



**Ndenge v Naji & another (Environment & Land Case 3 of 2011)
[2022] KEELC 13666 (KLR) (19 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13666 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 3 OF 2011**

JO OLOLA, J

OCTOBER 19, 2022

IN THE MATTER OF PORTION NO. 44 MALINDI TITLE NO. CR 6391

AND

IN THE MATTER OF LIMITATION OF ACTIONS ACT CAP. 22 LAWS OF KENYA

AND

**IN THE MATTER OF AN APPLICATION FOR DECLARATION THAT THE PLAINTIFF
HAS OBTAINED TITLE OVER THE SAID PARCELS OF LAND BY ADVERSE POSSESSION**

BETWEEN

KADENGE DUKA NDENGE PLAINTIFF

AND

ZAID BIN AHMED BIN SAID NAJI 1ST DEFENDANT

ZEID AHMED SAID 2ND DEFENDANT

JUDGMENT

Background

1. By the Originating Summons dated February 3, 2011 but filed herein on February 4, 2011, Kadenge Duka Ndenge (the Plaintiff) claims to have acquired title in respect of the portion of land occupied by him measuring 19 acres by way of adverse possession and urges the court to determine and order:
 1. That the Plaintiff is entitled to be declared as (the) proprietor of his respective portion within Portion No 44 Malindi Title No CR 6391 which he has acquired by adverse possession, having lived and worked on the same for over 12 years since (the) late 1950's and used it peacefully, openly and without any interference from the defendants and their predecessors;



2. That the Plaintiff is entitled to be registered and issued with certificates of title over the same in the place of the defendants/respondents;
 3. That the Plaintiff (is) entitled to (the) costs of this suit.
2. The Originating Summons is supported by an Affidavit sworn by the Plaintiff wherein he avers that he was born and brought up in the 19 acres of land that was previously in possession and occupation of his parents. The Plaintiff further avers that his father is now long dead and was buried on the property and that his occupation of the land had been open and uninterrupted for as long as he has lived thereon.
 3. The Plaintiff asserts that though the suit property is registered in the name of Zaid Bin Ahmed Bin Said Naji (referred to as the 1st Defendant) he has never seen him. It is the Plaintiff's case that it is only recently that one Zeid Ahmed Said (referred to as the 2nd Defendant) emerged from nowhere claiming to be the 1st Defendant's son and thereby claiming ownership of the land.
 4. But in a Replying Affidavit sworn and filed herein on March 1, 2011, Zaid Ahmed Said Naji sued as the 1st Defendant avers that he is the same person sued as the 1st and 2nd Defendants as both names belong to himself. The Defendant admits that he is the proprietor of the suit property measuring some 36 acres but asserts that the Plaintiff is not entitled to the orders of adverse possession against any portion of the suit land.
 5. The Defendant avers that it is not true that the Plaintiff was born and raised on the suit property as the Plaintiff has all along been a squatter on Plot No 47 Malindi which borders the suit property. The Defendant avers further that sometime in the year 2000, the Plaintiff encroached onto the suit land, built a small hut, cleared a portion measuring about half an acre and started growing Cashew nuts thereon.
 6. Following that encroachment, the Defendant states that he reported the Plaintiff to the Gongoni District Officer whereupon the Plaintiff was ordered to vacate the land with an agreement that the Defendant would compensate him for the value of his crops assessed at Kshs 12,759/- and the value of the house assessed at Kshs 32,000/-. The Plaintiff however later reneged on the agreement and demanded to be compensated with an alternative land.
 7. The Defendant denies that the Plaintiff's father was buried on the suit land and avers that the Plaintiff has his home elsewhere in Gongoni. He accused the Plaintiff of being a "professional squatter" notorious for invading various private properties in the Coast region and claiming ownership thereof and urges the Court to discourage such tendencies in the strongest terms possible by dismissing the Plaintiff's claim.

