



**Kioko v Mutava (Originating Summons E012 of 2022)  
[2023] KEELC 22112 (KLR) (6 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22112 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ORIGINATING SUMMONS E012 OF 2022  
CA OCHIENG, J  
DECEMBER 6, 2023**

**BETWEEN**

**MUTUNE KIOKO ..... APPLICANT**

**AND**

**MWIKYA MUTAVA ..... RESPONDENT**

**JUDGMENT**

1. Through an Originating Summons dated the 18<sup>th</sup> May, 2022 the Applicant seeks to be declared owner of half portion of land parcel number MBIUNI / MUMBUNI/ 157 through adverse possession.
2. The Originating Summons is supported by the affidavit of Mutune Kioko where he deposes that MBIUNI/ MUMBUNI/ 157 hereinafter referred to as the ‘suit land’, belonged to Mutunga Mbula And Ndalii Mutua. He explains that the suit land was sold to Mbithe Kioko By Mutunga Mbula And Ndalii Mutua but the parties all died before transfer could be effected. He claims Mutava Musau who was a witness to the agreement marked as ‘MK2” secretly moved to have his son Mwikya Musau registered as owner of half of the parcel of land. He contends that after purchase, he immediately entered into the suit land, constructed a permanent house, cultivated it, planted trees and has enjoyed peaceful, open and exclusive possession thereon from 1981 to date, which is approximately 41 years. Further, that he has fully fenced the suit land. He avers that the Respondent is his neighbour and has all along been aware of his occupation of the portion of land which he has openly, uninterruptedly occupied without their consent. He states that the Respondent has never set foot on the portion of the suit land he occupied since 1981. Further, no one has ever complained when he took over the claimed portion of land despite his numerous developments thereon. He explains that the Respondent has started subdividing the suit land and threatened him with eviction from the portion he occupies since he obtained the title deed for half the portion of the said land. Further, that he will suffer irreparable damage if his houses are demolished rendering him homeless. He reiterates that the Respondent’s rights to the portion of land he occupies has extinguished.



3. The Respondent Mwikya Mutava opposed the Originating Summons by filing a replying affidavit where he confirms that the Applicant is his cousin as his father Mutava Musau is a brother to the Applicant's mother. He avers that he has been in occupation and possession of the suit land since the year 1960 having been born thereon and thereafter constructed permanent structures as well as undertook cultivation on it. He explains that originally the suit land was owned by three persons with equal shares namely; Mueni Mutua Mbula, Mutunga Mbula Mutua And Ndali Mbula Mutua who are now all deceased. He confirms that the suit land is jointly registered in his name and that of his auntie Mueni Mutua with each one of them having an equal share of it. He contends that the Applicant has not disputed that he has all along been in occupation and possession of the suit land. He argues that the attached purported sale agreements marked as "MK-2" have no correlation whatsoever to the suit land. Further, the said sale annexures marked as "MK-1" are in an unofficial language of the Court without subsequent translation thereof and as such are of no evidentiary weight to the matters in contention hence he prays that they be expunged from the Court record. He reiterates that the Applicant's relationship, if any, with the said deceased Mbithe Kioko who purports to have purchased the suit land is unknown and hence without Letters of Administration, the Applicant has no locus whatsoever to claim on behalf of a deceased person. He avers that the Applicant together with his family has been in occupation and possession of another parcel of land adjacent to the suit land known as MBIUNI/MUMBUNI/713, which his father allowed them to occupy a portion of, measuring three (3) acres and that is where the Applicant's mother's remains were interred. He claims on or about the year 2015 the Applicant together with other persons physically assaulted his father Mutava Musau which incident resulted into the family of the Applicant moving from the parcel known as MBIUNI/MUMBUNI/713 to another parcel of land known as Ndumbuli in Mumbuni. Further, through the Assistant Chief Mumbuni sub location he demanded for the Applicant to vacate the aforesaid adjacent land which he had been permitted by his father to occupy. He reaffirms that the Applicant is deliberately misleading this Court that he has been in occupation and possession of the suit land whereas the situation is that it was not until recently that he started construction on the said suit land. He states that on or about the month of March 2022 the Applicant trespassed into the suit land, cut trees and damaged crops thereon as a result of which he reported the matter to Mumbuni Police post vide O.B number 05/26/3/2022 and which malicious act caused him damage to the tune of Ksh 91,531/=. Further, as a result of the aforesaid damage of his trees, the Applicant was charged court with the offence of malicious damage and released on Police bond. He further avers that the Applicant attempted to sell and/or dispose of part of the suit land which illegal sale he reported to Mumbuni police post vide O.B number 3/25/2/2022.
4. The Originating Summons was canvassed by way of written submission, although it is only the Respondent who filed his.

