



**Katana & 29 others v Nathoo (Environment & Land Case
208 of 2017) [2022] KEELC 2232 (KLR) (29 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2232 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 208 OF 2017
MAO ODENY, J
JUNE 29, 2022
IN THE MATTER OF LAND REGISTRATION ACT NO. 3 OF 2012
AND
IN THE MATTER OF THE LAND ACT NO. 6 OF 2012;
AND
THE REGISTRATION OF TITLES ACT CAP. 282 (REPEALED);
AND
IN THE MATTER OF LAND PORTION NUMBER L. R. 245 MALINDI;
AND
IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT
CAP 22 LAWS OF KENYA
AND
IN THE MATTER OF AN APPLICATION FOR A DECLARATION THAT THE
APPLICANTS HAVE ACQUIRED LAND PORTION NUMBER 245 MALINDI
BY ADVERSE POSSESSION.

BETWEEN

FRANCIS KATANA 1ST PLAINTIFF
FEDNARD GUNGA 2ND PLAINTIFF
ELVIS MAKANGA 3RD PLAINTIFF
MAKANGA THUVA MBORO 4TH PLAINTIFF
HASSAN UNDA KOMBE 5TH PLAINTIFF
MRAMBA MAITHA 6TH PLAINTIFF



PATRICK KARISA NZAI	7 TH PLAINTIFF
JUMWA MWENI	8 TH PLAINTIFF
LENOX KADZAGAMBA	9 TH PLAINTIFF
SAMUEL THUVA MBORO	10 TH PLAINTIFF
KOMBO IBRAHIM KAINGU	11 TH PLAINTIFF
FURAHA CHARO	12 TH PLAINTIFF
RIZIKI CHARO	13 TH PLAINTIFF
ANDREW KAHINDI BAYA	14 TH PLAINTIFF
LUCAS SAFARI	15 TH PLAINTIFF
JUMA CHARO	16 TH PLAINTIFF
MOHAMED ALII	17 TH PLAINTIFF
ADISON DECHE	18 TH PLAINTIFF
CONSTANCE NAZI KADZENGA	19 TH PLAINTIFF
NELSON NGUMBAO CHAI	20 TH PLAINTIFF
HABEL CHARO	21 ST PLAINTIFF
SHIDA KIRAO	22 ND PLAINTIFF
SAMUEL NGALA	23 RD PLAINTIFF
LUCAS BAHATI	24 TH PLAINTIFF
SAFARI KENGA HENGA	25 TH PLAINTIFF
ALEX THOYA	26 TH PLAINTIFF
JAMES MNYAKA	27 TH PLAINTIFF
CHARO CHOME KIPONDA	28 TH PLAINTIFF
JUMWA THOYA	29 TH PLAINTIFF
ALEX KADZAGAMBA	30 TH PLAINTIFF

AND

SHAHBUDIN KARMALI NATHOO DEFENDANT

JUDGMENT

1. By an Originating Summons dated 19th October 2017 the Plaintiff/Applicants herein sued the Respondent seeking the following orders: -
 1. That the Plaintiffs are entitled to be declared the proprietors of land parcel No. 245 Malindi on account of having acquired it by adverse possession, having lived and worked thereon for over



12 years using it peacefully continuously and without any interference from the defendants or their agents.

2. That the Plaintiffs are entitled to be registered and issued with titles over their respective portions of the said suit property as detailed in the supporting affidavit.
3. That the costs of the suit be provided against the defendant.

Applicants' case

2. The Applicant Hassan Unda Konde swore an affidavit in support of the summons on behalf of the 29 Applicants where he re-iterated the grounds in support and stated that the Respondent is the registered proprietor of Plot No. 245 Malindi as per the annexed land Certificate and the official search.
3. The Applicant further deponed that the Respondent has never been on the suit land for more than a period of 12 years and that all the Applicants have been in occupation and developed the suit property by building dwelling houses, both semi-permanent and permanent houses, buried their loved ones there, conducted marriages, got their children, carrying out agricultural and commercial activities by planting crops such as Cashew nut, Mango and Coconut Trees among others without any interference for over 60 years.
4. PW1 adopted his statement and gave evidence on behalf of the Applicants and stated that they have been in occupation of the suit land without interruption for over 70 years and that the Respondent does not stay on the land.
5. PW1 produced a copy of a title, official search of the property registered in the Respondent's name, photographs showing the semi and permanent houses on the suit land and urged the court to declare that the Applicants have acquired the suit land by way of adverse possession.