The plaintiff's case

8. The Plaintiff called two witnesses who testified in support of his case at the trial which commenced before the Honourable Justice C W Meoli on August 29, 2012.
9. PW1 – Kadenge Duka Ndenge is the Plaintiff and a farmer in Marekebuni in Malindi. He told the Court he knows the Defendant as his neighbor and that each one of them have their separate homes. PW1 testified that his portion of land is 19 acres in size but he had no certificate of title as they had not been registered.
10. PW1 testified that he was unaware if the Defendant had a title to his portion of land. He told the Court they had lived on the land since 1936 to-date but the Defendant claims to own the land on which the



- Plaintiff lives. He further told the Court he was born on the suit land in 1954 and that the Defendant had taken over almost 16 acres of their land leaving him with only the space where his house stands.
11. PW1 told the Court they complained to the Area Chief who called a meeting. The Chief however said the Plaintiff had no title to the land. In 1962 the dispute over the land had been determined and the Defendant's father had been directed to compensate the Plaintiff's father if he wanted the Plaintiff's father to move from the land. The Defendant's father did not offer any compensation and the Plaintiff's family continued to live on the land.
 12. PW1 testified that they had a dispute in 2011 and that the District Officer (D.O) ordered him to vacate the land. PW1 refused and sought help from his Advocates who gave him a letter to take to the D.O Thereafter the Defendant did not return to the Plaintiff's land: PW1 told the Court he had built two houses on the land. He further told the Court the Defendants had not build on the land and that it is only recently they started farming thereon.
 13. PW2 – Chapuo Baya Thoya is a farmer in Gongoni and an acquaintance of the Plaintiff. He told the Court he had known the Plaintiff's home ever since he was in school in Marekebuni and that there used to be many houses in the homestead even though only two are remaining now. PW2 further told the Court that when PW1's father died, they buried him on the suit property.
 14. PW2 testified that he knows the boundaries of the Plaintiff's parcel of land even though he does not know its acreage.
 15. On cross-examination, PW2 conceded that he had written in his statement that he had known the Plaintiff since 1936 even though his national identity card shows that PW2 was born in 1943. He told the Court he was unable to remember the year he went to Marekebuni Primary School and admitted he had nothing to show he had attended school there.
 16. PW2 told the Court there were about 5 people buried on the land even though he could only remember the name of Mzee Duka who was the Plaintiff's father. He testified it had been long, probably 20 years since he was in the suit property. PW2 further told the Court he had heard that the Plaintiff's mother died and that she was buried in a place called Kanisani.
 17. PW2 told the Court the Plaintiff resides in Gongoni and not Marekebuni and that he does not know when the Plaintiff built the house on the land. He further told the Court the Plaintiff and his father had originally come from a place called Garashi where he (PW2) was born.

The Defence Case

18. The Defence called two witnesses who testified in support of their case at the trial
19. DW1 – Zaid Ahmed Said Naji is the 1st Defendant and a farmer residing in Mambui. He told the Court he was the one sued as the 1st and 2nd Defendants as the two listed names are his own.
20. DW1 testified that he is the registered owner of Plot No 44 Malindi which measures approximately 36 acres. Sometimes in early 2000, the Plaintiff encroached upon the land cleared about half-an-acre and built a small hut thereon. He thereafter started to grow Cashew nuts on the said piece of land.
21. DW1 told the Court he warned the Plaintiff but he insisted the area he had occupied was part of his plot No 47 which borders the suit property. DW1 reported the Plaintiff to the Gongoni District Officer (D.O) who ordered the Plaintiff to vacate the land upon valuation and compensation of the structure he had built and the crops he had planted. The hut was assessed at Kshs 32,000/- while the crops were valued at Kshs 12,759/-. Despite DW1's agreeing to compensate the Plaintiff the Plaintiff changed his mind and requested to be settled on another parcel of land.



22. DW1 told the Court he then offered his plot No 758 in Garite area to the Plaintiff but the Plaintiff refused and went to an Advocate who wrote to DW1 on October 19, 2001 demanding that DW1 should provide proof of ownership of the said Plot No 758 in Garite.
23. DW1 testified that he later cleared the entire 36 acres of land and planted Cassava thereon with the assistance of his younger brother Abdallah Ahmed Naji. The Plaintiff then started complaining that they were interfering with his land claiming to have inherited the same from his father. By a letter dated November 5, 2010, DW1's brother was summoned by the Chief Magarini Location on allegations that he was interfering with the Plaintiff's land.
24. DW1 told the Court he later on November 30, 2010 accompanied his brother for a meeting at the Chief's office where it was established that it is the Plaintiff who had encroached on DW1's land. The Chief asked them to explore an amicable settlement. DW1 then agreed to excise from the suit property a portion measuring 60 x 50 feet where the Plaintiff had erected his huts and was cultivating some crops. That portion of the land was measured by the Chief by counting the steps on the area occupied by the Plaintiff to which everyone agreed.
25. On cross examination DW1 told the Court he had known the Plaintiff for a long time as he used to see him in Gongoni. He also knew the Plaintiff's mother who was living in the neighbouring Plot No 72 DW1 did not however know the Plaintiff's father
26. DW2 – Abdalla Mohammed Abdisheikh is a businessman in Gongoni and a childhood friend of the Defendant. DW2 told the Court he had known the Plaintiff since the 1980's when the Plaintiff worked as a tractor driver at a salt works company in Gongoni. DW2 further Court the Plaintiff is his neighbor at Gondoni and that the Plaintiff who is a pastor lives there with his two wives. DW2 told the Court that when the Plaintiff's mother passed away, she was buried in the Plaintiff's place at Gongoni.
27. On cross-examination, DW2 conceded that he had only recorded his statement a week before he came to testify in Court. He told the Court the Plaintiff's mother lived on the suit land at some point although he did not know where she was living when she died.