### **Submissions**

5. The Respondent in his submissions provided a background of the matter herein and reiterated his averments as per the replying affidavit. He submits that the Applicant has not disposed him of the use and or occupation of the suit land or discontinued him from using it. Further, that he is still in use and occupation of the suit land up to date. He insists that that the Applicant has failed to prove a claim of adverse possession as against him. It was his further submission that the Applicant's allegations of having purchased more than half of the suit land are unsubstantiated. He argues that in this instance, adverse possession cannot be calculated as per payment of purchase price as the date of the alleged payment is not known. Further, that the present suit is an afterthought following the Applicant's behavior and unbecoming conduct towards the Respondent's father. Further, that the Applicant has not been in occupation of the suit land and only attempted to put a structure thereon on 23<sup>rd</sup> June,



2022. He reiterates that the Applicant lacks the requisite locus standi to bring this suit on behalf of the said deceased person Mbithe Kioko who is the person the applicant alleges to have purchased the suit land. Further, that no evidence has been tendered to demonstrate that the Applicant is an administrator to the estate of the said Mbithe Kioko. To support his averments, he relied on the following decisions: Sisto Wambugu V Kamau Njuguna (1983) and KLR 173; Public Trustee V Wanduru (1984) KLR314.

### **Analysis and Determination**

6. Upon consideration of the Originating Summons, respective affidavits, annexures and submissions, the only issue for determination is whether the Applicant is entitled to orders of adverse possession in respect to half of land parcel number MBIUNI/ MUMBUNI/ 157.
7. Adverse possession is governed by the provisions of section 38 (1) and (2) of the Limitation of the Actions Act that provides thus: ‘ 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.’
8. The Applicant in his supporting affidavit claimed that after purchase of the suit land by one Mbithe Kioko, he immediately entered into the said land, constructed a permanent house, cultivated it, planted trees and has enjoyed peaceful, open as well as exclusive possession from 1981 to date. He further claimed that he has fully fenced the suit land and the Respondent who is his neighbour has all along been aware of his occupation of the portion of the said land which he has openly, uninterruptedly occupied without their consent. Further, that the Respondent has never set foot on the portion of the suit land he occupies since 1981 and no one has ever complained when he took over the claimed portion of land despite his numerous developments thereon.
9. On proof of adverse possession, the Court in Daniel Kimani Ruchine & Others versus Swift Lotherford & Co. Ltd and Anor (1977) eKLR held that ‘ The Plaintiffs have to prove that they used the land as of right, nec vi, nec clam, nec precario (no force, no secrecy, no evasion)’.
10. While in the case of Wambugu V Njuguna (1983) KLR 173 the Court of Appeal highlighted the ingredients to be fulfilled in a claim of adverse possession and stated thus: ‘Adverse possession contemplates two concepts: Possession and discontinuance of Possession. It further held that the proper way of assessing proof of Adverse Possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.’ Emphasis mine.
11. Further, in Public Trustee v Wanduru, (1984) KLR 314 at 319 Madan, J.A. stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.
12. In the evidence presented herein, the Applicant except for providing some notes in kikamba language which were not translated, claiming that it was a sale agreement, has not demonstrated how he occupied the suit land from 1981 to date. Further, the Respondent who confirms the Applicant is his cousin annexed photographs of an incomplete brick house being constructed and explained that the same belonged to the Applicant. The Applicant never controverted the Respondent’s averments that he destroyed crops and was charged with malicious damage to property. Further, the Applicant did not deny that he commenced constructing the brick house in June, 2022. It the Respondent’s evidence that



he is the one who has been occupation of the suit land since 1960, constructed permanent structures as well as undertakes cultivation thereon. I note the Applicant did not dispute that the Respondent is the one on the suit land. Further, the Applicant did not explain to court the correlation between the purported Sale Agreement in Kikamba language (annexures 'MK1 and MK2'), the vendor and himself. Further, no Letters of Administration Intestate in respect to the estate of Mbithe Kioko has been provided in court. The Respondent insists that the Applicant together with his family have been in occupation and possession of another parcel of land adjacent to the suit land known as MBIUNI/MUMBUNI/713, which his father allowed them to occupy and that is where the Applicant's mother's remains were interred.

13. It is against the foregoing and in associating myself with the judicial authorities cited above, I find that insofar as the Respondent claims he has been on the suit land, he has not provided evidence on how he entered thereon. Further, since it has emerged that he assaulted the Respondent's father, forcefully entered the suit land and in June 2022 commenced construction of a permanent structure which culminated in his being charged with malicious damage to property, I hence find that the Applicant's alleged entry on the suit land was not permissive and the acts he attempted to undertake thereon were not inconsistent with what the Respondent had done on the suit land. Further, I find that the Applicant has not proved he dispossessed the Respondent from the suit land as the Respondent still resides thereon to date. To my mind, the Applicant who is a cousin to the Respondent seems to want to take advantage of his uncle's love and support to shortchange them by seeking to acquire the suit land through the doctrine of adverse possession but this must fail.
14. On the issue of costs, since this is a dispute involving cousins, I direct each party to bear their own costs.
15. It is in those circumstances and for the reasons I have given above, that I find the Applicant has not proved his claim on a balance of probabilities and hence find the Originating Summons dated the 18<sup>th</sup> May, 2022 unmerited and will disallow it.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 6<sup>TH</sup> DAY OF DECEMBER, 2023**

**CHRISTINE OCHIENG**

**JUDGE**

