



**Manani v Mwangi & another (Environment & Land Case  
5 of 2021) [2022] KEELC 3262 (KLR) (22 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3262 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 5 OF 2021  
FO NYAGAKA, J  
JULY 22, 2022**

**BETWEEN**

**GEOFFREY ACHOKA MANANI ..... PLAINTIFF**

**AND**

**APPOLLOS KENNEDY MWANGI ..... 1<sup>ST</sup> DEFENDANT**

**HARUN MUNA MWANGI ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By an Originating Summons dated 13/05/2021 the Plaintiff herein moved the Court to issues a number of Orders against the Defendants. The Summons was brought under Order 38 (sic) of the [Limitation of Actions Act](#), Chapter 22 of the Laws of Kenya and Order 37 Rule 7 of the [Civil Procedure Rules](#) and Section 28(h) of the [Land Registration Act](#), Act No. 3 of 2012. The Summons required the two defendants to enter appearance on questions posed by Geoffrey Achoka Manani that:
  - a. Applicant have obtained the title to 3 acres out of land parcel No. Waitaluk/Kapkoi Block 9/Gutongorio/385 measuring 18.79 hectares being a subdivision of Waitaluk/Kapkoi/Gutongorio/4 by way of adverse possession.
  - b. The Respondent is holding title for part of land parcel No. Waitaluk/Kapkoi Block 9/Gutongorio/385 in trust for the Applicant.
  - c. The portion of land be curved out by the County surveyor, Trans Nzoia County on under his/her supervision or directions on the parcel currently occupied by the Applicant measuring approximately 0.03 (1.2146)hectares and issue a parcel number.
  - d. Pursuant to (a), (b) and (e) above, the Land Registrar, or the registrar in charge of the Trans Nzoia County Land Registry or the registrar where the register of land to delete the name of the Respondent in regard in lieu thereof enter the name of the Applicant and issue the



Applicant with a title deed to the 3 acres out of land parcel No. Waitaluk/Kapkoi Block 9/ Gutongorio/385 or such other number as the registrar may issue.

- e. Pursuant (e) above the Land Registrar, Trans Nzoia Land Registrar or the Registrar having custody of the register for parcel No. Waitaluk/Kapkoi Block 9/Gutongorio/385, do issue a title deed to the Applicant accordingly over the said 18.79 hectares.
  - f. Costs be borne by the Respondent.
2. This suit proceeded by way of formal proof, the Defendant's having failed to enter appearance. The Plaintiff testified as PW1, on 15/02/2022. He stated that he was a farmer who resided in Gutongorio in Trans Nzoia County. His further evidence was that he sued the Defendants because he bought from the 1<sup>st</sup> Defendant, one Apollo Kennedy Mwangi, 3 acres being part of No. Waitaluk/Kapkoi Block 9/Gutongorio/385 (herein known as the suit land) which at the time of purchase was known as No. Waitaluk/Kapkoi Block 9/Gutongorio/4.
  3. It was the testimony of PW1 that the transaction was in 2005. He made the full payment of the purchase price. He produced as P. Exhibit 1 (a), (b) and P. Exhibit 2 an Agreement dated 15/06/2005 and two acknowledgements dated 11/11/2005 and 21/01/2006 respectively. His evidence was that the initial parcel number changed from Waitaluk/Kapkoi Block 9/Gutongorio/4 to Waitaluk/Kapkoi Block 9/Gutongorio/385 because some people sued the Defendants after they had failed to transfer part of the land the Defendants had sold to them hence the Kitale Environment and Land Court ordered that the parcel be subdivided and the rightful share of the Plaintiffs in that other matter be given to them. Thus, after the subdivision, the new title was issued in the names of the two Defendants, as it is now in the suit. He produced a copy of the judgment of the Court delivered on 29/01/2015 in Kitale ELC No. 45 of 2012 between Charles Owiti Mudunyi and 2 Others versus Appollos Kennedy Mwangi.
  4. Following the judgment, the parcel of land was subdivided into parcel Nos. 385, 386, 387 and 388. The approximate size of parcel number 385 was said to be 18.79 hectares. It was on part of the latter parcel where he resided on 3 acres. He produced as P. Exhibit 4 (a) the Mutation Form for, and P. Exhibit 4 (b) the extract of title to parcel number Waitaluk/Kapkoi Block 9/Gutongorio/4. He also gave in evidence on P. Exhibit 5(a), a copy of the official search for parcel No. 385, P. Exhibit 5(b) a copy of the Extract of title to the parcel, P. Exhibit 6 a copy of a survey report to show the sized he occupied, P. Exhibit 7 a copy of a sketch plan, P. Exhibit 8 a map of the area from office of the Survey and a set of six Photographs to demonstrate the kind of developments on the parcel. He then closed his case and that of the Defendants since they did not enter appearance.
  5. At the close of the evidence, the parties were given opportunity to submit on the issues before the Court. Only the plaintiff submitted. In the submissions the Plaintiff summed up the genesis and history of the suit. It basically repeated the evidence on record. It does thus not require that I reproduce the evidence here again.
  6. But besides the summary of the evidence, the Plaintiff summed it that he had been in open, free and uninterrupted possession of 3 acres out of Land Parcel No. Waitaluk/Kapkoi Block 9/ (Gutongorio)/385 for more than 16 years and was entitled to the same by way of adverse possession. By virtue of that, the Respondents' title to the 3 acres thereof stood extinguished by operation of the law since the Applicant fulfilled the nec clam nec vi nec pre cario principle.
  7. The Plaintiff submitted that Section 38(1) of the *Limitations of Actions Act* was in his favour since it provided for a case where a "person claiming to have become entitled by adverse possession to land registered under any of the Acts may apply to the High Court for an order that he be registered as the



