



**Nzomo v Mwandoto (Environmental and Land Originating Summons  
E002 of 2021) [2023] KEELC 22646 (KLR) (27 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 22646 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2021**

**AE DENA, J**

**NOVEMBER 27, 2023**

**BETWEEN**

**SAMUEL MWOLOLO NZOMO ..... PLAINTIFF**

**AND**

**REUBEN BISHON MWANDOTO ..... RESPONDENT**

**JUDGMENT**

1. The Plaintiff instituted the suit herein vide Originating Summons dated 13/10/2021 on 14/10/2021 where he sued the defendant claiming that he has acquired 13 Acres on land known as Kwale/Gandini/210 by way of adverse possession. The Plaintiff stated that the defendant title hereto has been extinguished in accordance with Section 17 of the *Limitation of Actions Act* [Cap 22] and that the Plaintiff has hence acquired rights over the same.
2. The summons is supported by the affidavit of the Plaintiff Samuel Mwololo Nzomo. It is averred that in the year 1981 the Respondent Reuben Bishon Mwandoto visited the Plaintiff's late father and wanted to buy a parcel of land. That he purchased the same and registered it at the then land offices at Ngaluku. The land was registered as Kwale/Gandini/210. That the Respondent left the purchased parcel to the Plaintiff as a caretaker. That since 1981 to date, the Respondent has never showed up on the property.
3. The Plaintiff states that he has been on the suit property and has worked on the suit property for over 40 years by cultivating both food and cash crops and the said farming activities have been his source of livelihood. That he has further put-up permanent structures on the said land where he lives. The land measures approximately 13 acres. That the Land Registrar Kwale issued an official search over the suit property and the same confirmed the same was registered in the defendant's name. That in the circumstance it would be fair to have the Plaintiff registered as the proprietor of the land.
4. Upon the matter coming up virtually before me on 24/11/2021. It was ordered that the Originating Summons be served on the Respondent by way of advertisement in the daily nation. An affidavit



- of service dated 27/1/2022 sworn by Benedict Wambua Kenzi the Plaintiff's Counsel confirms that the respondent was served vide advertisement in the Daily Nation copy of 21/12/2021. A newspaper cutting in evidence of the same is attached to the affidavit. The Respondent did not however enter appearance and neither did he file a replying affidavit to the summons.
5. On 31/1/2022 the court gave further orders including that the Plaintiff files a ground status report of the suit property through the District Land Surveyor Kwale. Subsequently the matter was set down for hearing on 21/6/23 upon compliance.
  6. PW1 Samuel Mwololo Nzomo adopted his statement filed before court as part of his evidence in chief. He testified that he lives in Gandini, Dzombo location in Lungalunga. He testified that he has lived on the suit property but the same does not belong to him. That the property is registered in the names of the Respondent who bought the same in the year 1981 but has never come back to the property since then. The witness states that he uses the suit property for farming and produced photographs attached in the affidavit herein PExh1. Also produced were the survey map PExh2 and search dated 28/9/2021 PExh3 and survey report PExh4. He stated that the suit property does not belong to him but he desired it be given to him legally as prayed for in the Originating Summons.
  7. The court sought clarification on him being a caretaker. The plaintiff testified that the respondent had bought the land and was given the title at the land's office. That he looked for a genuine person to look after the land and found the Plaintiff. That the respondent then left and has never gone back to the property.
  8. PW2 Peter Mwema Ndile also adopted his statement filed on 14/10/2021 as part of his evidence in chief. He testified that the Plaintiff was known to him as he had been his neighbour since 1984. That he had never seen anyone on the suit property where the Plaintiff resides besides the plaintiff. He stated that the plaintiff farms on the land and has put up two houses one of them being incomplete.
  9. Upon inquiry by the court on whether PW2 used to see PW1 on the property before 1984, the witness testified that the plaintiff had entered the land in 1981 but the witness had started knowing him in 1984.
  10. PW3 Muthini Joseph Katunga testified that he had known the Plaintiff from the year 1995. He stated that he did not know the owner of the land. That the land had houses erected thereon by the Plaintiff. That he had never seen anyone attempting to remove the plaintiff from the land. On inquiry by the court on whether the witness had ever had a conversation with the plaintiff on the suit property. The witness testified that the plaintiff had told him the property was given to him by his father.
  11. With the above the Plaintiff's case was marked closed. The Respondent did not participate in the suit. The evidence of the Plaintiff was therefore uncontroverted by the Respondent.

