



**Kalume & 148 others v Jadvji & 2 others (Land Case 42 of 2019)
[2023] KEELC 20744 (KLR) (16 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20744 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
LAND CASE 42 OF 2019
EK MAKORI, J
OCTOBER 16, 2023**

BETWEEN

FRANCIS KALUME & 148 OTHERS APPLICANT

AND

KARABHAJ JADVJI 1ST RESPONDENT

SAKINABAI MOHAMMED 2ND RESPONDENT

MERALLI RAHEMTULLA 3RD RESPONDENT

JUDGMENT

1. The applicants instituted this claim seeking that they are entitled to the parcel of land reference No 414 Malindi through adverse possession. They also sought the costs of the suit.
2. Service of summonses to enter appearance was done by substituted service in the Daily Nation Newspaper since the respondents could not be found to be served personally and or physically.
3. The applicants relied on the affidavit deposed on 14th June 2019 by one Francis Kalume. This matter proceeded by way of formal proof.
4. At the hearing hereof the said Kalume who testified as PW1 stated that they have been in quiet possession of the land since time immemorial. Their grandfathers had acquired the land. Upon search at the land offices, they discovered that the respondents were the registered owners of the suit property hence this suit. The applicants contended that the respondents had never set foot on the suit property. They produced photographs to show the manner they have settled on the suit property and they called a surveyor Samuel Masaka who testified as PW5 and produced a survey report indicating the manner the applicants have demarcated and settled on the suit property. The report was produced as plaintiff exhibit No 5 (a) and (b). Philip Apiyo PW2, Gabriel Katana PW3, and Manyeso Kenga PW3 – adopted similar evidence as that of Kalume PW1.



5. The issue for the determination in this matter is whether the plaintiffs have acquired the suit property by way of adverse possession.
6. The applicants submitted that they met the test required by the many years they have stayed in the land in question without interruptions or at all from the titleholders. The cases in *Jonathan Matano Mweni v Kazungu Muthengi & 3 Others* [2017]eKLR and *Wilson Kazungu Katana & 101 Others v Salim Abdalla & Another* [2015] JELR 92847 (CA), are cited in support.
7. 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 be successful in a claim of adverse possession. The burden of proof in a claim of adverse possession reposes 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”

8. 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.”



9. The principle of adverse possession was more ornately 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.”

10. The applicants contended that they have lived on this land since their forefathers that the titleholders have never set foot on this land and that their stay has been so to say as held in *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR:

“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.”

11. The upshot is that the applicants have proved their claim on a balance of probabilities and I will proceed to give the following final Orders:

- a. The applicants be and are hereby declared as the proprietors of land reference No 414 Malindi in accordance with the subsisting subdivisions having acquired it by adverse possession.
- b. The applicants be and are hereby declared to be entitled to be registered as the absolute owner of the land in question.
- c. The cost of the suit be borne by the respondents.



**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS
16TH DAY OF OCTOBER 2023.**

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E. K. MAKORI

JUDGE