Analysis and Determination

28. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the disputants herein.
29. The Plaintiff herein urges this Court to declare that he has acquired 19 acres comprised in the parcel of land known as Portion No 44 Title No CR 6391 Malindi by way of adverse possession. Accordingly he implores this Court to find and determine that he is entitled to be registered and issued with a certificate of title for the said portion of land in place of the Defendants herein.
30. In his affidavit in support of the Originating Summons, the Plaintiff avers that though the suit is registered in the name of Zaid Bin Ahmed Bin Said Naji (whom he refers to as the 1st Defendant), he had never seen the said 1st Defendant. The Plaintiff avers in those pleadings that it is only recently that one Zaid Ahmed Said whom he refers to as the 2nd Defendant emerged from nowhere claiming to be the 1st Defendant's son and by virtue of that fact claiming ownership of the land.
31. As it would turn out, there was no case of a father and son being sued as the person listed as the 1st Defendant entered appearance and laid claim to not only his name listed as the 1st Defendant but also the name listed as the 2nd Defendant. The now sole Defendant identified himself as the registered



proprietor of the suit property but at paragraph 18 of his Replying Affidavit rejected the Plaintiff's contention that the two protagonists have never met or known each other.

32. That the Plaintiff and the Defendant had met and knew each other well before this suit was instituted became clear and apparent when the Plaintiff testified herein as PW1 before the Honourable Justice Meoli before whom this trial commenced in Malindi on August 29, 2012. In his opening remarks before the Learned Judge, the Plaintiff is captured stating as follows:

“I reside at Marekebuni in Malindi. I am a father. I know Zeid Ahmed as a neighbor at Marekebuni. Each of us has our separate home. My portion is 19 acres in size. I have no certificate of titles as we have not registered. I do not know if Zheid had a title all I confirm is that we are neighbours. We have lived on the land since 1936 to date but Zheid claims he owns the land on which we live. I was born in 1954 but that is the home of my parents. The Defendant has taken over almost 16 acres leaving me space where my house stands. He cleared all vegetation. We complained to the Chief and had a meeting. The Chief said we had no title so we had no land ...”

33. In response to the Plaintiff's contention that they have been in occupation of the suit land since 1936, the Defendant told the Court that the Plaintiff had been a squatter on an adjacent Plot No 47 and that he had only encroached on the suit property some time in the year 2010 when the dispute herein started. The Defendant further told the Court that he had on several occasions warned the Plaintiff about his encroachment and asked him to vacate his property.

34. The Plaintiff herein has anchored his claim in the main on Section 38 of the [Limitation of Actions Act](#). The said Section provides inter, alias that:

“... where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, 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 the proprietor of the land.”

35. As the Court of Appeal observed in [Wilson Kazungu Katana & 101 Others v Salim Abdalla Bakshwein & Another \(2015\) eKLR](#):

“... beyond prescribing the limitation period, the [Limitation of Actions Act](#) does not expressly define “adverse possession” as a term. Section 13(1) however, provides that a right of action in recovery of land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession). Tied to this, is Section 7 of the [Limitation Act](#) which bars an owner of a parcel of land from an action to recover it at the expiry of twelve years. From all these provisions, what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the applicant; the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner ...” (Emphasis added).



