



**Katana & 7 others v Tayabal & 4 others (Environment & Land Case
201 of 2015) [2023] KEELC 21801 (KLR) (22 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21801 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 201 OF 2015**

MAO ODENY, J

NOVEMBER 22, 2023

**IN THE MATTER OF: LAND PARCEL PLOT NO. 21 & 22 GROUP V (WEST
OF TAKAUNGU TOWNSHIP TITLE NUMBER LT. 22 FOLIO 74 FILES)**

**IN THE MATTER OF: AN APPLICATION FOR DECLARATION THAT THE
PLAINTIFFS/ APPLICANTS HAVE OBTAINED OWNERSHIP OF SIXTEEN
(16) ACRES OF THE ABOVE SAID LAND BY WAY OF ADVERSE POSSESSION.**

BETWEEN

**BENJAMIN KAHINDI KATANA 1ST PLAINTIFF
KARISA CHAI MAINGI 2ND PLAINTIFF
KATANA CHAI MAINGI 3RD PLAINTIFF
NGUMBAO MWATETE 4TH PLAINTIFF
SAFARI NGUMBAO 5TH PLAINTIFF
KESI NGUMBAO 6TH PLAINTIFF
KAHINDI NGUMBAO 7TH PLAINTIFF
JOSEPH NGUMBAO MWATETE 8TH PLAINTIFF**

AND

**MURTAZA SHABBIR TAYABAL 1ST DEFENDANT
QUIBUDDIN SHABBIR TAYABAL 2ND DEFENDANT
MABETE PROPERTIES LTD 3RD DEFENDANT
LABAN NJENGA KAGIMBI 4TH DEFENDANT
FERDINARD NDUNDI MWAMBIRE 5TH DEFENDANT**



JUDGMENT

1. By an Amended Originating Summons dated 21st February, 2020 the Applicants sued the Respondents seeking the determination of the following questions:
 - a. Whether the Applicants themselves, their ancestors and families be declared to have become entitled by virtue of adverse possession of over 30 years all that piece of land containing an area of 16 acres or thereabout registered under the registration of Title Act (Chapter 281) Laws of Kenya in the name of Tayabali and compromised in Title L.T. 22 FOLio 74 files 3294.
 - b. Whether the Applicants are entitled to be duly registered as proprietors of suit lands by virtue of adverse possession.
 - c. Whether the registration and subdivision done by Noel Mwakiteles can prevail against the overriding interest of the Applicants.
 - d. Whether the 3rd respondent had authority dispose off the suit- land to the 3rd and 4th respondent knowing very well that the Applicants are in occupation of the land.
 - e. Whether the subsequent registration of Noel Mwatiti MwakitelE sub- division No. 21 Group is affected by the adverse claim against the 1st and 2nd Respondents.
 - f. Whether the finding by a court that the 1st Plaintiff is not a trespasser entitles the Applicant to the land.

Applicants'case

2. The Originating Summons was supported by the sworn affidavit of Benjamin Kahindi Katana who deponed that they have been in occupation of the parcel of land known as Plot No. 21 & 22 Group V (West Takaungu Township) for a period of over 30 years hence entitled to be registered as owners vide adverse possession.
3. PW1 also stated that more than 8 members have been in exclusive possession of the parcel of land containing an area of 16 acres and comprised in Title L.T 22 Folio 74 FILE 3294 situate at Takaungu within Kilifi County and the said land is used for the benefit of the Applicants.
4. PW1 Benjamin Kahindi Katana adopted his Witness Statement dated 25th September 2019 and produced the documents as PEX No. 1 to 14 and the supplementary list of documents. It was his evidence that the suit land Plot No. 21/22 Group in Takaungu Township is registered in the names of the 1st and 2nd Respondents as per the search that he carried out on 3rd March 2014.
5. PW1 stated that the photos are in respect of their houses, crops and graves and that they were born on the suit land. He further testified that they had written complaints to the Land Registry as the 3rd Respondent had claimed that the land belonged to them in 2012 but they did not show them any title.
6. On cross-examination by Mr. Muyala, he told the court that he had authority to act for all the Plaintiffs but there was no signature for No. 9 to 14. He also told the court that his father had stayed on the suit land since 1954 and that he did not know whether the land borders government land, which is a settlement scheme. He denied having invaded the suit land in 2002 and told the court that they did not get any notices from the chief to vacate. PW1 stated that he was not aware whether a survey was done on the suit land and further that he did not know Ngumbao Mwatete.



7. PW 2 Robert Karisa also adopted his statement told the court that he was born in 1952 in Kaloleni and went to the suit land in 1962 where he stays together with his family. He also stated that he buried two of his children on the suit land.
8. Upon cross examination by Mr. Muyala, he informed the court that he was born in Kaloleni then moved to Mavueni and has been working in Vipingo and further that they did not buy the suit land. The other witnesses also adopted their statements with similar evidence.

