



**Mwita & 15 others v Maswi (Environment & Land Case 239 of 2017)
[2023] KEELC 22582 (KLR) (29 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22582 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 239 OF 2017
MN KULLOW, J
DECEMBER 29, 2023**

BETWEEN

MAKABWA MWITA & 15 OTHERS PLAINTIFF

AND

JOSEPH MARWA MASWI DEFENDANT

JUDGMENT

1. This judgment relates to ELC Case No. 239 of 2017 (formerly Kisii ELC case No. 353 of 2016 O.S) and Kehancha Principal Magistrates Court ELC Case No. 13 of 2019 (formerly PMCC No. 6 of 2015) which were consolidated vide an Order of the Court issued on the 22/7/2020, as they both relate to the same subject matter. It was agreed that ELC Case No. 239 of 2017 would be the lead file.
2. The Plaintiffs herein commenced this suit by way of an Originating Summons dated 31/10/2016 and Amended on 14th December, 2020 against the Defendant for a determination of the following questions: -
 - i. Whether the Defendant's right to recover a portion measuring 17.93Ha in total of L.R. No. Nyabasi/ Bomerani/448 currently registered in the Defendant's name is barred under the *Limitation of Actions Act* Cap 22 Laws of Kenya and the Defendant's title thereto extinguished on account of Adverse Possession by the Plaintiff jointly and severally which Adverse Possession has been for a period exceeding 40 years and the same has been open, peaceful, continuous and uninterrupted.
 - ii. Whether upon finding in favor of the Plaintiffs in paragraph 1 above herein, the Plaintiffs jointly and severally are entitled to be the registered owners of the respective portions they have acquired by way of Adverse Possession which portions measure 17.93Ha in total of L.R. No. Nyabasi/ Bomerani/448 which measures 25.5Ha.



- iii. Whether upon being registered as owners of L.R. No. Nyabasi/ Bomerani/448 measuring 25.5Ha on 27th August 2013, the Defendant holds the 17.93Ha in trust for the Plaintiffs who had all along acquired title thereof by way of adverse possession.
 - iv. Whether the Defendant should therefore be ordered to transfer 17.93Ha of L.R. No. Nyabasi/ Bomerani/448 to the Plaintiffs jointly and severally and in default the Deputy Registrar to execute the subdivision and transfer documents in favour of the Plaintiffs jointly and severally.
 - v. Costs of this suit be borne by the Defendant.
 - vi. Any other relief.
3. The Amended Originating Summons is premised on the 8 grounds thereon and on the 1st Plaintiff's Supporting Affidavit sworn on 14.12.2020, on his own behalf and on behalf of 2nd – 16th Plaintiffs. He avers that the Plaintiffs are the registered owners in common of parcel No. 447 which borders the suit land No. 448 which is registered in the name of the Defendant. Both parcels of land are ancestral lands which both families have used for over 4 decades.
 4. It is their claim that they only recently came to realize a portion of the suit land which they occupy and use measuring approx. 17.93Ha was shown in the survey records as forming part of the suit land No. 448 while on the ground the same is clearly known as part of No. 447 which is registered in the names of the Plaintiffs.
 5. They contend that they were born and raised on the portion of the suit land and they have established their homes and lived thereon for over 40 years. That the said occupation and use has been peaceful and uninterrupted for over 40 years. They further relied on the Survey Report dated 25/10/2019 in support of their control and occupation claims of the said portion measuring 17.93Ha.
 6. They thus maintained that owing to their occupation and use of the said portion for a period of over 40 years; the Defendant's title over the said portion has extinguished by prescription of time and/or Adverse Possession. Consequently, the Defendant holds the suit land in trust for the plaintiffs. They urged the court to allow the suit and grant the orders sought.
 7. The Amended Originating Summons was opposed; the Defendant filed a Replying Affidavit sworn on 18th December, 2020 in response to the allegations levelled against him. He averred that he is the registered proprietor of the suit parcel No. 448 and accused the Plaintiffs for trespassing into a portion of his rightful land. That as a result of the Plaintiffs' acts of trespass into his land; he filed a case against them vide Kehancha PMCC No. 6 of 2015 in the year 2015, which case had been ongoing until an Order of consolidation was made in the instant suit.
 8. In further support of his trespass claims, it was his contention that a consent was recorded by both advocates on record in the PMCC No. 6 of 2015 file, for a land surveyor to visit the 2 parcels of land in dispute No. 447 and 448. The survey exercise was done and a report was thereafter filed in court. The effect of the said report was that the proprietors of parcel No. 447 had encroached onto a portion of parcel No. 448 measuring approx. 17.93Ha.
 9. In response to the claims of Adverse Possession raised by the Plaintiffs; it was his contention that he was only registered as the proprietor of land parcel No. 448 on 18/10/2001 and he obtained his title thereto on 23/10/2013 and thus the claims by the Plaintiffs against him is premature. He consequently dismissed the plaintiffs' suit as not having met the legal threshold required in a claim of adverse possession.



