



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 123 OF 2013 (OS)**

**JULIUS PETER MIGWI GICHIMU.....1<sup>ST</sup> APPLICANT**

**JOYCE NYOKABI.....2<sup>ND</sup> APPLICANT**

**SILAS MICHAEL MURIITHI.....3<sup>RD</sup> APPLICANT**

**=VERSUS=**

**SAUL CHEMOS TUKA.....RESPONDENT**

**RULING**

1. This is an Originating Summons dated 2<sup>nd</sup> April 2019 brought under Section 38 of the Limitation of Actions Act and Order 37 of the Civil Procedure, Rules 2010.
2. It seeks the determination of the following questions:-
  1. *Whether having been in continuous and uninterrupted possession and occupation of the suit land Nairobi/Block 97/1348 for a period in excess of 12 years the Applicants have now acquired prescriptive rights to title thereto by adverse possession.*
  2. *Whether the Land Registrar at Nairobi should be ordered and directed to delete the name of the Respondent and register the names of the Applicants herein in the place thereof absolutely.*
  3. *Whether the Respondent should meet the costs of the suit.*
3. The Originating Summons is supported by the affidavit of Julius Peter Migwi Gichimu, the 1<sup>st</sup> Applicant sworn on the 4<sup>th</sup> April 2019.
4. The Defendant was served by substituted service by way of advertisement in one of the Daily Newspapers of Nation wide circulation.
5. There is an affidavit of service sworn by Justus Mulinge, court process server, on the 21<sup>st</sup> November 2020. He confirms that the advertisement appeared in the Star Newspaper of Friday, 20<sup>th</sup> September 2019. He has attached a copy of the said advertisement to his affidavit.
6. I am satisfied that the Defendant was duly served but did not put in any response within the stipulated period.
7. The Originating Summons proceeded by way of viva voce evidence. P.W.1 Julius Peter Migwi Gichimu testified on 22<sup>nd</sup> September 2021. He told the court he had authority from his Co-Applicants to plead and to give evidence on their behalf. He adopted his affidavit in support of the Originating Summons, dated 4<sup>th</sup> April 2019 as part of his evidence in this case. He also adopted the documents attached as exhibits in this case.
8. He further stated that he and the Co-Applicants have been in occupation of the suit property from 1995. That they have since put up permanent structures and no one has attempted to evict them. He annexed photographs of the said structures to his affidavit.
9. It is his testimony that they have been on the suit property for over twenty-four (24) years and they pray that they be registered as proprietors by reason of adverse possession.

10. At the close of the oral evidence, the Applicants tendered written submissions.

**The Applicants' submissions**

11. They are dated 12<sup>th</sup> November 2021. They raise one issue for determination:-

***Whether the Applicants have satisfied Section 38(1) of the Limitation of Actions Act Cap 22 Laws of Kenya that they have an adverse interest in the said land and thus entitled to an order that they be registered as the proprietors of Nairobi/Block/97/1348 ("subject land") within Nairobi in place of Saul Chemos Tuka.***

12. They have relied on Section 7 and 13 of the Limitation of Actions Act and the case of **Celina Muthoni Kithinji vs Safiya Binti Swaleh & Others [2018] e KLR**. They have also put forward the case of **Peter Okoth vs Ambrose Ochido Andayo & Another [2021] e KLR**.

13. The suit property is registered in the name of Saul Chemos Tuka the Respondent herein. The Applicants entered the land in 1994 and have been in open, continuous, uninterrupted and exclusive possession and occupation without consent or permission of the Respondent for a period of over twelve (12) years. They pray that the orders in the Originating Summons be granted.

14. I have considered the Originating Summons and the affidavit in support. I have also considered the evidence tendered and the written submissions. The issues for determination are:-

***(i) Whether the Applicants are entitled to be registered as the owners of Nairobi/Block/97/1348 by way of adverse possession.***

***(ii) Who should bear costs of this suit?***

15. The ingredients of adverse possession were discussed by the Court of Appeal in **Mtana Lewa vs Kahindi NGala Mwangandi [2005] eKLR** where it was held that:-

***"Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such as a person in asserting his title for a certain period, in Kenya 12 years".***

16. In the case of **Celina Muthoni Kithinji vs Safiya Binti Swaleh & Others [2018] e KLR** the court stated thus:-

***"(12) It is also a well settled principle that a party claiming adverse possession ought to prove that this possession was 'nec vi nec clam nec precario', that is, peaceful, open and continuous. The possession should not have been through force nor in secrecy and without the authority or permission of the owner....."***

17. It is the Applicant's case that they have been on the suit property for over twenty seven (27) years. They produced photographs confirming the permanent structures they have put up on the suit property.

18. I am satisfied that they have proved that they have been on the land for a period of more than twelve (12) years.

19. The Applicants' case is uncontroverted. I find that they have proved their case on a balance of probabilities. I find that their claim for adverse possession succeeds.

20. Accordingly, I enter judgment for the Applicants as against the Respondent as follows:-

***(a) That the Applicants are entitled to be registered as owners of Nairobi/Block 97/1248.***

***(b) That there are no orders as to costs.***

It is so ordered.

**DATED, SIGNED AND DELIVERED NAIROBI THIS 24<sup>TH</sup> DAY OF FEBRUARY 2022.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Webale for the Applicants

No appearance for the Respondent

Steve - Court Assistant