



**Ageyo & another v Riunga & 5 others (Environment & Land Case
E019 of 2021) [2023] KEELC 22504 (KLR) (18 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22504 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E019 OF 2021
EK WABWOTO, J
DECEMBER 18, 2023**

BETWEEN

STANLEY ANYAMBA AGEYO 1ST APPLICANT

JAMES ZOLLO MOGAKA 2ND APPLICANT

AND

**MUSA MATU RIUNGA ALIAS MUSA MATU JOSHUA
RIUNGA 1ST RESPONDENT**

RICHARD MAINA 2ND RESPONDENT

DIRECTORS OF SURVEY 3RD RESPONDENT

CITY COUNTY OF NAIROBI 4TH RESPONDENT

CHIEF LAND REGISTRAR 5TH RESPONDENT

ATTORNEY GENERAL 6TH RESPONDENT

JUDGMENT

1. The Applicants sought the following reliefs vide their Amended Originating Summons dated April 30, 2021;
 - a. That the respondents Title, interest, or claim over L.R. No. 5842/15 have been extinguished and the legal Title shall vest in Stanley Anyamba Ageyo and James Zollo Mogaka who have been in adverse possession of the said parcel of land.
 - b. That the Registrar of Lands, Nairobi be and is hereby ordered to cancel the existing title and to register and issue a new title Deed for the said parcel of land in the names of Stanley Anyamba Ageyo and James Zollo Mogaka.



- C. That the costs of this summons be provided for.
2. The Amended Originating Summons was supported by the Affidavits of Stanley Anyamba and James Mogaka deponed on 30th April, 2023. The same was opposed by the Respondents. The 3rd, 5th and 6th Respondents filed grounds of opposition. The grounds of opposition were dated December 3, 2021. The 4th Respondent filed a Replying Affidavit sworn by Abwao Erick Odhiambo on October 4, 2021.
 3. The case of the Applicants was that they have occupied the suit premises for a period of over 15 years adverse to the interest of the Respondents being on the land uninterrupted since 1998.
 4. It was averred that the Applicants have been on the land since 1998 having been in continuous occupation without any interruption. The 1st and 2nd Respondents has knowledge of the Applicants' possession of the suit premises for the said period and have never made any attempt to claim the land from the Applicants. The 1st and 2nd Respondents have never been on the suit land and are aware that the Applicants' possession has been and continues adverse to that of the Respondents.
 5. It was also averred that the Respondents have all along known of the Applicants interest in the land and their continued occupation. Having been in possession of the land known as Land Reference Number 5842/15 exclusively and adverse to the 1st and 2nd Respondents for a period of over 15 years, the title has been extinguished and as the adverse possessor, the Applicants have the right to legal recognition as the owner of the property.
 6. The case of the 3rd, 5th and 6th Respondents was the Applicant has not demonstrated actual, visible, exclusive and open adverse possession.
 7. It was also contended that the Applicant has failed to satisfy the necessary ingredients for the application of the doctrine of adverse possession and their suit should fail.
 8. It was further contended that the orders sought are untenable since no evidence has been produced before this court to demonstrate uninterrupted possession and that the occupation that is open and peaceful by a person on the land under a colour of title has not been satisfied.
 9. It was also contended that the application and Originating Summons is not supported by any evidence of probative value and that there is no evidence before court to demonstrate that the 1st and 2nd Defendants knew they were being ousted, dispossessed and parted with the possession.
 10. It was further contended that the Applicants have not raised a prima facie case for granting of orders sought and that a certificate of title operates as *prima facie* proof that the 1st Respondent is an absolute and indefeasible owner of the suit property.
 11. The 4th Respondent's case was that as per the records held with the 4th Respondent, the property rates of the suit property is paid by J. Musa Riunga, the 1st Respondent herein.
 12. The 4th Respondent averred that as at September 23, 2021, the property rates for L.R. 5842/15 have been paid in full and there is no outstanding amount.
 13. It was also averred that the applicants have failed to prove continuous occupation of the suit property for a period of 12 years to be entitled to the orders sought.
 14. The 1st and 2nd respondents never filed any response nor participated in the trial despite service.