10. Further, he deposed that the Plaintiff's claims for adverse possession were extinguished when he filed his case on trespass against the Plaintiffs in the Kehancha case.
11. In conclusion, he dismissed the case as being highly prejudicial to him and being brought in bad faith. He urged the court to dismiss the Plaintiffs' suit and to order/ direct the plaintiffs to stop trespassing into his land.
12. The instant suit was consolidated with Kehancha PMELC No. 13 of 2019 (formerly Kehancha PMCC No. 6 of 2015); in which the Defendant herein had sued a section of the plaintiffs in the instant case (2nd, 5th, 1st, 7th, 8th and 12th Plaintiffs) for trespass over the suit parcel herein. The Plaintiff filed a Plaint dated 13th February, 2015 against the defendants seeking the following orders: -
 - i. A Permanent Injunction to issue restraining the Defendants jointly and severally from trespassing, occupying, cultivating, grazing and/or carrying out any dealings on L.R. No. Nyabasi/ Bomerani/ 448 and an eviction order to issue therefrom.
 - ii. Costs of this suit.
 - iii. Interest on (b) at the current court rates.
 - iv. Any other relief that the court may deem fit.
13. It was the Plaintiff's case (Joseph Maroa Maswi) that he is the registered owner of the suit parcel No. Nyabasi/ Bomerani/448. It was his claim that sometimes in the year 2009; the Defendants jointly and severally trespassed into his land and have since continued causing wastage thereon, that the 6th Defendant (Marwa Gibahi) has even erected a housing structure and continues to reside there with his family without the Plaintiff's consent. He thereafter outlined the particulars of trespass.
14. It was his contention that as a result of the aforesaid acts of trespass, he has been deprived use of the said parcel as the same is being occupied by the defendants. He therefore urged the court to allow the suit and grant the orders of eviction and permanent injunction as sought.
15. The suit was opposed; the 1st- 6th Defendants filed a Joint Statement of Defence dated 05/08/2015 wherein they denied the allegations of trespass made against them by the Plaintiff.
16. It was their contention that their occupation and use of the suit land is lawful as they have been in effective, uninterrupted occupation and use of the suit land for a period of over 30 years and the Plaintiff's right thus became extinguished by effluxion of time.
17. They further stated that their main defence to the suit touches on matters of adverse possession; hence the filing of ELC Case No. 239 of 2017 (O.S). They thus urged the court to dismiss the Plaintiff's suit with costs.

Trial

18. The Plaintiffs' case proceeded for hearing on 17/06/2021. The 1st Plaintiff testified as PW1, on his own behalf and on behalf of the other plaintiffs. He stated that even though the suit land No. 448 is registered in the Defendant's name; he was born in the year 1949, bred thereon and has lived on the suit land since then, together with the other plaintiffs, who are his brothers and they were all born and bred on the suit land.
19. It was his testimony that they have built on the suit land and the defendant never protested their possession and occupation thereon.



