  - b. An Order that the Applicant be registered as the absolute proprietor of a portion measuring 9.5 Acres to be excised from land parcel Number Bukira/bwisaboka/637 in place of the Respondent. The Respondent is hereby directed to execute the necessary transfer instruments to effect the said registration within 45 days from the date of this Judgment. In default, the Deputy Registrar is hereby directed to execute the said Transfer instruments to effect the said registration in favor of the Applicant.
  - c. The costs of the suit to be borne by the Respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 13<sup>TH</sup> DAY OF OCTOBER, 2023.**

**MOHAMMED N. KULLOW**

**JUDGE**

**In presence of; -**

Ms. Agade for the Plaintiff

No appearance for the Defendant

Court Assistant - Tom Maurice/Victor