Evidence

15. During trial, Stanley Anyamba Ageyo testified as PW1 while James Zollo Mogaka testified as PW2. PW1 stated that he had been in the property for over 15 years and the suit property is located in Karen. He also stated that he has tilled the land and has planted maize and other crops. It was his testimony that the house is connected with electricity and he has been paying the electricity bills as and when they fall due. It was also his testimony that he came to the land when it was bushy. He later came to know that the land belongs to the 1st and 2nd Respondents, and that no rates had been paid by them. He stated that from the records that he obtained, the outstanding rates were about Kshs 7,672,317.00 which has been pending for over 12 years. It was also his testimony that no person has ever laid claim to the property. He also produced the following documents in his evidence in chief in support of the Applicants case:
- i. Letter from the Chief Land Registrar dated October 3, 2022,
 - ii. Property rates payment for L.R. Number 5842/15 dated September 21, 2022,
 - iii. Transference document from the Register of Government of lands dated June 5, 2001.
 - iv. Memorandum of registration of transfer of lands dated November 16, 1970,
 - v. Property rates statement dated September 23, 2022,
 - vi. Letter to the Chief Registrar dated September 29, 2022,
 - vii. Indenture dated November 16, 1970,
 - viii. Photographs of L.R. Number 5842/15.
16. On Cross-examination by Counsel for the 3rd, 5th and 6th Respondents, he stated that he entered into the land in 1998. He also stated that from the payment rates request that was produced in Court, it did not show if any payment had been made for the last 10 years. He also stated that he has never met Musa Riunga.
17. On Cross-examination by counsel for the 4th Respondent, he stated that he came to the land in 1998 which was about 24 years ago. He also stated that he had put up a Mabati house on the land and the house has 6 rooms. He further stated that the records show that J. Musa Riunga is the owner of the property. He also stated that he had no records to show that Richard Maina is the owner of the property. He also stated that the indenture has 14 names indicated as the owners of the land measuring 140 acres. He also stated that the Indenture shows the suit property L.R. 5842/15.
18. When re-examined, he stated that the amount of the outstanding rates included interest which had been levied for the over 12 year's period. He also stated that he was only claiming 10 acres and not the entire 140 acres.
19. Upon close of the Applicants case, none of the Respondent called any witness during the trial of the suit despite being given an opportunity to do so. The Respondents case was subsequently closed without any single witness testifying on their behalf.

The Site Visit

20. After hearing of the Applicants case, a site visit was conducted pursuant to an application made by the Applicants. The site visit was undertaken by the Deputy Registrar of this Court and in the presence of Ms. Purity Makori, counsel for the Applicants and Ms. Karanja counsel for the 4th Respondent. The



Deputy Registrar filed a report dated May 29, 2023 for consideration by this Court. In the said report, it was stated that the property is located at Kerarapon, Karen Area, measuring about 10 acres. It was also stated that it was fenced with barbed wire and concrete poles. It was also largely covered by maize plantation and vegetable. Both the Applicants live on the suit property with their respective families. The report also had photos demonstrating the structures and crops existing in the suit property.

The Applicants Submissions:

21. The Applicants filed written submissions dated October 13, 2023. Counsel submitted on the following issues:
 - i. Whether the Applicants have stayed and lived on L.R. No. 5842/15, and have made a case of adverse possession against the 1st and 2nd Respondents.
 - ii. Whether the Applicants have made out a case for cancellation of title L.R. No. 5824/15 previously in the name of Joshua Musa Irunga and now in the name of Richard Maina and the same be registered in the name of Stanley Anyamba Ageyo and James Zollo Mogaka.
 - iii. Costs.
22. It was submitted that the evidence adduced before Court shows that the Applicants have been in occupation of the land more than 25 years. It was also submitted that the evidence on record also showed that the land originally belonged to John Lionel Poretherton who then transferred it to Joshua Musa Riunga on the 16th November, 1970. That the land was later transferred to Richard Musa on 8th July, 2004 when the Applicants were already in possession. It was further submitted that the Applicants have made a case for adverse possession against the 1st and 2nd Respondents and urged the Court to grant the reliefs sought. Reliance was made to the case of *Tabitha Waittherero Kimani v Joshua Ng'ang'a* [2017] eKLR and section 7, 17 and 38 of the *Limitation of Actions Act*.
23. It was also submitted that the Applicants have proved all the ingredients of Adverse possession and the consequence thereto must follow being that the title to the land known as L.R. 5842/15 originally in the name of Joshua Musa Riunga and now in the name of Richard Maina Musa be extinguished and the title be registered in the names of the Applicants. The Applicants also urged this Court to grant them costs of the suit.

