



**Kinyuru v Githome & 3 others (Environment & Land Case 35 of 2022)
[2023] KEELC 22394 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 22394 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 35 OF 2022
EK MAKORI, J
NOVEMBER 29, 2023**

BETWEEN

EDWIN GITAU KINYURU PLAINTIFF

AND

PETER MWALIMU GITHOME 1ST DEFENDANT

MUTUA GITHOME 2ND DEFENDANT

MWASA GITHOME 3RD DEFENDANT

GIDEON MURATI 4TH DEFENDANT

JUDGMENT

1. The Plaintiff's claim relates to plot Numbers MN/III/11897, MN/III/11901, MN/III/11902, and MN/III/11905 Maweni – Kilifi County. He seeks a permanent injunction restraining the defendants from entering on or from erecting or causing to be erected thereon any structures or in any way interfering with the plaintiff's quiet enjoyment of the suit properties and any structures placed on the suit properties be demolished and eviction to issue. The plaintiff further seeks damages with costs.
2. On the other hand, the defendants in raising their defences have counterclaimed for adverse possession of the respective plots they occupy.
3. At the hearing hereof the plaintiff testified as PW1 and said that he owns plots at Kikambala - Numbers MN/III/11897, MN/III/11901, MN/III/11902, and MN/III/11905 Maweni – Kilifi County. People whom he came to learn were the defendants, invaded his land, and forcibly built on it. They have even gone ahead and fixed permanent structures on the land. He has severally reported to the police and the area administration but the persons have refused to vacate leading to the filing of this matter. The plaintiff produced several documents in support of his case – a demand letter asking the defendants to vacate the suit properties, title documents showing the original owner and transfers from one Susan



- Walowe Dena to the plaintiff, letters from the area chief summoning the defendants for arbitration, boundary establishment on the original land LR No MN/III/5066, with findings of encroachment of the parcel by the structures placed by the defendants.
4. One Dama Karisa Kazungu PW2 a village elder said that she knew the plaintiff and the original seller of the land in question. The defendant encroached onto the plaintiff's land. The issue was mediated but no resolution was found.
 5. The one Mwasya Kivisu who testified as DW1 said, that he and the other defendants have been living on the portions in dispute, which is separate and distinct from that of the plaintiff. They knew Susan Dena who sold the land to the plaintiff but that it never included the portion they occupy. They farm in that area and have built a well, which they use. They seek to be declared to have acquired the land by adverse possession. The survey by the government shows there is a boundary problem whoever sold him the land did not show him the extent of the boundary, this was a later re-establishment.
 6. Parties did write submissions with the plaintiff stating that the encroachment on the land in question started in 2019 and the defendants have not been on the ground since 1978 as alleged. They have been in occupation of other properties but invaded on this one in the year 2019. When that happened, he reported to the Kijipwe police station. Therefore, adverse possession cannot attach. The plaintiff averred that he was issued title in his name in 2019, when an adverse possession claim could start running as held in the case of *Francis Gitonga Macharia v Muiruri Waitbaka* [1998]eKLR.
 7. The plaintiff further stated from 2005 to 2019 the land was unoccupied. The plaintiff became aware of the encroachment in 2019 when he took action for ejection as stayed in the case of *Abulitsa v Albert Abulista* HCCC No 86 of 2005.
 8. The defendants submitted that the respective portions pleaded in the counterclaim be registered in their favor as pleaded. The defendants stated that by dint of Section 13 of the *Limitation of Actions Act*, they have acquired the land in question having been in occupation for over 12 years (a period spanning over 40 years). The decisions in *Wambugu v Njuguna* [1983] KLR 172, *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR, *Mbira v Gabuhi*{2002}1 EALR 137.
 9. The defendants further averred that they have chronologically shown how the families have occupied the land in question and extended the occupation to the neighboring land as their families grew bigger,
 10. The Defendants further asserted that the plaintiff was not well aware of the boundaries of the land he purchased until 2021.
 11. From the materials placed before me the issues which fall for the determination of this suit are whether the plaintiff is entitled to the grant of the orders sought, whether the defendants have succeeded in the claim for adverse possession, and who should bear the costs of this suit.
 12. It is not in dispute that the plaintiff is the registered owner of all that land described as plot Numbers MN/III/11897, MN/III/11901, MN/III/11902, and MN/III/11905 Maweni – Kilifi County. The plaintiff acquired the said land by way of purchase from one Susan Walowe Dena. It is also not disputed that the defendants do not have titles to the land they are occupying hence the issue of adverse possession. To me settling the issue of adverse possession will resolve the matter herein.



13. The burden of leading the court to ascertain adverse possession lay with the defendants. 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”

14. 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) 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, per 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.”

15. 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 had the requisite number of years.”

16. The Defendants presented evidence that they have had uninterrupted and open possession of the land for over 44 years. This claim was disputed by the plaintiff who was categorical that the defendants invaded the land in the year 2019 when he reported the issue to the area administration and police as shown by the correspondence he produced. Even if he had not settled on the land, he was monitoring what was happening on the ground. The survey, which was done, was necessitated because of the encroachment. From the suit papers by the defendants, they have been expanding the land in occupation as the families grew and the numbers increased. It cannot be said that their stay has been uninterrupted.
17. In *Chevron (k) Ltd v Harrison Charo Wa Shutu* [2016] eKLR, the Court of Appeal had this to say:

“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).”
18. The plaintiff has put evidence across stating the encroachment to his properties commenced in the year 2019. From the time he bought the properties, 2005 to 2019 when he got title documents, the properties were unoccupied. It was when he realized that illegal occupation had commenced, that he started the process of eviction by reporting to the area administration, as supported by the evidence of one Dama Karisa Kazungu PW2 who was involved in arbitration and she said the defendants became aggressive when they were told to move out of the suit property, they even built more house on the suit property. Reports were also made to the police, and finally action before this Court.
19. The defendants therefore have not established their occupation on the suit properties to have been acts that were – ‘*nec vi, nec clam, nec precario* (that is, neither by force nor secretly and without permission).’
20. There are several methods of acquisition of land in Kenya. Those modes are recognized under Section 7 of the *Land Act*:

“Methods of acquisition of title to land.

 7. land title may be acquired through— (a) allocation; (b) land adjudication process; (c) compulsory acquisition; (d) prescription; (e) settlement programs; (f) transmissions; (g) transfers; (h) long term leases exceeding twenty one years created out of private land; or (i) any other manner prescribed in an Act of Parliament.”
21. The plaintiff has shown that he purchased the land in question from one Susan Walowe Dena. The defendants have not proved they have acquired the land by the doctrine of adverse possession.



22. The upshot is that the plaintiff's claim will succeed in the manner I will propose below with costs and the counterclaim will be dismissed with costs:
- a. A permanent injunction be and is hereby issued restraining the defendants and agents or servants from encroaching onto land parcels plot Numbers MN/III/11897, MN/III/11901, MN/III/11902, and MN/III/11905 Maweni – Kilifi County.
 - b. An order be and is hereby issued that the defendants and agents or servants do within 90 days from today voluntarily remove themselves and the structures placed on parcels plot Numbers MN/III/11897, MN/III/11901, MN/III/11902, and MN/III/11905 Maweni – Kilifi County. Failure to do so the plaintiff to evict.
 - c. No award of damages as the same was not prosecuted.
 - d. The plaintiff is entitled to costs for both the plaint and counterclaim.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 29TH DAY OF NOVEMBER, 2023.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Mwinyi for the Plaintiff

Court Clerk: Happy

In the absence of:

M/s Nguyo Kariuki for the Defendants.

