



**Nguya v Abdille (Environment & Land Case 184 of 2018)  
[2023] KEELC 22065 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22065 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 184 OF 2018**

**MAO ODENY, J**

**DECEMBER 7, 2023**

**IN THE MATTER OF: LAND PARCEL KNOWN AS KILIFI/NGERENYI/931**

**AND**

**IN THE MATTER OF: AN APPLICATION FOR DECLARATION THAT THE**

**PLAINTIFF/ APPLICANT HAS OBTAINED**

**OWNERSHIP OF THREE DECIMAL SIX (3.6)**

**HECTARES OR THEREABOUT OF THE ABOVE SAID**

**PARCEL OF LAND BY WAY OF ADVERSE**

**POSSESSION.**

**BETWEEN**

**JAMBROSE KALU NGUYA ..... PLAINTIFF**

**AND**

**KURESHA MOHAMED ABDILLE ..... DEFENDANT**

**JUDGMENT**

1. By an originating summons dated September 19, 2018 the applicant sued the respondent seeking the following orders;
  - a. That the applicant be declared as the proprietor of 3.6 hectares of land on Plot No. Kilifi/ Ngerenyi/931 for having acquired the same by way of adverse possession upon occupying and residing thereon for over 12 years.
  - b. That the applicant be registered as the owner of Plot No. Kilifi/ Ngerenyi/ 931 and be issued with a Title Deed.



- c. That the plaintiff/ applicant be entitled to costs of the suit.

### **Applicant's case**

2. The application was supported by the affidavit sworn by Jambrose Kalu Nguya dated September 19, 2018 who deponed that the Defendant is the registered owner of the suit premises known as Plot No. Kilifi/ Ngerenyi/ 931 and that he has occupied and/or resided on the suit premises for over 51 years having entered, resided and stayed thereon since 1967.
3. PW1 produced a list of documents dated September 19, 2018 as PEX Nos 1 to 23 and stated that the Ministry of Land and Settlement did a ground report on August 16, 1996 which report stated that he was the lawful and/or legal occupant of the suit premises and recommended issuance of ownership documents in his favour.
4. It was PW1's testimony that he has fully developed the suit premises by erecting residential houses for himself and his polygamous family and that the entire parcel of land is fully occupied. Further, that he has been cultivating the suit premises for the number of years he has been staying thereon, planting crops and other plants for his subsistence and as means of making a living. He urged the court to allow the prayers in the Originating Summons.

### **Applicant's submissions**

5. Counsel gave a brief background to the case and submitted that the Applicant has proved that he has been in actual, continuous, exclusive, uninterrupted occupation of the suit premises since 1967 without force or the respondent's permission.
6. Counsel relied on the cases of *Cosmos Safari Chuka & 134 others v Bryan Daniel Mc Cleary & another* (2010) eKLR, *Chevron (K) Limited v Harrison Charo wa Shutu* Civil Appeal No. 17 of 2016 and *Kirimo Shutu & 6 others vs Godfrey Karume* Civil Appeal No. 85 of 2015 on adverse possession and urged the court to allow the prayers in the Originating Summons.

### **Analysis and Determination.**

7. By an order dated October 7, 2021, the court allowed the applicant to serve the respondent by way of substituted service which was duly complied with but the Respondent neither entered appearance nor filed any response. The matter therefore proceeded undefended.
8. The issue for determination is whether the Applicant has proved that he has acquired the suit land by way of Adverse Possession.
9. The law on adverse possession is anchored on the *Limitation of Actions Act* cap 22 and the *Registration of Land Act* No 6 of 2012.
10. Section 7 states 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”

Further in section 13

“(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.”

11. 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.”

12. It is the applicants’ case that he has been in continuous uninterrupted occupation and possession of the suit property for a period in excess of 12 years. It is further the applicant’s case that he entered the suit land in 1967 without the permission of the Respondent.

13. In the case of *Celina Muthoni Kitbinji v Safiya Binti Swaleh & 8 others* [2018] eKLR, the court stated that:

“This being a claim for adverse possession, the plaintiffs must show that they have been in continuous possession of the land for 12 years or more; that such possession has been open and notorious to the knowledge of the owner and that they have asserted a hostile title to the owner of the property.”

14. The burden of proof that the Applicant has been in continuous uninterrupted possession and occupation lies on such claimant. The Applicant produced a copy of the extract of the green card indicating that the respondent is the registered owner of the suit land, photographs of the developments therein, correspondence from the Chief Roka location confirming that the applicant is a resides on Plot No.931 Ngerenyi Settlement Scheme, a letter dated August 16, 1996 from the Land Adjudication and Settlement Scheme in respect of a ground report which confirmed that there were permanent houses, a serving water well, 63 palm trees, 3 acres under casuarina trees, 123 cashew nuts, 16 mango trees and a barbed wire fence.

15. The applicant acknowledged that the respondent is the registered owner of the suit land. In the case of *Haro Yonda Juaje v Sadaka Dzenge Mbauro another* [2014] eKLR the court held that;

“One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land”

16. The applicant’s evidence is uncontroverted but this does not mean that where a defendant does file a response to a claim the same can be allowed without proof of the claim. The claimant is still under an



obligation to prove his/her case. From the evidence on record, I find that the applicant has discharged the burden of proof that he has acquired the suit land by way of adverse possession. I therefore allow the originating Summons dated September 19, 2018 as prayed.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 7<sup>TH</sup> DAY OF DECEMBER, 2023.**

**M.A. ODENY**

**JUDGE**

