



**Nyachieo v Ogwankwa (Environment & Land Case 6 of 2021)  
[2022] KEELC 13661 (KLR) (19 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13661 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 6 OF 2021**

**FO NYAGAKA, J**

**OCTOBER 19, 2022**

**N THE MATTER OF LAND PARCEL NO. TRANS- NZOIA/GETA/190**

**AND**

**IN THE MATTER BETWEEN**

**BETWEEN**

**NEMWEL NYACHIEO ..... APPLICANT**

**AND**

**MOSES OGWANKWA ..... RESPONDENT**

**JUDGMENT**

1. By an Originating Summons dated July 22, 2021 filed on July 23, 2021 but received in Court on July 22, 2021, the Applicant, one Nemwel Nyachieo, claimed that he obtained the suit land from the Defendant by way of adverse possession. The Originating Summons was brought under Order 37 Rules 61(1), 7(1) and 8 of the *Civil Procedure Rules* and Sections 37 and 38 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya. In it he sought a determination of a number of questions, namely, whether the Respondent was the registered owner of land comprised of Title Deed No Trans-Nzoia/Geta/190 since the 24/11/2008; whether he purchased a plot measuring 50ft x 100ft forming part of Title Deed No Trans-Nzoia/Geta/190 from the Respondent in the year 1991; whether he had been in open and notorious occupation of and in use of the said portion measuring 50ft x 100ft since the year 1991 to the present time without interference from the Defendant; whether had been using and occupying the said portion of land measuring 50ft x 100ft since the year 2008 to the exclusion of the Respondent; whether he had obtained title for the portion measuring 50ft x 100ft by way of adverse possession at the expiry of 12 years; whether the County Surveyor of Trans-Nzoia County should be directed to curve the portion of 50ft x 100ft from Trans-Nzoia/Geta/190 and put in place beacons thereto in readiness for transfer into the Applicant; whether the Land Registrar Trans-Nzoia County should be directed to transfer the portion measuring approximately 50ft x 100ft out of parcel



No Trans-Nzoia/Geta/190 to and register it into the Applicant's name; and whether the Respondent should be ordered to pay the costs of this suit.

2. The Applicant then prayed for Orders that: -
  - a. A Declaration be issued that the Applicant has obtained Land measuring 50ft x 100ft forming part of the Respondent's Title deed No Trans- Nzoia/Geta/190 (the suit land) by way of adverse possession by virtue that(sic) he has been occupying and using the said portion for a period of more than 12 years from the time when the Respondent was registered as the owner.
  - b. An Order directing the County Surveyor Trans- Nzoia County to curve the portion of 50ft x 100ft out of Title deed No Trans- Nzoia/Geta/190 and the same to be transferred into the name of the Applicant by the Land Registrar Trans-Nzoia County.
  - c. A Permanent Injunction restraining the Respondent/his servants/his agents/his successors/ Legal administrators and all those claiming under him from interfering in any manner with the Applicant's portion
  - d. That costs of this suit be paid by the Respondents.
  - e. Any other relief that this Honourable court may deem fit and just to grant
3. The Application was supported by the affidavit sworn by the Applicant on July 22, 2021. In it he deponed that he purchased a portion of land measuring approximately 50ft x 100ft from the Respondent (Plot No 190 North Kisii) which is now Title Deed No Trans-Nzoia/Geta/190 on the April 29, 1991. His further deposition was that the purchase price was agreed at Kshs 16,000/=. He swore that he paid it by way of installments to the full. He annexed to the Affidavit and marked as NN"1" a copy of the sale of land agreement of the said date. He then deponed that he had been occupying and using said portion of 50ft x 100ft from 1991 up to the time of suit. His oath was that prior to 24/04/2008 the Respondent was not registered as owner but on the said date he got himself registered as such. He annexed to the Affidavit and marked as NN"2" a copy of the Certificate of Official Search to evidence the registration.
4. The Applicant further deponed that he had severally requested and/or demanded that the Respondent obtains the consent of the Land Control Board to have the portion of land transferred into his name but in vain. He annexed marked as NN"3" a copy of the Demand Notice to the Respondent. It was dated August 11, 2020. He then swore that he had been peacefully, notoriously occupying and using the said portion of land without any interference from the Respondent for a period of more than twelve (12) years, more particularly, from the time the Respondent obtained title to all that parcel of land known Trans-Nzoia/Geta/190.
5. The Applicant then swore that he Respondent's claim over the portion of 50ft x 100ft portion of land out of title No Trans-Nzoia/Geta/190 had since been extinguished by the operation of law and he had obtained title deed thereto by way of adverse possession. He then deponed that the County Surveyor Trans-Nzoia County be directed to curve and erect beacons on the portion measuring 50ft x 100ft of the entire parcel of land in question and the County Land Registrar Trans-Nzoia County be directed to transfer the portion being the subject matter of the suit into the Applicant's name.
6. The Applicant deponed further that the Respondent, his agents, servants, successors or legal administrators and anyone claiming under him be restrained by way of a permanent injunction from interfering with the Applicants quiet possession of the suit portion. He asked the Court to condemn the Respondent to pay the costs of the suit.



