



REPUBLIC OF KENYA



KENYA LAW
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**Kithiira v Mugambi (Environment & Land Case E007 of 2021)
[2022] KEELC 10 (KLR) (10 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 10 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT & LAND CASE E007 OF 2021**

CK YANO, J

MAY 10, 2022

BETWEEN

SILAS KITHIIRA PLAINTIFF

AND

TIMOTHY MUGAMBI DEFENDANT

JUDGMENT

1. The Plaintiff filed an originating summons dated 15th July, 2021 brought under section 7 and 17 of the *Limitation of Actions Act* and invited the court to make a determination of the following questions:
 - I. Whether the Defendant was on 1.4.2006 registered as owner of L.R. NKONDI “B”/467.
 - II. Whether the Plaintiff has been in exclusive, open and continuous possession of L.R. NKONDI “B”/467 for a period in excess of 12 years.
 - III. Whether the Plaintiff’s possession of L.R. NKONDI “B”/467 amounted to adverse possession.
 - IV. Whether the Defendant’s right over the land has been extinguished.
 - V. Whether a declaration should issue that the Plaintiff has become entitled to L.R. NKONDI “B”/467 and that the suit land be transferred to him.
 - VI. Whether the Plaintiff is entitled to costs of these proceedings.
2. The originating summons is supported by the affidavit of Silas Kithiira the Plaintiff sworn on 16th July, 2021 and supplementary affidavit dated 4th February, 2022. The Plaintiff averred that in the year 1997, his father M’Nkuura Kaiga who was then living at Tumbura village, Nkondi ward shared out his then unregistered land to his children, including the Plaintiff who was given a portion measuring about 2.2 acres which he stated that he settled on together with his family that same year. The Plaintiff averred that he continued cultivating the land and living on it with his family while in exclusive possession thereof. That later, the area where the land is located was declared as Nkondi “B” Adjudication section



and was demarcated as Land Parcel Nkondi “B”/467 in the Plaintiff’s name. The Plaintiff averred that upon the demarcation of the boundaries by the demarcation officer, he was issued with a duly stamped demarcation book, a copy of which has been annexed and marked “SK1”.

3. The Plaintiff stated that in or about the year 2006, the Government announced that the registration of the land within Nkondi “B” section had been done but the title deeds were yet to be processed. That in or about the year 2008, it was announced that the title deeds for Nkondi “B” were ready for collection from the Land Registry Chuka Town. The Plaintiff has deposed that when he visited the Land Registry to collect his title deed for L.R. Nkondi “B”/467, he was shocked to be informed that the land had been registered in the name of Timothy Mugambi, the Defendant herein.
4. The Plaintiff states that he does not know the Defendant and that the Defendant has never stepped on the suit land at all. The Plaintiff carried out an official search and was issued with the certificate of search marked “SK II” which indicated that the Defendant was registered as the owner of the land on 1.4.2006 and issued with a title deed on 2.3.2008. It is the Plaintiff’s case that he has been in open, continuous and exclusive possession of the suit land for a period in excess of 12 years, and that the Defendant’s title to the land has been extinguished, hence this suit.
5. The Defendant was served by way of substituted service by advertisement in the Daily Newspaper of 27th November, 2021 pursuant to leave granted by the court. The Defendant neither entered appearance nor did he file a defence, and the Plaintiff’s case proceeded by way of formal proof.
6. The Plaintiff testified as PW1 and relied on the contents of the affidavit and further affidavit in support of the summons. The Plaintiff produced the demarcation book, the certificate of official search and sketch map as P. Exhibits 1, 2, and 3 respectively.
7. After the close of the Plaintiff’s case, the Plaintiff’s advocates filed written submissions on 24th February, 2022.
8. Having considered the Plaintiff’s case and submissions on record and having taken into consideration that the Defendant has neither entered appearance nor has he filed a defence, I find that the following issues are for determination:
 - i. Whether the Plaintiff has proved that his occupation of the suit land is adverse to the title of the Defendant for the requisite period hence to be entitled to be declared the owner of the suit premises as prayed in the originating summons.
9. Adverse possession is a common law doctrine under which a person in possession of land owned by someone else may acquire valid title to it. In Kenya, this doctrine is alive in section 7 of the [Limitation of Actions Act](#) that states:

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 first accrued to some person through whom he claims, to that person.”
10. In *Alfred Welimo –v- Mulaa Sumba Barasa*, CA No. 186 of 2011, the Court of Appeal expressed itself thus:

It is trite that adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it, for as Robert Megarry aptly observed in his Megarry’s Manual of the Law of Property, 5th edition page 490, the owner may have little present use for the land and that land may be used by others, without the users demonstrating a possession inconsistent with the title of the owner. So the mere fact that



the appellant abandoned possession of the suit property and went to live at Ndalumu scheme by and of itself does not establish adverse possession. The abandonment of possession must be complied with animus possidendi (the intention to possess) and asserting thereon rights that are inconsistent with those of the appellant as the owner of the land...”

11. The court further held that, for a claim founded on adverse possession to succeed, the person in possession must have a peaceful and uninterrupted User of the land. Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are important factors in a claim for adverse possession.
12. In *Wambugu –vs- Njuguna* (1983) KLR 173, the Court of Appeal held that adverse possession contemplates two concepts: possession and discontinuance of possession. It was further held that the proper way of assessing proof of adverse possession is 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.
13. The ingredients were recently discussed by the Court of Appeal in the case of *Mutana Lewa –vs- Kabindi Ngala Mwangandi* [2015] eKLR where it was stated:

Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya is twelve (12) years. The process springs into action essentially by default or inaction of the owner...”

14. The Plaintiff has to prove that he has used the suit premises as of right: nec vi, nec clam, nec precario. It must be shown that the registered owner of the land had knowledge (or means of knowing, actual or constructive) of the possession or occupation. Further, the possession must be continuous.
 15. In the instant case, the Plaintiff has stated that he has been in exclusive open and continuous possession and occupation of the suit land since 1997 which is a period in excess of 12 years. Even the period from the year 2008 when the land was registered in the Defendant’s name is over 12 years. The registered owner did not take any step to evict the Plaintiff from the suit premises for over twelve years. The Plaintiff has tendered evidence that has not been challenged or controverted by the Defendant. The Plaintiff’s evidence is that he has been using the suit property together with his family as if it were his own and does not share control of the property with the Defendant or anyone else other than himself. The Plaintiff uses the land at the exclusion of everyone else as if he is the actual owner.
 16. Presented before this court is undisputed and undefended evidence by the Plaintiff. I find that the Plaintiff has on a balance of probability proved that he has a claim over the title Nkondi “B”/467 registered in the Defendant’s name by way of adverse possession. From the material presented before this court, I find that the Plaintiff has on a balance of probabilities proved that he has adversely remained in possession and occupation of the suit property for a period in excess of 12 years to the exclusion of the Defendant who is the registered owner. The Defendant as registered owner has certainly lost his right over the property and the Plaintiff has now acquired prescriptive rights over the property by way of adverse possession. I find that all the questions for determination in the originating summons dated 15th July, 2021 are in the affirmative. I enter judgment as follows:
 - i. The Plaintiff is hereby declared to have become entitled to LR. Nkondi “B”/467 by virtue of adverse possession and the Plaintiff is entitled to be duly registered as proprietor thereof.
 - ii. The Defendant’s right over the suit land has been extinguished.
- iii. Since the suit is undefended, I make no order as to costs.



DATED, SIGNED AND DELIVERED AT CHUKA THIS 10TH DAY OF MAY, 2022 IN THE PRESENCE OF:

CA: MARTHA

Ringera h/b for Mwenda for Plaintiff

N/A for Defendant

C. K. YANO,

JUDGE.

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