proprietor, in place of the person then registered as proprietor of the land.” He relied on the Court of Appeal case of *Macharia Maina & 87 Others -vs- Davidson Mwangi Kagiri* (2014) eKLR and that of *Kynoch Ltd -vs- Rowlands* (1912) 1CC 527 534 Lindley MR in *Lettledale -vs- Liverpool College* (1900)1 Ch 19, 21 as cited in *Sisto Wambugu -vs- Kamau njuguna* (1983)eKLR, In *Hosea -vs- Njiiru & Others* (1974)EA 526.

8. He then submitted that the evidence was clear that the Respondents had not been using or enjoying the 3 acres of land out of Land Parcel No. Waitaluk/Kapkoi Block 9/(Gutongorio)/385 since 2006 when the Applicant took possession hence dispossessing the Respondents. On this point he relied on Eldoret CACA No.212 of 2012 - *Isaac Cypriano Shingore -vs- Kipketer Togom*. He also relied on the case of the *Public Trustees -vs- Wandura* 1984 KLR 314 at 319 Madan J 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”.

9. He also based his submission on the case of *Mbira -vs- Gachubi* (2002) eALR 137 as cited in the case of *Celina Muthoni Kithinji -vs- Saflyia Binti Swaleh & 8 Others* (2018) eKLR. In it the Court basically reiterated the nec vi nec clam nec precario principle. Lastly he relied on the Court of Appeal case of *Mtana Lewa -vs- Kabindi Ngala Mwangandi* (2005) eKLR that:-

“ 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.”.

### **Analysis And Determination**

10. I have considered the pleadings together with the evidence tendered and plaintiff’s submissions. My view is that the Plaintiff needed to satisfy this Court whether he had established a claim of adverse possession. This is irrespective of the fact that the suit proceeded by way of formal proof hence his evidence remained unconverted. In the end of everything the Court always asks itself whether the Plaintiff has discharged the burden laid on him by the law, for instance, under Section 107 of the *Evidence Act*. Thus, the case has to be determined on its own merits.
11. The law regarding Adverse Possession is laid down in various statutory provisions the *Limitation of Actions Act* and the *Land Registration Act*. These include Sections 7, 13, 17 and 38 (1) and (2) of the *Limitation of Actions Act*. Regarding the *Land Registration Act*, Section 28 (h) is relevant. In *Gabriel Mbui vs Mukindia Maranya* [1993] eKLR it was observed that the principles of adverse possession have been settled and they are that (i) One must have been in continuous and uninterrupted possession of the land for at least 12 years (ii) the possession has been open and notorious to the knowledge of the owner (iii) the possession must be without the permission of the owner; and (iv) the plaintiff ought to have asserted a hostile title to the owner of the property. This is the same principle repeated in the Latin Maxim nec vi nec clam nec precario which means, not by force, not by stealth nor by the permission of the owner.