20. He also produced the following documents as exhibits in support of their case as follows;
 - a. Copy of the extract of the register of the suit land No. 448 – Pexh. 1
 - b. Bundle of photographs – Pexh. 2 (a) – (q)
 - c. Survey Report – Pexh. 3
21. On cross-examination, he stated that he has lived on the suit land for the past 70 years though he conceded that he also owns parcel No. 447 which borders the suit land. He further stated that they are 8 sons and they all live on the 40 Acres of the suit land.
22. He further conceded that he did not have any documents to reveal that they occupy the suit land. It was his contention that the defendant has never owned the suit land until recently, when he instituted the Kehancha case on trespass. It was also his testimony that they live on parcel No. 447 and not on the suit land and further that they have not shown that they have planted trees and cultivate the suit land.
23. On re-examination, he clarified that they discovered that the suit land is registered in the name of the defendant in the Kehancha PMCC No. 13 of 2019. He further stated that PMFI 3 shows their occupation and possession of the suit land by the plaintiffs.
24. Nyambari Mwita, the 5th Plaintiff testified as PW2; he adopted his witness statement dated 11/06/2021 as his testimony in chief. It was also his testimony that he was born on the suit land No. 448 and he has lived thereon for over 57 years. That he has lived with his family on the suit land peacefully until 2019, when they were informed by the surveyor who visited the land that the land belonged to the defendant.
25. It was also his testimony that he inherited the land from his late father, Mwita Wambura. That all the plaintiffs live on the suit land and they occupy a portion measuring approx. 17.93Ha. He thus urged the court to order that the land be registered in their plaintiffs since everyone knows that the land belongs to them.
26. On cross-examination, he conceded that the Kehancha case on trespass was filed before the instant suit. He admitted that as per the Survey Report dated 25/10/2019 showed that they had indeed trespassed into the Defendant's parcel of land.
27. He further conceded that the parcel of land that he inherited from his late father was No. 447 while the suit land is parcel No. 448, though both parcels share a boundary. It was also his testimony that they had all along known that they were living on their late father's land until 2019 when they were informed by the Surveyor that they were staying on the defendant's land.
28. On re-examination, he reiterated that he has lived on the suit land for about 50 years and that the portion they occupy is known to belong to them.
29. Emmanuel Makabwa, the 3rd Plaintiff testified as PW3; he adopted his witness statement dated 11/6/2021 as his evidence in chief. It was also his testimony that he has lived on the suit land for the past 66 years, since he was born. He maintained that they live on the suit land together with their families peacefully and without the defendant's consent to live on the land.
30. He further stated that he only came to know about the defendant in 2015, when the defendant filed a case in Kehancha on trespass and the surveyor visited the parcels of land in 2019. It was his contention that the bundle of photographs shows their homesteads and are proof of their possession.