Respondents'case

9. DW1 Luke Bruno Mwatsuma adopted his statement filed in court on 27th October 2022 and produced a list of documents dated 22nd June 2022 as DEX 1 to 10. He further told the court that he together with Mr. Noel Mwatati Mwakitele now deceased and Elizabeth Wanjru Kamau established a partnership firm by the name Mabete Properties in April, 2011 and that they subsequently bought parcel of land known as Kilifi Group V/22 in 2011.
10. It was DW1's evidence that at the time of purchase, the parcel of land Kilifi Mavueni V/22 had marked beacons in place and that there were three buildings whose occupants were; Safari Ngumbao Mwatete, Kesi Ngumbao Mwatete and Kahindi Ngumbao Mwtatete which house was located at the edge of Group V/ 1683 and the Area Chief had served them with a notice to vacate.
11. He stated that in 2012, PW1 brought his sick father to the parcel of land and put up a house but prior to the construction, they had reported the matter to the Area Chief who wrote to the police and criminal charges were preferred against him. That his father was forcefully buried on that parcel of land.
12. DW1 further stated that survey works were done and they had in their possession the deed plans and all the 55 subplots were put up for sale but left out one plot for public utility for the community to have a school put up for the children.
13. It was his testimony that they have a list of 16 sub plots including plot No. 48 also known as group V/1683 which measures approximately 1.5 acres and as a result, Mavueni V/ 22 does not exist. According to the schedule presented in the statement, Plot No. 48-ref Kilifi group V/ 1683 the parcel set for public utility is the portion that the Plaintiffs have encroached.
14. On cross-examination by Mr. Tindi, he told the court that they purchased the property in 2011 and the three sons of Ngumbao were on the land. According to him, they enquired and were told that they had been issued with letters to vacate but they were still in occupation. He also told the court that they sold all the parcels as they initially acquired the land for purposes of sale and acquired the title in May 2013.
15. DW2 Rafare B. Karisa adopted his statement and told the court that he was the chief from 1991 to 2018 when he retired. He further told the court that he knew the family of Ngumbao Mwatete who were in his location while he was a Chief and that he knew them before he became a Chief. It was his testimony that Ngumbao and his family were staying at the border of the plot.
16. It was DW2's testimony that he was later informed that Benjamin Kahindi brought his sick father who died and was buried on the suit plot. Further, that he wrote a letter to the caretaker who took it to the police. He stated that some of the people vacated but the family of Ngumbao remained. He also told the court that it was not true that Benjamin had been on the land for 39 years and that he was staying on government land then moved to the suit land in 2013.
17. DW3 Wilson Kalulwe Shungu adopted his Witness Statement and informed the court that he has been working as the caretaker for Mabete Properties since 2011. He further told the court that when Mabete



Properties bought the property the sons of Ngumbao were on Plot No. 48 and not the whole parcel of land.

Plaintiffs Submissions

18. Counsel gave a background to the Plaintiff's case and submitted that a squatter becomes legally entitled to the land by operation of the doctrine of adverse possession. Counsel relied on the case of Joseph Mutafari Situma v Nicholas Makhanu Cherongo [2007] eKLR where the court held that where a squatter or the prospective purchaser of the land is in actual possession, such possession will not be terminated merely because the true owner sends such a letter requiring him to vacate the premises. The clock of 12 years will continue to tick in favour of the squatter unless and until he vacates or is evicted from the land or otherwise acknowledges the true owners title.
19. Mr. Tindi further relied on the cases of Chevron (k) Ltd Vs Harrison Charo Wa Shutu (2016) Eklr, Peter Mbiri Michuki Vs Samuel Mvau Michuki (2014) Eklr, Gulam Miriam Noordin Vs Julius Charo Karisa (2015) eKLR on adverse possession and urged the court to find that the Plaintiffs have proved that they are entitled to the suit land by operation of the law.

Defendants' submissions

20. Counsel for the Defendants similarly reiterated the evidence by the parties and submitted that the Plaintiffs have never been in occupation of the suit land for 65 years as claimed as it is on record that the 1st Plaintiff brought his ailing father on a portion No. 1638 and buried the remains forcefully.
21. Counsel further submitted that the matter was reported to the Area Chief and the Police where the 1st Plaintiff was charged with a criminal offence in 2013. Mr. Muyala drew the court's attention to a survey report by the County Surveyor dated 6th March 2020 which indicated that there were only 2 graves on the sub plot contrary to the Plaintiffs assertion.
22. Counsel relied on the cases of Joseph Macharia Kairu v Kenneth Kimani Muiruri [2021] eKLR, Gabriel Mbui Vs Mukindia Muranya [1983] eKLR, Kesi Kahindi & 23 others Vs Philip Kimeu & Another [2020]eKLR, Wilson Kazungu Katana & 101 others Vs Salim Abdalla Bakshmein & Another [2015]eKLR on adverse possession and submitted that it is not enough for an Applicant to simply state that he has been in open, continuous and uninterrupted occupation as he ought to prove the allegation.
23. It was Mr. Muyala's submission that the Plaintiffs are not sure of the plot they are claiming (plot Nos 21 or 22 of Group V) taking into consideration that the same underwent subdivisions. Counsel urged the court to find that the Plaintiffs have not met the threshold to be declared as having acquired the suit property by adverse possession.