36. That was the same position taken by the Court in *Margaret Wangui Njagi & 2 Others v George Kimani & Another (2019) eKLR* where the Court stated thus:

“The common law doctrine of adverse possession connotes possession which is inconsistent with and in denial of the title of the true owner of the land. To establish adverse possession, a claimant must prove that he has both the factual possession of the land and the requisite intention to possess the land. Secondly, the claimant must prove that he had used the suit land without force, without secrecy and without persuasion for the prescribed period limitation period of 12 years. Third, he must demonstrate that the registered owner had knowledge (or the actual or constructive means of knowing) that the adverse possessor was in possession of the suit property. Fourth, the possession must be continuous, it must not be broken or interrupted.”

37. Arising from the foregoing, the Plaintiff herein was required to prove that the said requirements had been satisfied in order for a finding of adverse possession to be returned herein. While the Plaintiff asserted that his family had been in adverse possession of the suit property since 1936, it was not clear how the Plaintiff knew when his parents moved onto the land if at all. The Plaintiff himself was by his own evidence born in the year 1954 and ought to have given a basis for his claim that the family occupied the land in 1936. At any rate, no time could have run against the Defendant as he was only registered as the proprietor of the land on 10th July, 1962.

38. Indeed while the Plaintiff told the Court that his father and the Defendant’s father had a dispute in 1962 in which the Defendant’s father was required to pay compensation before the Plaintiff’s father could move out of the land, there was absolutely no evidence of the alleged Court case nor the compensation required that was placed before the Court.

39. Other than his statements that he had been on the land for decades, there was nothing placing the Plaintiff on the suit land prior to the year 2001 which incidentally is the year the Defendant accuses the Plaintiff of encroaching on the land. While the only document produced by the Plaintiff in regard to the land refer to the year 2010 and 2011, it was clear from a perusal of the Defendant’s documents that the parties had a dispute over the land in October, 2001 pursuant to which some arrangement was arrived at to give the Plaintiff a different parcel of land in return to his ceasing the claim on the Defendant’s land.

40. It was otherwise clear from the Plaintiffs documents especially the minutes of the meeting held at the Magarini Area Location Chief David Mwangandi’s office on November 30, 2010 that the Plaintiff did not consider himself to be an adverse possessor but as one who had a boundary dispute to his ancestral land with that of the Defendant. That must have informed the opening remarks captured hereinabove in which the Plaintiff told the Court that each one of them had their respective parcels of land neighbouring each other at Marekebuni.

41. It was telling that while the Plaintiff has sought orders of adverse possession against the Defendant, he told the Court in those remarks that he was unaware if the Defendant had a title to his portion of the land. It was also telling that while the Plaintiff laid claim to 19 acres of the parcel of land measuring 36 acres, he did not provide any proof at how he had arrived at the acreage and or proof of the fact that he occupied or utilized the portion to the exclusion of the Defendant.

42. It is trite law that the land or portion of land adversely possessed must be definitely identified, defined or at least an identifiable portion with a clear boundary or identification. By his own admission, the Defendant had retaken much of the land the Plaintiff had laid claim to as at the time the Plaintiff came



to Court as the Plaintiff in his own testimony told the Court the Defendant had taken more than 16 acres of the land he was originally claiming and had left him only with the space where his houses stand.

42. That position was indeed supported by the Report from the Magarini Area Chief cited hereinabove dated November 30, 2010. As the Plaintiff told the Court in the opening remarks, the Area Chief did find that he had indeed encroached on the Defendant's land and it was only with the agreement of the Defendant that the Chief measured out an area of 150 strides by 60 strides for the Plaintiff to continue occupying.
43. Having found nothing to demonstrate that the Plaintiff was on the suit land prior to the year 2001, it was clear to me that as at the time this suit was instituted on February 4, 2011, the period of 12 years prescribed under Section 7 of the Limitation of Actions Act had not lapsed. I was also not persuaded that the Plaintiff had had an open, notorious and an uninterrupted possession and/or occupation of the suit land for the prescribed period.
44. The upshot is that I did not find merit in the Plaintiff's claim of adverse possession of any portion of the suit land. His suit is accordingly dismissed with costs to the Defendant.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI VIA MICROSOFT TEAMS THIS 19TH DAY OF OCTOBER, 2022.

In the presence of:

No appearance for the Plaintiff

Ms Thuku holding brief for Kilonzo for the 1st and 2nd Defendant

Court assistant - Kendi

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J O OLOLA

JUDGE