31. On cross-examination, he stated that they live on the shaded portion on the survey report. He however stated that the report does not state for how long they have lived on the disputed portion of the suit land.
32. On re-examination, he restated that he was given the suit land by his late father and maintained that they did not occupy the land forcefully.
33. Francis Gibai, the 12th Plaintiff testified as PW4; he adopted his witness statement dated 11/6/2021 as his evidence in chief. He further stated that he bought a portion of the suit land measuring approx. 5 Acres sometimes in the year 1975, from one Mwita Wambura who is since deceased. That he has settled on the said portion from 1975 to date.
34. It was his testimony that the defendant, who is also his neighbour, was not around when he purchased the suit land and only went to the suit land in the year 2004. That the boundary of the suit land has remained how it was since 1975 and has lived on the land peacefully.
35. He also averred that at the time of filing the Kehancha Civil case, they had lived on the suit land for over 40 years. He relied on photo No. 2 which showed his home and the trees that he had planted in 1983.
36. On cross- examination, he restated that he bought a portion of the suit land in the year 1975 but conceded that he did not know when the defendant was registered as the owner of the said land. He also conceded that he had not shown or produced any sale agreement before the court. He reiterated that he lives on the parcel that was rightfully sold to him and he did not know that he had trespassed into the suit land. The Plaintiffs thereafter closed their case.
37. The matter proceeded for Defence Hearing on 04/10/2023. The Defendant testified as DW1, he adopted his witness statement and Replying Affidavit as his evidence in chief.
38. It was also his testimony that he is the owner of the suit land and he obtained title thereto in the year 2013. He claimed that the photographs exhibited by the plaintiffs are on their parcels of land No. 447. He dismissed the claims by the plaintiffs that they have lived on the suit land for over 12 years.
39. It was his contention that the case filed in Kehancha vide PMCC No. 13 of 2019 was to determine the boundary between the 2 parcels Nos. 447 and 448. The same was heard and by consent, the court directed the county surveyor to visit the 2 parcels of land in dispute for purposes of determining the boundary; the same was done and a report duly filed in court. The said report showed that the plaintiffs had encroached into parcel No. 448.
40. He produced the annexures on his Replying Affidavit as DExhibits 1- 4 in support of his case as follows; copy of the Title Deed of the suit land No. 448 as Dexh. 1, copy of the Plaint in Kehancha PMCC No. 6 of 2015 as Dexh. 2, copy of the consent order dated 12/9/2019 as Dexh.3 and copy of the Survey Report dated 25/10/2019 as Dexh. 4.
41. On cross- examination; he maintained that the survey showed that the plaintiffs had encroached into his land and lives on a portion measuring approx. 17.93Ha. He however dismissed the claims by the plaintiffs that they had lived on the suit land for over 30 years.
42. He stated that the suit land was originally registered in the name of his late grandfather and the same is a family land. He also maintained that the plaintiffs were not living on the land at the time the same was registered in his name. The defence thereafter closed their case.
43. Upon close of the defence case, I issued directions on the filing of final submissions. Both parties filed their rival submissions and authorities which I have read and considered;



Plaintiffs' Submissions

44. Mr. Kisera, counsel for the Plaintiffs submitted on one main issue; whether the Plaintiffs had proven their claim on adverse possession. Counsel submitted that the plaintiffs proved that they are in possession of the suit land where they have lived all their lives and built their homes as evidenced by the photographs produced before the court. That they also confirmed that they carry out cultivation and animal keeping besides having planted trees thereon.
45. It was also his contention that the Survey Report dated 25/10/2019, which was produced as an exhibit, confirmed that the plaintiffs are in actual occupation of a portion of the suit measuring 17.93Ha or 44 Acres.
46. He maintained that the Plaintiffs' possession has been open and without license or permission of the defendant and that the same was with the sole intention to have the suit land. It was his assertion that the long period of possession can be inferred from the fact that in 1975, the Plaintiff's family sold a portion of the suit land to the 12th Plaintiff, where he built his permanent home and has remained therein from 1975 to date.
47. Further, he dismissed the allegation of trespass/ encroachment made by the defendant and which allegedly took place in the year 2009. It was his submission that at the time when the defendant was registered as the owner of the suit land in 2013; the plaintiffs' entitlement over the said portion had already crystallized. He thus urged the court to find in favor of the plaintiffs.

Defendant's Submissions

48. Mr. Singei, counsel for the Defendant submitted on one main issue of whether the plaintiffs met the legal threshold to support their claim for adverse possession. It was his submission that when the defendant lodged the Kehancha suit vide ELC Case No. 13 of 2019; the same interrupted the plaintiffs' occupation and disrupted the peace. The same was also an indication of the defendant asserting his rights over the trespassed portion.
49. It was his contention that no proof had been fronted by the plaintiffs to avert the defendant's claim that they entered the suit land in the year 2009. In addition, at the time of filing the Kehancha suit and seeking an order for eviction, the plaintiffs were merely 6 years on the land and thus the legal interruption before the statutory period of 12 years was achieved.
50. He further submitted that the plaintiffs had relied on a blanket survey report that states that they had trespassed onto 17.93Ha of the Defendant's land; whereas none of the plaintiffs had put up a claim to the specific portion of the said land, it is not pleaded or proved which plaintiff is entitled to what portion. There was also no specific proof of how long each specific plaintiff had stayed on the disputed portion adversely.
51. In conclusion, he urged the court to dismiss the plaintiffs claim of adverse possession and allow his claim of trespass with costs.