12. In *Abdulkhall Mohamed Abdulkhalik Mazurui & 2 Others v Josiah Kafuta J. Mtila & another* [2021] eKLR, the Court of Appeal held that:

“The burden of proving adverse possession lay with the 1<sup>st</sup> respondent who made the claim. That burden was to be discharged by him demonstrating, on a balance of probabilities, that his possession was adverse; open, peaceful, without consent of the 1<sup>st</sup> and 2<sup>nd</sup> appellants and for an uninterrupted period of 12 years, expressed in Latin as *nec vi, nec clam, nec precario*. Or, as Lord Hoffmann put it in *R. vs. Oxfordshire County Council ex p. Sunningwell Parish Council* [2000] 1AC 335 at 350, 'not by force, nor stealth, nor the licence of the owner'. See also *Kimani Ruchine vs. Swift Rutherford & Co.Ltd* [1980] KLR on this point.

A claim of adverse possession can only be maintained against a registered owner, as set out in *Chevron (K) Ltd vs. Harrison Charo Wa Shutu* [2016] eKLR, and time as envisioned under Section 7 of the *Limitation of Actions Act*, can only run against a registered owner.”

13. I have considered the principles applicable, the law and case law on the issue before me. The evidence adduced by PW1 was that in 2005 he bought the 3 acres of land forming part of the land parcel No. Waitaluk/Kapkoï Block 9/Gutongorio/385 measuring 18.79 hectares which was initially part of the then larger parcel No. Waitaluk/Kapkoï Block 9/Gutongorio/4. He went into possession thereof, has been using the same. He has been in open and uninterrupted use of the said parcel to the exclusion of both Defendants who finally got registered as proprietors after the subdivision through a Court order, of the latter parcel of land. He has built on it. This period of uninterrupted occupation is more than twelve years. And as Sections 7, 17 and 28(1) and (2) of the *Limitations of Actions Act* provide as read with Section 28(h) of the *Land Registration Act*, the evidence demonstrates long possessory rights to the exclusion of the registered owner. The totality of the analysis of the evidence herein is that the Plaintiff has proved on a balance of probabilities that he is entitled to be declared the registered owners, by way of adverse possession the parcel of land comprising of three (3) acres of land being part of land parcel No. Waitaluk/Kapkoï Block 9/Gutongorio/385.
14. Again, the Plaintiff led evidence that in the course of time the defendants got themselves registered as the proprietors of all that parcel No. Waitaluk/Kapkoï Block 9/Gutongorio/385, measuring 18.79 Ha or thereabouts, which includes the 3 acres of land which he occupies. It therefore follows that since the Plaintiff did not permit them to do so and yet had already bought the land from the 1<sup>st</sup> Defendant and has been in adverse possession thereof from 2005, then, the registration of the Defendants as owners of the entire parcel of land including the portion he bought was done in trust for him.

### Final Disposition

15. As a consequence of the above, I make the following final orders:
- That the Plaintiff/Applicant has proved his claim for adverse possession to the effect that he obtained the title to three (3) acres out of the parcel No. Waitaluk/Kapkoï Block 9/Gutongorio/385 measuring 18.79 Hectares being a subdivision of Waitaluk/Kapkoï Block 9/Gutongorio/4 by way of adverse possession.
  - The Defendants/Respondents hold title for the three (3) acres of land being part of the parcel of land parcel No. Waitaluk/Kapkoï Block 9/Gutongorio/385 in trust for the Plaintiff.
  - That the Applicant is entitled to ownership of three (3) acres to be excised from Waitaluk/Kapkoï Block 9/Gutongorio/385, having acquired the same by dint of adverse possession.



- d. That Land Registrar Trans Nzoia County be and is hereby directed to issue title in the name of the Plaintiff for a portion of three (3) acres upon the conclusion of the requisite process of demarcation and survey, to be borne by the Plaintiff.
- e. The Deputy Registrar of the Honourable Court do execute all documents necessary to effect the said transfer.
- f. As the Defendants are the ones who did not fulfill their part of the bargain by transferring the three (3) acres to the Plaintiff as required hence this suit, they shall bear the costs of this suit.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS  
22ND DAY OF JULY, 2022.**

**DR.IUR FRED NYAGAKA**

**JUDGE, ELC, KITALE.**