### **Plaintiffs Submissions**

12. The Plaintiff places reliance on the provisions of Sections 17, 18, 37 and 38 of the *Limitations of Actions Act*. It is submitted that the Plaintiff has been in occupation of the suit property from 1981 to date. Computation of time thus lays on 42 years of the said occupation. That the title to the property was registered on 29<sup>th</sup> August 2000 from the review of the copy of official search dated 31/1/2023 and the one dated 28/9/2021. That even if the land was first registered on 29/8/2000 and time was to run from that period, it would then be 22 years which is beyond the statutory time.
13. It is submitted that as per the survey report, the land is clearly in use as alleged by the Plaintiff. The court is referred to the Court of Appeal decision in *Peter Mbiru Michuki v Samuel Mugo Michuki* [2014] eKLR. It submitted in complying with order 37 rule 7[2] of the *Civil Procedure Rules* a copy of the



search dated 31/1/2023 had been produced and another dated 28/9/2021 and which are conclusive proof of ownership of the land, on this reliance is placed in the case of *Johnson Kinyua v Simon Gitura Rumuri* [2011] eKLR.

### **Analysis and Determination**

14. The Court of Appeal elaborately considered the principles to be considered in cases where parties claim to be entitled to ownership by virtue of adverse possession in the case of *Wambugu -vs- Njuguna* (1983) KLR 172 where the Court held: -

“in order to acquire by the Statute 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 property that defeats the title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it”.

15. Judge Asike-Makhandia described adverse possession in *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR as follows:

Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act*, which is in these terms: -

“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.”

16. The issue for determination is whether the applicant has proved that he has acquired the suit land by way of adverse possession. It is trite law that he who alleges must prove. Section 107(i) of the *Evidence Act* provides that: -

“Whoever desires any court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

17. The Applicant states that he has been on the suit land from the year 1981 to date. That from the said time no one has ever claimed or asked him to move out of the land. This evidence is corroborated with that of all his witnesses who claim they have witnessed his occupation of the suit property from the said time to date. Further that he has been in possession openly without secrecy for the period since 1981. To get a clear picture of what was really on the ground in terms of the use and occupation of the suit property, the court ordered for a ground status report from the county surveyor and which report was produced as PExh4 during trial. A perusal of the same confirms that there is indeed use and occupation of the suit parcel by the applicant herein as alleged.

18. The applicant in cementing his claim has produced before court a copy of the official search of the suit property from the land's registry. The same is in evidence of the assertion that the land is registered in



the respondent's name. The import of a Certificate of Official Search is provided for in section 34 and 35 of the Land Registration Act. Section 34 Land Registration Act provides that;

“A person who requires an official search in respect of any parcel, shall be entitled to receive particulars of the subsisting entries in the register, certified copies of any document, the cadastral map, or plan filed in the registry upon payment of the prescribed fee.”

Section 35(2) provides (2) Every copy of or extract from a document certified by the Registrar to be a true copy or extract shall, in all proceedings, be received as prima facie evidence of the contents of the document.

19. It is trite that adverse possession claim is against the ownership and registration of a registered owner of title to the suit property and which has been proved by the certificate of official search produced before court.

20. At the hearing of the suit, PW1 confirmed his earlier statement that he was in the suit property by virtue of having been employed as a caretaker. In the case of Samuel Miki Waweru vs. Jane Njeru Richu, Civil Appeal No. 122 of 2001, the Court of Appeal held that:

“...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in Jandu v Kirpal [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted.”

21. I however note that no form of any employment contract has been presented before court on the terms of the said contract for the Plaintiff being the caretaker to the property. Availability of the contract might have led the court in confirming the existence of the relationship between the applicant and the respondent and for what period the said alleged employer employee relationship was to be in existence. Section 10 of the Employment Act lays out the fact that the burden of proving or disproving the existence of a specific term of the contract alleged shall be on the employer. The court cannot therefore make a determination based on an indefinite period of time. The respondent as alleged has never come back on the land, registration of the same took place in the year 2000. But despite such registration, efforts to evict the applicant and for the respondent to take occupation or make use of the suit property have not been demonstrated as the suit is undefended. Given the circumstances I find that the alleged care giver task given to the Plaintiff does not in anyway get in the way of his adverse possession claim.

22. The upshot is I find that the applicants' claim for adverse possession succeeds. the Court is persuaded that the Plaintiff has proved adverse possession on a balance of probability. I hereby enter judgement in favour of the Plaintiff as follows;

- i. A declaration be and is hereby made that Samuel Mwololo Nzomo, the Plaintiff herein has become entitled by adverse possession to 13acres out of land known as Kwale/Gandini/210 registered in the name of Reuben Bishon Mwandoto.
- ii. It is hereby ordered that Samuel Mwololo Nzomo be registered as the sole proprietor of 13acres of the said parcel of land Kwale/Gandini/210 in place of Reuben Bishon Mwandoto.
- iii. The costs of subdivision and registration if any shall be met by the Plaintiff.
- iv. The Deputy Registrar of this Court is mandated to so execute all the necessary documents to effect the orders of the Court in the absence of the Respondent.



v. There shall be no orders as to costs.

It is so ordered.

**JUDGEMENT DATED, SIGNED AND DELIVERED THIS 27<sup>TH</sup> DAY OF NOVEMBER 2023**

.....

**A. E. DENA**

**JUDGE.**

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of: -

N/A for the Plaintiff/Applicant

N/A for the Respondents

Mr. Daniel Disii – Court Assistant