Analysis and Determination

52. I have carefully considered the pleadings filed in both suits and the various responses filed thereto, the respective exhibits produced and the rival submissions in totality. On that account, it is my considered opinion that the following issues arise for determination: -



- a. Whether the Plaintiffs in ELC Case No. 239 of 2017 have proved their claim of Adverse Possession to the required standard and are entitled to the reliefs sought.
- b. Whether the Plaintiff in Kehancha PMELC Case No. 13 of 2019 has proved his claim on trespass to the required standard and is entitled to the reliefs sought.
- c. Who should bear the costs of the respective suits.

I. Whether the Plaintiffs in ELC Case No. 239 of 2017 have proved their claim of Adverse Possession to the required standard and are entitled to the reliefs sought.

53. Adverse possession is essentially a situation where a person takes possession of land and asserts his rights over it and the person having title and rights to the said land neglects to act against such person in assertion of his title for a period of twelve (12) years.
54. The legal framework for adverse possession is provided in Sections 7, 13, 17 and 38 (1) and (2) of the Limitation of Actions Act and Section 28 (h) of the Land Registration Act.
55. The requirements for adverse possession were reiterated in Kisumu Civil Appeal No. 27 of 2013 Samuel Kihamba v Mary Mbaisi [2015] eKLR where the court held as follows: -

“Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land” (emphasis added)
56. It is not in dispute that the suit land herein is registered in the name of the Defendant, Joseph Marwa Maswi. This has been confirmed in the pleadings filed in court, Pexh. 1 produced by the Plaintiffs as well as Dexh. 1 produced by the Defendant. With the guiding principles in a claim of adverse possession in mind, I will proceed to address the issue of possession and occupation in determining whether the Plaintiffs have proved their claim to the required standard.
57. As outlined above, possession and occupation must be open, continuous and uninterrupted for a period of 12 years, with the intention to dispossess the actual owner.
58. The Plaintiffs herein contend that they have been in occupation and use of a portion of the suit land measuring 17.93Ha since they were born; that they have been raised on the suit land and they all have their families thereon, they have built their homes and do cultivation as well.
59. It is also their claim that their parcel of land is No. 447, which borders the suit parcel No. 448 and the two parcels are ancestral lands which have been occupied by the respective families for more than 4 decades. It is the Plaintiffs position that their occupation and use of a portion of the suit land has been with the knowledge that the said portion formed part of their land parcel No. 447 and they only recently found out that the said portion formed part of the suit parcel No. 448, which is registered in the name of the Defendant.
60. The question that therefore follows is whether the Plaintiffs occupation and use of a portion of the suit land can be said to have been adverse and with the intention to dispossess the actual land owner/ title holder. It is the testimony of PW1, 2, 3 and 4 that they only recently learnt that the portion of the suit land measuring 17.93Ha formed part of the defendant’s land No. 448, when the Defendant filed the Kehancha case and when the Surveyor visited both parcels of land in the year 2019.



61. The defendant on the other hand maintained that he only became registered as the owner of the suit land and obtained the title deed thereto in the year 2013 and therefore at the time of filing the suit, the plaintiff's claim against him of adverse possession was premature. Respectfully, this is not the right position. As established by a long line of authorities; adverse possession is a fact that is observed on the land and not on the title deed. Thus, the fact that the defendant only became registered as the proprietor and obtained title in the year 2013 is irrelevant. All the plaintiffs need to prove is that they have been in occupation and possession of the suit land and to demonstrate the nature of their possession and use.
62. On the nature of the Plaintiffs' possession, occupation and use of the suit parcel; it is my finding that from the plaintiffs' own admission that they only recently learnt that the portion of the suit land which they occupy is part of the suit land No. 448, it cannot be said that their long possession of over 40 years was with the intention to dispossess the actual owner when they actually occupied the same on the belief that the said portion formed part of their late father's land which they inherited.
63. As held in the court of appeal case above; possession and occupation must be with the intention to dispossess, *animus possidendi*; and the same must be for the statutory period of 12 years. This has not been established in the instant case. Therefore, even though the Plaintiffs produced Pexh. 2 (a) – (q) as proof of the various activities conducted on the suit land, the same is not proof of adverse possession. As *Kuloba J. (as he then was)* held in the case of *Nairobi Civ No. 283 of 1990 Gabriel Mbui v Mukindia Maranya [1993] eKLR*; long possession is not necessarily adverse possession. The adverse character of 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. The onus is thus on the Plaintiffs to demonstrate when their occupation and use of the suit land became adverse.
64. The totality of the foregoing is that the Plaintiffs have failed to prove their claim on adverse possession to the required standard and are therefore not entitled to the reliefs sought. Consequently, the Amended Originating Summons dated 4th December, 2020 is hereby dismissed with no orders as to costs.