The 4th Respondent' written Submissions

24. The 4th Respondent filed written submissions dated November 10, 2023. Counsel submitted on the following issues:
 - i. Whether the Applicants have been in open, continuous and uninterrupted possession of the suit property and the nature of activities and or occupation of the suit property have extinguished the 1st and 2nd Respondents' right to the suit property.
 - ii. Whether the Applicants are entitled to the reliefs sought.
25. Relying on the cases of *Benjamin Kamau Muma & others v Gladys Njeri* [CA No. 213 of 1996], *Jackson Mwangi Wambui v John Kiereini Kirika* [2021] eKLR and *Stewart Jalango Agot v Fredrick Odhiambo Chiambe* [2022] eKLR, it was submitted that the main element of adverse possession that the Applicants have to prove include, actual open, continuous, exclusive and hostile possession of the land claimed.
26. It was also submitted that from the evidence produced in Court, the suit property is traceable to the mother title L.R. No. 5842/2 which was transferred to Joshua Musa Riunga and others. The land



was subsequently subdivided and as per the property rate statement for L.R. No. 5842/15, the rate payer and owner of the property is Joshua Musa Riunga, the 1st Respondent. Counsel urged the Court to examine the facts and the law and arrive at a just and fair determination on whether or not the Applicants have made a case for adverse possession and whether they are entitled to the reliefs sought. The 4th Respondent also urged the Court to grant them the costs of the suit.

The Submissions of the 1st, 2nd, 3rd, 5th and 6th Respondents.

27. No written submissions were filed by the 1st, 2nd, 3rd, 5th and 6th Respondents for consideration by the Court.

Analysis and Determination

28. I have considered the amended Originating Summons together with the evidence adduced and written submissions filed. The two main issues for consideration by this Court are:

- i. Whether the Applicants have made out a case of adverse possession in respect to L.R. No. 5842/15 as against the 1st and 2nd Respondents.
- ii. What are the appropriate reliefs herein.

29. Section 38 of the *Limitations of Actions Act* provides a framework on how an adverse possessor is to move the court for orders vesting the land in the adverse possessor. The Section provides as follows:

38. Registration of title to land or easement acquired under Act

- (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.
- (3) A proprietor of land who has acquired a right to an easement under section 32 of this Act may apply to the High Court for an order vesting the easement in him, and may register any order so obtained in the register of the land or lease affected by the easement and in the register of the land or lease for whose benefit it has been acquired, and the easement comes into being upon such registration being made, but not before.
- (4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.
- (5) The Minister for the time being responsible for Land may make rules for facilitating the registration of titles to land or to easements acquired under this Act.



30. The essential and mandatory ingredients that a claimant seeking adverse possession orders under Section 38 of the *Limitation of Actions Act* must establish have been spelt out by our courts in various cases, among them; *Kweyu v Omutut* [1990] KLR 709, *Patrick Magu Mwangi Kimnyu v Joreth Limited* [2015]eKLR, *Peter Mbiru Michuki v Samuel Mugo Michuki* [2014]eKLR; and *M'Mbaari M'Ithara v James Mbaka* [2019] eKLR among others.
31. The Applicants in this suit testified that they entered into the suit land in 1998 and started tilling the land. They also stated that they have been in continued uninterrupted occupation of the land since 1998. They also adduced evidence showing the crops and structures put up on the land.
32. A site visit was also conducted which showed that the Applicants are currently residing on the suit property with their families. The report from the site visit also confirmed that the suit property is 10 acres fenced with barbed wire and concrete poles and largely covered with maize plantation and vegetables grown in the lower part of the farm.
33. As to the nature of occupation, the Applicants contend that they have been in open, continuous and exclusive occupation. To determine the nature of possession, this Court is guided by the decision in Kisumu Civil Appeal No. 27 of 2013; - *Samuel Kibamba v Mary Mbaisi* [2015] eKLR where the court held:
- “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”.
34. The Respondents never called any witness to controvert the evidence adduced by the Applicants and in the circumstances, this Court finds that the Applicants have been able to prove on a balance of probabilities their claim for adverse possession against the 1st and 2nd Respondents and they are entitled to the orders sought.

Final Orders

35. In the end, the Applicants claim for adverse possession succeeds and this court makes the following orders:
- i. The Respondents’ title interest or claim over L.R No. 5842/15 have been extinguished and the legal title shall vest in Stanley Anyamba Ageyo and James Zollo Mogaka who have been in adverse possession of the said parcel of land.
 - ii. An order be and is hereby issued directing the Registrar of Lands, Nairobi to cancel the existing title and issue a new title for L.R. No. 5842/15 in the names of Stanley Anyamba Ageyo and James Zollo Mogaka.
 - iii. Each Party to bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF DECEMBER, 2023.

E. K. WABWOTO

JUDGE

