



REPUBLIC OF KENYA



**Kosibei & 48 others v Komei & 32 others (Environment & Land Case
13 of 2021) [2022] KEELC 14417 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14417 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 13 OF 2021
FM NJOROGE, J
OCTOBER 27, 2022**

BETWEEN

NICHOLAS KIPROP KOSIBEI 1ST PLAINTIFF
HILLARY KIPRONO MARITIM 2ND PLAINTIFF
SOLOMON KIPTERER TANUI 3RD PLAINTIFF
JAMES YEGON 4TH PLAINTIFF
PAUL ROTICH KICHIRCHIR 5TH PLAINTIFF
MICHAEL CHEPKWONY 6TH PLAINTIFF
PHILIP NGENY 7TH PLAINTIFF
AMOS KIPKOECH KETER 8TH PLAINTIFF
DAVID KIPSANG SIGEI 9TH PLAINTIFF
SAMWEL RUTOH 10TH PLAINTIFF
JOHANA CHERUIYOT 11TH PLAINTIFF
SHADRACK BETT 12TH PLAINTIFF
CHARLES KIPNGETICH KOECH 13TH PLAINTIFF
PHILIP KIMEI 14TH PLAINTIFF
SIMON KIPRONO KETER 15TH PLAINTIFF
JOHN KIPKEMOI TANGUS 16TH PLAINTIFF
STEPHEN MUTAI 17TH PLAINTIFF
EDWARD KIPLANGAT KOSKEI 18TH PLAINTIFF
JAMES K TERER 19TH PLAINTIFF



JOSEPH KIPRONO SAMOEI	20 TH PLAINTIFF
DANIEL CHERUIYOT	21 ST PLAINTIFF
KIRUTO A TEITUIK RASO	22 ND PLAINTIFF
JOEL LIMO	23 RD PLAINTIFF
EVANS KIPNGETICH KORIR	24 TH PLAINTIFF
MAXWELL KIPSOI	25 TH PLAINTIFF
COSMAS SANG	26 TH PLAINTIFF
MOSES KOSKEY	27 TH PLAINTIFF
BENARD KOSKEI	28 TH PLAINTIFF
SAMWEL KIPRONO KOECH	29 TH PLAINTIFF
JOSHUA KIPCHUMBA	30 TH PLAINTIFF
EDWARD KIPLANGAT KIRUI	31 ST PLAINTIFF
SIMON KIPKEMOI KETER	32 ND PLAINTIFF
ROBERT KIPKOECH NGETICH	33 RD PLAINTIFF
RICHARD KIPLANGAT ROTICH	34 TH PLAINTIFF
GEOFFREY KIPKOECH RUTOH	35 TH PLAINTIFF
STEPHEN K. A. TOWETT	36 TH PLAINTIFF
DANIEL KIPLANGAT KOSKEI	37 TH PLAINTIFF
DAVID RONO	38 TH PLAINTIFF
MERCY CHEPKEMOI ROTICH	39 TH PLAINTIFF
JOSEPH MAKASA VIASI	40 TH PLAINTIFF
JOHANA KIPTOO CHEPKECH	41 ST PLAINTIFF
EMMY CHELANGAT NGETICH	42 ND PLAINTIFF
SIMON LANGAT	43 RD PLAINTIFF
JOSEPH KITANUI MOSONIK	44 TH PLAINTIFF
GABRIEL ROTICH KIBET	45 TH PLAINTIFF
JOSEPH KIPKORIR CHEPKWONY	46 TH PLAINTIFF
DAVID KIPSANG RUTTO	47 TH PLAINTIFF
PETER ROTICH	48 TH PLAINTIFF
HILLARY KIPLAGAT NGENO	49 TH PLAINTIFF
AND	
WILLIE KIPNGENO KOMEI	1 ST RESPONDENT