Analysis And Determination.

24. The issue for determination is whether the Applicants have proved that they have acquired the suit parcel of land vide adverse possession.
25. In the case of Kasuve Vs Mwaani Investments Limited & 4 others 1 KLR 184, the Court of Appeal restated what a Plaintiff in a claim for Adverse Possession has to prove;

“In order to be entitled to land by Adverse Possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a



period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

26. For a claim of adverse possession to succeed a party must prove that he has been in exclusive possession of the land openly, quietly without interruption for a period of 12 years. Proof of adverse possession is a question of fact which must be proved and not inferred by the court as was held in the case of Gabriel Mbui v Mukindia Maranya [1993] eKLR, where the Court stated 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”

27. It was therefore incumbent upon the Plaintiffs to prove that they have been in possession and occupation of the suit land openly without interruption for a period of 12 years. The Plaintiffs contend that they have been in occupation of the parcel of land known as Plot No. 21 & 22 Group V (West Takaungu Township) measuring 16 acres for a period of 30 years hence entitled to be registered as owners by way of adverse possession.

28. It was the Defence case that they bought the suit parcels of land in 2011 and as at the time of purchase the Plaintiffs were not on the suit land and that the parcel of land had all its marked beacons. DW1 stated that at the time of the purchase there three buildings whose occupants were; Safari Ngumbao Mwatete, Kesi Ngumbao Mwatete and Kahindi Ngumbao Mwatete whose house was located at the edge of Group V/ 1683 and the Area Chief had served them with a letter to vacate.

29. DW1 also stated that they have a list of 16 sub plots including plot No. 48 also known as group V/1683 which measures approximately 1.5 acres and as a result, Mavueni V/ 22 does not exist. According to the schedule presented in the statement, Plot No. 48-ref Kilifi group V/ 1683 the parcel set for public utility is the portion that the Plaintiffs have encroached.

30. The statutory provision on the law of adverse possession is the [*Limitation of Actions Act*](#). Section 7 of the said Act provides that :

“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”

31. Section 13 further provides that:

“(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”.

32. Section 38(1) and (2) states;

- “(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 or lease in place of the person then registered as proprietor of the land.
- (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

33. The Applicants stated that they were born on the suit land and that have stayed on the land for 39 years. He testified that they had written complaints to the Land Registry as the 3rd Respondent had claimed that the land belonged to them in 2012 but they did not show them any title.

34. The County Surveyor’s report indicates that Plot No Group V 1638 was set aside for public utility and that it is the one currently occupied by some squatters. Further there survey report also confirmed that the suit plots had been subdivide into 55 sub plots It is trite that for a claim for adverse possession to suffice, the claimant must demonstrate that that the possession is adverse, must be actual, open, notorious, regular, continuously uninterrupted, hostile, exclusive occupancy, non-permissive and non-consensual and without license.

35. From the evidence on record, it shows that PW1 entered the suit land in 2012 when he came with his ailing father who subsequently dies and buried him without permission on the suit land. The Area Chief, DW1 and the Survey report confirmed that there were two graves on the suit land. It is also on record that the 1st Plaintiff Benjamin was arrested and charged with a criminal offence. He did not dispute these facts. The issue that the suit land was reserved for public utility as stated in the survey report and DW1’s evidence has also not been controverted by the Plaintiffs.

36. The Plaintiffs claimed that they are in occupation of 16 acres of the suit land but there was no tangible evidence to show that they occupy the same. The Defendants admitted that the only family that was on the suit land were Safari Ngumbao Mwatete, Kesi Ngumbao Mwatete and Kahindi Ngumbao Mwtatete whose house was located at the edge of Group V/ 1683 and the Area Chief had served them with a letter to vacate. There was no evidence that they had stayed on the suit land for a period of 12 years.

37. It was incumbent upon the Plaintiffs to prove their case against the Defendants with convincing evidence. In the case of *Miller v Minister of Pensions* [1947] 2 All ER 372, Lord Denning stated that:

“ Thus proof on a balance of preponderance or probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained” .



38. Further in the case of Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others (2018) eKLR, where the Court enumerated the required elements to prove adverse possession as follows:

“Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12years as espoused in the Latin maxim, nec vi nec clam nec precario.”

39. I have considered the pleadings, the evidence, and the submissions by counsel and find that the Plaintiffs have not proved that they have acquired the suit land by way of adverse possession. The case is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF NOVEMBER 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.