Applicants' Submissions.

6. Counsel reiterated the evidence of the Applicants and relied on Articles 26 and 60 of *the Constitution* of Kenya 2010 and further cited the case of *Peter K. Waweru v Republic* High Court Misc. Civil Application 118 of 2004 where Applicants sought for the protection of the right to continue living in their ancestral land.
7. Ms Minyazi also submitted on the law on adverse possession and the conditions that an Applicant must meet in order to succeed and cited the case of *Wambugu v Njuguna* (1983) eKLR 17 where the Court of Appeal held that the concept of adverse possession contemplates two concepts; possession and discontinuance of possession and the best way of proving possession would be whether or not the title holder has been disposed 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.
8. Counsel therefore urged the court to find that the Applicants have been in possession and occupation of the suit land uninterrupted for over a period of 12 years hence entitled to be registered as owners.

Analysis And Determination.

9. The Respondent was served with summons but neither filed any response to the summons therefore the matter proceeded undefended.



10. The issue for determination is whether the Applicants have met the ingredients of adverse possession as was held in the case of *Tabitha Waittherero Kimani v Joshua Ng'ang'a* [2017] eKLR, where Ombwayo J held follows: -

“(A) Open and notorious use of The Property For this condition to be met the adverse party’s use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim. The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If a legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about.

(B) Continuous use of the property The adverse party must, for Statute of Limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor's time on the land, not how long true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned.

(C) Exclusive use of the property The adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a barn on the owner's property, and the owner then uses the barn, the adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (i.e. owners) in common, so long as the other elements are met.

(D) Actual possession of the property the adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession.”

11. The possession must be must be open, notorious, continuous, exclusive and the Applicant must be in actual physical possession adverse to the owner of the suit land. Once these are proved then the court can declare that an applicant has acquired land by way of adverse possession.
12. The Court of Appeal in the case of *Benjamin Kamau Murma & Others v Gladys Njeri*, CA No. 213 of 1996 held that: -

“The combined effect of the relevant provisions of Sections 7, 13 and 17 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of Adverse Possession of that land.”

13. The onus is on the person claiming Adverse Possession: -

“.. to prove that they have used this land which they claim as of right: Nec vi, nec clam, nec precario (No force, no secrecy, no evasion). So the Applicant must show that the respondent had knowledge (or the means of knowing, actual or constructive) of the possession or



occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavors to interrupt it or by any recurrent consideration”

14. The Applicants produced a copy of the land certificate and official search to prove the that suit land belongs to the Respondent which is a requirement in claims for adverse possession. In the case of *Grace Jesoimo Tarus & another v Sarah Rop & 2 others* [2018] eKLR this court held that: -

“The need for production of a form of a copy of title document must be exhibited to indicate that the person sued is the registered owner of the suit land. This can be a copy of an extract of the register or an official search showing the details of the registration. Failure of such evidence is fatal to the claimant’s suit as orders can be granted in respect of a parcel of land that does not belong to the respondent.”

15. On the issue as to whether the Applicants have proved adverse possession, the evidence on record is that the Applicants have been in possession over a period of 12 years and have done so in open and without secrecy and that the owner has been dispossessed of the suit land.

16. In India, the Supreme Court decision in the case of *Kamataka Board of Wakf v Government of India & Others* [2004] 10 SCC 779 the court stated thus:-

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won’t affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continues. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

17. The Applicants’ occupation and possession has not been disputed by anyone including the Respondent who was served with summons but never filed a response. The Applicants also exhibited photographs of the semi and permanent houses on the suit land. It should be noted that non- use of a property by an owner does not affect the property, this only changes if another person takes possession asserting ownership as against the legal or true owner.

18. I have considered the evidence, the exhibits and submissions by counsel and find that the Applicants have proved that they have acquired the suit land by way of adverse possession therefore they are entitled to be registered as owners as per their respective portions of occupation.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 29TH DAY OF JUNE, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