REDEMPTA WANJIKU MBUGUA	2 ND RESPONDENT
FREDRICK KIMANI KARUGA & FELISTER NJERI KIMANI	3 RD RESPONDENT
SAMWUEL KAGWIMA WAINAINA	4 TH RESPONDENT
PATRICIA NJERI MUCHAI	5 TH RESPONDENT
SIMON OBONGI OMARE	6 TH RESPONDENT
WILLIAM NJUGUNA MACHARIA	7 TH RESPONDENT
JOSEPH KARIUKI KARANJA	8 TH RESPONDENT
GEORGE KARIUKI MWANGI	9 TH RESPONDENT
ALFRED WANGONDU KURIA	10 TH RESPONDENT
WANJIRU NGANGA NGUO	11 TH RESPONDENT
KAGUNDA MURAYA	12 TH RESPONDENT
ERNEST KIARIE MUIBU	13 TH RESPONDENT
KELLEN WACERA GITATA	14 TH RESPONDENT
REBECCA W THEURI	15 TH RESPONDENT
PHILIP WARUI IKANGU	16 TH RESPONDENT
AMOS MAINA THIONG'O	17 TH RESPONDENT
PATRICK HENRY MWALILI	18 TH RESPONDENT
JOHN NJOROGE GAKARA	19 TH RESPONDENT
MASHACK KARIUKI KAGWE	20 TH RESPONDENT
SAMUEL G. GATHECA	21 ST RESPONDENT
STEPEN KARANJA NJOROGE	22 ND RESPONDENT
JOSEPH MURINGE MWANGI	23 RD RESPONDENT
ISAAC KIRAGU KAHARO	24 TH RESPONDENT
JEMIMAH NYAKIO NJENGA	25 TH RESPONDENT
HELLEN WAMBUI KIBATHI	26 TH RESPONDENT
KIHIKO MAINGI KIMARU	27 TH RESPONDENT
GATHOGO THURURU	28 TH RESPONDENT
EUNICE WAMBUI MWANGI	29 TH RESPONDENT
ELIAS MAINA NYINGI	30 TH RESPONDENT
JOHN GITHUA MACHARIA	31 ST RESPONDENT
JOSEPH MURIITHI MUGENDI	32 ND RESPONDENT



JUDGMENT

Pleadings

1. The 49 plaintiffs in the present Originating Summons filed on 23/7/2021 seek declarations that the titles to the defendants parcels of land identified by their respective numbers as Miti Mingi Mbaruk Block 6/252, 298, 273, 249, 287, 282, 280, 262, 699, 283, 267, 274, 279, 297, 285, 263, 264, 292, 272, 250, 288, 275, 460, 259, 261, 260, 277, 698, and 295 (suit properties) have been extinguished by reason of the doctrine of adverse possession, that they are entitled to be registered as proprietors thereof, and an order that the Land Registrar Nakuru be compelled to so register them.
2. The plaintiffs claim that their possession of the suit land dates back to the year 1971 when they entered the suit land following a joint purchase of the land parcels known as LR numbers 11094, 11095, 1021, 1022, 8894, 8895, and 6273 by Kalenjin Enterprises Ltd and Mwariki Company Ltd. The defendants were members of Mwariki Company Ltd while the plaintiffs belonged to Kalenjin Enterprises Ltd. Upon purchase, the plaintiffs' narrative goes, Kalenjin Enterprises Ltd got 5900 acres while Mwariki Company Ltd got 4080 acres. During the subdivision of the land, Mwariki Company Ltd hived off 83 acres from the 5900 acres owned by the Kalenjin Enterprises Ltd and issued plots therefrom to its members. Those plots are the suit plots herein and many of their titles were issued on various dates between 1993 and 2002 and the plaintiffs aver that they have been in occupation of the suit plots for a period in excess of 30 years. However, no dates of issuance of title have been indicated in respect of a number of those plots.
3. According to the plaintiffs, they lodged a suit, Nakuru ELC 616 of 2013 seeking measurement, fresh survey of the original parcels no's 13106, 13105, 8895 and 6273 to realign them with the acreage of 4080 acres and 5900 acres which Mwariki Co Ltd and Kalenjin Enterprises Ltd were entitled to respectively. It is noteworthy that parcels Nos. 13106, and 13105 are not part of those claimed to have been jointly bought as stated in paragraph 2 hereinabove. They also sought cancellation of the titles and a permanent injunction to restrain disposal thereof.
4. The plaintiffs maintain that their possession of the suit plots has been open and peaceful and it has never been challenged by the defendants, who are aware of it; that occupation is in respect of all the plots save Miti Mingi /Mbaruk Block 6 /698, Miti Mingi/Mbaruk Block 6/699 and Miti Mingi/Mbaruk Block 6/298. The last two host a school and a borehole respectively while the first one is being used by the defendants for quarrying purposes. The plaintiffs have utilized the suit plots by planting trees and subsistence crops fencing them off from the neighboring Nakuru National Park, connecting them to public utilities, grazing of cattle and using some for recreational purposes despite ownership documents not being in their names. They maintain that the extensive development and exclusive control thereof is evidence of animus possidendi and that they have met the requirements of the doctrine of adverse possession. The originating summons is supported by the affidavit of Michael Chepkwony which reiterates the matters set out above under oath while exhibiting various documents to illustrate the factual statements.
5. Service of the originating motion was effected by way of substituted service on 15/3/2022 in an advertisement in a local daily of nationwide circulation as ordered by this court on 28/2/2022 but the defendants did not enter appearance nor file any defence to the suit.