II. Whether the Plaintiff in Kehancha PMELC Case No. 13 of 2019 has proved his claim on trespass to the required standard and is entitled to the reliefs sought.

65. The Plaintiff's claim in Kehancha PMELC No. 13 of 2019 (formerly Kehancha PMCC No. 6 of 2015), is that sometimes in the year 2009, the Defendants trespassed into a portion of his rightful parcel of land No. Nyabasi/ Bomerani/ 448, without consent and/or justification and have been causing wanton wastage and destruction of the suit land, thereby denying him use of the said portion. He outlined the particulars of trespass and loss suffered.
66. The Defendants on the other hand denied the allegations of trespass levelled against them in respect to a portion of the suit land measuring approx. 17.93Ha. It is their contention that their occupation and use of the portion of the suit land has been open and uninterrupted for a period of over 30 years and the plaintiff's rights thereto have therefore been extinguished by effluxion of time.
67. I have keenly considered the rival claims herein. It is the Plaintiff's claim that he is the rightful owner of the suit parcel No. 448 and he produced a copy of the Title Deed (Dexh.1) as proof of his ownership claims. However, before delving into the merit of the claim of trespass, it is important to first deal with the issue of limitation of time and determine whether the claim as filed is time barred or not.



68. Section 4(2) of the *Limitation of Actions Act* on actions founded on tort provides as follows: -

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:” Emphasis mine

69. From a look at the Complaint dated 13th February, 2015; it is not in dispute that the cause of action arose sometime in the year 2009. The suit was instituted in the year 2015, which is almost 6 years later after the cause of action had accrued. This fact has been reiterated by the Defendant in his testimony and written submissions where he stated that at the time of filing the suit and seeking an order of eviction against the Plaintiffs, they had stayed on the suit land for a period of 6 years.

70. In *Iga vs. Makerere University* [1972] EA it was held:

“A claim which is barred by limitation is a claim barred by law. A reading of the provisions of Section 3 and 4 of the Limitations Act Cap 70 together with Order 7 Rule 6 of the Civil Procedure Rule of Uganda which has same provisions with Limitations Act of Kenya seems clear that unless the applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the court cannot grant the remedy or relief.”

71. Issues of statute of limitation go to the root of the case and the jurisdiction of this court to entertain the suit before it. As held in the aforementioned case, once it has been established that a matter is statutorily time barred, the jurisdiction of the court is ousted and the court must consequently drop its tools.

Conclusion

72. The upshot of the above is that the Plaintiffs have failed to prove their case on adverse possession on a balance of probabilities and consequently, the Amended Originating Summons dated 14th December, 2020 is dismissed with no orders as to costs to the Defendant/ Respondent.

73. Further, with regards to *Kehancha PMELC No. 13 of 2019*, I find that the Defendant's claim on trespass is time barred and this court consequently lacks the requisite jurisdiction to entertain the suit as filed. In the premises therefore, I accordingly find that the Complaint dated 13th February, 2015 is time barred and the same is hereby struck out with no orders as to costs. It is so ordered!

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 29TH DAY OF DECEMBER, 2023.

MOHAMMED N. KULLOW

JUDGE

In presence of; -

No appearance for the Plaintiff

No appearance for the Defendant

Court Assistants - Tom Maurice/ Victor