Evidence of the parties

6. Hearing of the matter proceeded in open court on 2/6/2022 when the plaintiffs called only one witness and subsequently closed their case.
7. The evidence of their witness closely followed the contents of the originating summons and the supporting affidavit, which incidentally had been sworn by that witness. He adopted the contents of the said affidavit as his evidence-in-chief and the annexures thereto as the plaintiffs' exhibits. In his oral evidence he added that there was a boundary dispute between the two companies and the land was subdivided according to a map given by the late President Mzee Kenyatta. In 1986 some members from the Mwariki side dug a trench on the disputed land and the matter was reported to the local administration whereupon the titles issued to the defendants from 1993 came to light. Nevertheless, the plaintiffs continued living on the disputed land and developing it. They never obtained permission from any person. They have never been sued by any person over their occupation and utilization of the suit land, nor has any notice to vacate or other demand ever been made of them by the defendants.
8. Exh 1 (a) is a copy of a file memo by one Mahinda, a Deputy Provincial Commissioner, Rift Valley Province indicating that the matter was extensively discussed before the late President who decided that the farm should be divided into two parcels in the proportions set out herein before. The part of the farm near Lake Nakuru was to go Mwariki Co Ltd and the rest to Kalenjin Enterprises Ltd according to that memo. P. Exh 1(b) is a copy of a letter dated 26/10/88 from the Nakuru District Commissioner to the Chief Land Registrar seeking that the issuance of title for the Mwariki land be withheld pending the resolution of a boundary dispute. Many copies of certificates of official search have been exhibited for various parcels and many of them bear the name Government of Kenya rather than individual's names. In one parcel, that is Miti Mingi /Mbaruk Block 6/285 which was previously registered in the name of one Rebeccah W. Theuri, the 15th defendant, the title is marked in the official search certificate as "closed on subdivision and new titles issued." It is not clear whether the subtitles issued as a result of that subdivision form part of the land claimed by the plaintiffs herein.

Submissions

9. The plaintiffs filed their written submissions on 5/8/2022. They addressed the issue as to whether they have established ownership by way of adverse possession. They relied on Section 7 and 38 (1) of the *Limitation of Actions Act*.
10. Section 7 of the *Limitation of Actions Act* provides as follows:

“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 it first accrued to some person through whom he claims, to that person.”
11. Section 38(1) of the same Act provides as follows:

“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.”
12. They also relied on the case of *Celina Muthoni Kithinji Vs Safiya Binti Swaleh & 8 Others* [2018] eKLR and *Maweu Vs Liu Ranching and Farming Co-Operative Society* [1985] KLR 430 for the proposition



that a person who seeks to acquire land by way of adverse possession must prove non-permissive or non-consensual, actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption. The plaintiffs reiterated that they took possession of the suit land in 1971 pursuant to a joint purchase and relied on the case of *Public Trustee Vs Wanduru* [1984] eKLR for the proposition that time started running for the purpose of limitation from 1971 when they were granted possession upon payment of the purchase price and that they have been in continuous possession thereof since then despite the change in ownership status of the land. They reiterated that the change of ownership occurred when the defendant hived out 83 acres out of the land allocated to the plaintiffs and subdivided the same and caused titles to be issued in their names. They referred to the certificates of official search that they exhibited in court as evidence of change of ownership.

13. The plaintiffs aver that there was change of proprietorship “from the plaintiffs to the defendants” as registered owners of the property but they do not show how this happened since they never demonstrated that the land was earlier registered in the plaintiffs’ individual capacities. If anything, the possibility is that it was there before registered in the names of the companies in which they had held shares and they are not parties to the instant suit. Nevertheless, it is clear that a subdivision occurred and some of the resultant plots were registered in private individuals’ names while the rest remained in the name of the government of Kenya. The plaintiffs aver, and I agree with that argument entirely, that certificates of official search are the equivalent of an extract of title under the *Registered Land Act* (now repealed) and are conclusive evidence of registration under Section 37 of the Act just as the title deed was deemed prima facie evidence of ownership under Section 32(2) of the Act. They thus excused their failure to annex an extract of title and cited the case of *Johnson Kinyua Vs Simon Gitura Rumuri* Civil Appeal 265 of 2005 [2011] eKLR where a certificate of official search was upheld as a substitute for a certified extract of title recognized under land law regimes other than the RLA.
14. The plaintiffs stated that this court is able to make a determination as to whether the threshold of 12 years has been met in the instant case. They averred that time continues running unless the proprietor brings an action for the recovery of the subject land and added that the defendants have never sought to retake possession or raise their claim to the suit lands except under a civil suit that is Nakuru ELC 616 of 2013 seeking orders of specific performance pursuant to an agreement between Kalenjin Enterprises Limited and Mwariki Company Limited and the directives of the late President Kenyatta of 18/8/1971. The full details of that earlier litigation including its outcome were not provided to the court. The plaintiffs assert in their submissions that they purchased the lands and took possession thereof before subdivision and have remained thereon to date. They referred to the communal hiring of personnel to guard the borehole and payment for the same and the development of a recreational ground to support their claim. They aver that their possession is a matter of fact that can be discerned from the pleadings and the evidence they gave and pray that their claim be granted.
15. The plaintiffs rely on the case of *James Obande Wasui Vs Jeremiah Ochwanda Musumba* [2002] eKLR for the proposition that an occupier’s right under the doctrine of adverse possession subsists irrespective of change in ownership of the occupied land.

Determination

16. I have considered the Originating Summons, the supporting affidavit and the evidence tendered by the plaintiff’s chief witness including the documents exhibited at the hearing.
17. The main question that arises is whether the plaintiffs have established that they are entitled to registration as proprietors of title to the plots of land named in the originating summons by virtue of adverse possession.



18. It has been stated in earlier cases dealing with the adverse possession doctrine that as long as one is in occupation of the land with the knowledge of the owner and without the latter's permission that in itself constitutes trespass and may give rise to adverse possession. However, on a preliminary basis and without going into the other ingredients that constitute adverse possession, it must be noted that in the instant suit, none of the plaintiffs has identified an individual plot on which he or she has been residing or working on. Despite the fact that the land was subdivided into numerous plots which are now titled, only a general statement has been made to the effect that the plaintiffs are in possession of the suit parcels of land, without any of them claiming any specific portion by its assigned Land Reference number.
19. In a claim for registration of title by way of adverse possession, precise identification of the individual land parcel claimed to have had its title extinguished by virtue of the doctrine and the full extent of physical occupation is as vital as evidence that the plaintiff or plaintiffs have been in occupation of that parcel *nec per vim, nec clam, nec precario* for a period in excess of 12 years. A general statement that the 49 plaintiffs are "in occupation of the suit plots on the ground," without identifying who is in possession of which plot, can not be allowed to stand, more so when there are 29 parcels and 33 defendants involved. The ingredients of adverse possession must be proved by each individual plaintiff against the proprietor of the title that they actually occupy, and each individual plaintiff's claim under adverse possession must be dealt with on its own merits. If this course of action is not strictly adopted, the court will in numerous claims of adverse possession not be acting in the interests of justice by allowing some litigants to joyride on the back of any other litigants' claims in order to obtain orders that they would probably never have secured had they sued alone. It suffices to state here that for the present case none of the plaintiffs have claimed any specific portion.
20. Further, in view of the relatively smaller number of plots compared to the number of claimants, granting the orders sought without identification of each person's claim may create considerable social disorder on the ground and chaos in the land registry and survey records especially if it turns out that the individual occupation straddles the existing plot boundaries, and regularizing the same may result in a nightmare for the survey office and the land registry. In brief, what I am stating here is that granting of such orders may even create conflict amongst the plaintiffs themselves as they later attempt to adjust to the existing boundaries, which problems will needlessly be transferred to Government offices.
21. The generality of the plaintiff's claim can be savoured from the contents of the entire Originating Summons. In particular, the contents of paragraph 20 of the supporting affidavit which states as follows:
- "That the plaintiffs are by way of adverse possession entitled to be declared owners of Miti Mingi Mbaruk Block (parcel numbers provided.)"
22. I hardly find this to be a good pleading for the purpose of seeking title by way of prescription.
23. The Court of Appeal in the case of *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another* [2015] eKLR stated as follows:
- "The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of *Githu v Ndeete* [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them."



24. In *Samuel Kipngeno Koech v Agnes Wambui Gitonga* [2016] eKLR my brother Judge Sila Munyao demonstrated the need for specificity in adverse possession matters when he stated as follows:

“It follows that for a claim of adverse possession to be entertained in this country, the applicant must specifically identify the exact title of land that is the subject of the claim.

The extract of the title also has another significant importance. It does show the history of the proprietorship of the land in issue. This history is important in computing time, for there are some entities against whom one cannot claim adverse possession.”

25. This identification is vital in this case where evidence has shown that some of the parcels may have already been subdivided and disposed of by the defendants.

26. It is also the correct position that adverse possession orders can not be granted against the government of Kenya yet many of the titles over which adverse possession is sought are registered not in the names of the defendants but in the government’s name. (See the case of *Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees* [2016] eKLR and *Marao Gitabi v Gerald Wambui Kiragu* [2019] eKLR.) In the case of *Samuel Kipngeno Koech v Agnes Wambui Gitonga* [*Supra*] the court also observed as follows:

“So long as these entities remain the registered owners of the title being claimed, time cannot start running in favour of the occupant of the land in question. These entities are set out in Section 41 of the *Limitation of Actions Act*, CAP 22, Laws of Kenya, which provides as follows :-

S.41 Exclusion of public land

This Act does not—

- (a) enable a person to acquire any title to, or any easement over—
 - (i) Government land or land otherwise enjoyed by the Government;
 - (ii) mines or minerals as defined in the *Mining Act* (Cap. 306);
 - (iii) mineral oil as defined in the Mineral Oil Act (Cap. 307);
 - (iv) water vested in the Government by the *Water Act* (Cap. 372);
 - (v) land vested in the county council (other than land vested in it by section 120(8) of the *Registered Land Act* (Cap. 300); or
 - (vi) land vested in the trustees of the National Parks of Kenya; or
- (b) affect the right of Government to any rent, principal, interest or other money due under any lease, licence or agreement under the *Government Lands Act* (Cap. 280) or any Act repealed by that Act.

It seems to me from the documents availed by the applicant, that the land being claimed has been under the Settlement Fund Trustees. It has been held in various decisions, that land under the Settlement Fund Trustees is Government Land, and therefore one cannot claim adverse possession over such land.”

27. In the circumstances of this case and having regard to the case law cited above, I find that the plaintiffs have failed to prove their claim on a balance of probabilities.



28. For the foregoing reasons, the plaintiff's claim can not succeed and the Originating Summons dated 23/7/2021 is hereby dismissed with no orders as to costs.

DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 27TH DAY OF OCTOBER, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