7. When the Summons were served, the Respondent neither entered appearance nor filed any response thereto. Thus, the Summons was set down for hearing by way of formal proof. On the date of hearing Directions were taken, in terms of Order 37 Rule 19, to the effect that the Summons be deemed as though the suit was commenced by way of Plaint and therefore the Summons and Affidavit in support formed the pleadings. The matter proceeded by way of viva voce evidence.
8. The Plaintiff testified as PW1. He reiterated the contents of the Affidavit sworn on July 22, 2022. He stated how, on April 29, 1991, the Defendant sold to him the portion of land measuring 50ft x 100ft which was part of the then parcel that the Defendant owned in North Kisii Kitale. He produced the Sale Agreement as P Exhibit 1. He stated further that the agreed purchase price was Kshs 16,000/= of which he paid in two instalments, the second one being for Kshs 5,800/=. He testified further that he took possession of the land upon execution of the agreement and has since been in quiet and uninterrupted occupation thereof to the time of giving testimony. He gave evidence that he put up some rental structures on the portion of land and ran a barber shop from there all along. He estimated the period to be 31 years.
9. He testified further that the entire parcel of land which measured approximately 0.809 Hectares was finally registered as Trans Nzoia/Geta/190 in the Defendant's name on 24/11/2008 and that the portion comprising 50ft x 100ft was part of the title. He produced as P Exhibit 2 a copy of the extract of title which shows that the title was issued on that date in the Defendant's name. He also produced a copy of the Certificate of Official Search issued on July 1, 2021, evidencing the ownership as stated. He also produced as P Exhibit 4 the Defendant Notice he had since given to the Defendant but it was not heeded to. He then stated that having been in open, quiet and uninterrupted occupation of the land of over twelve (12) years he had since acquired title thereto by way of adverse possession. He prayed for the orders as pleaded in the Plaint.
10. At the end of the testimony he closed both his and the Defendant's case. He elected not to submit on the pleadings and evidence and left the Court to make a determination of the matter.

### **Issues, Analysis and Determination**

11. I have considered the pleadings, the law and evidence on record. I am of the view that the following issues commend themselves to me for determination:
  - a. Whether the plaintiff has proved acquisition of the suit land by way of adverse possession.
  - b. Who to bear the costs of the suit.
12. I proceed straight away to determine the issues.

#### **a. Whether the plaintiff has proved acquisition of the suit land by way of adverse possession**

13. In regard to a claim by adverse possession, this Court has stated before that it is one of those relics from the medieval ages that bestows an originally illegal occupier of another's land with proper title to the specific portion that he occupies unlawfully. I will not go to the discussion of the history and basis of that at this point or in this decision. Be that as it may, as I turn to the merits of the instant suit, I cite the analysis of the law from an earlier judgment of this Court.
14. In *Michael Maling'a Mbito v Florence Kethleen Law [2021] eKLR* this Court stated as follows:

“...three Sections of the *Limitation of Actions Act*, provide to an interrelated theme: a person who is not the registered owner of a parcel of land acquiring title thereto without the consent of the proprietor except where the proprietorship is of the government. Section 7 of the



*Limitation of Actions Act*, Chapter 22 of the Laws of Kenya lays out the principle of adverse possession. It states 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 on him, or if it first accrued to some person through whom he claims, to that person.”

15. Section 13 of the *Limitations of Actions Act* further provides:

“a right of action to recover 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) and, where under Sections 9,10,11 and 12 (of the Act) a right of action to recover land accrues on a certain date and no person is in Adverse Possession on that date, a right of action does not accrue unless and until some person takes Adverse Possession of the land.”

16. Section 17 of the *Act* is to the effect that where a person does not bring a suit for recovery of his land before the end of the period prescribed by the Act, that person’s rights over the land are extinguished. The persuasive case of *Wanjira Waweru v Peter Kabuga (2008) eKLR*, while discussing the theme I have alluded to above cited the case of *Benjamin Kamau Murima & Others v Gladys Njeri CA No 213 of 1996* where the Court of Appeal stated:

“The combined effect to 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 a proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of the land.”

14. Further, in the case of *Kasuve v Mwaani Investments Limited & 4 others 1 KLR 184*, the Court of Appeal restated what a Plaintiff in a claim for Adverse Possession has to prove;

“In order to be entitled to land by Adverse Possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

17. In the recent Court of Appeal case of *Mtana Lewa v Kabindi Nala Mwangandi [2015] eKLR* the Court summed up adverse possession as:

“... 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. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner...”

18. Therefore, in order for one to succeed in a claim for adverse possession, he has to prove the four elements of thereof. They are that he must have been in actual and not constructive possession of the land, the possession should have been open and not secret or be clear to everyone who knows and accesses the land, no other person other than the owner should be laying claim to the land.



19. In the case of *Ibrahim Wachira Karaguri v Mary Mwibaki Simon & Another [2020] eKLR* it was stated that the elements above stated ought to be proven. It cited the case of Benjamin Kamau Murima & Others v Gladys Njeri CA No 213 of 1996 (*supra*) which held as follows:

“.. 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 Plaintiff must show that the defendant 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”

20. The Court of Appeal in *Francis Gicharu Kariri v Peter Njoroge Mairu*, Civil Appeal No 293 of 2002 (Nairobi) the Court of Appeal cited with approval the High Court decision of *Kimani Ruchire v Swift Rutherford & Co Ltd (1980) KLR 10* where Kneller J, held that:

“The plaintiffs have 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 persuasion)”.

21. I have considered the above principles of law in relation to the facts of the instant case. In this matter the Plaintiff claims to have bought the portion of land comprising 50ft x 100ft being part of land parcel No Trans Nzoia/Geta/190 from the Defendant herein who as at the time of testimony herein was the registered owner as proved through P Exhibit 2 and 3. The transaction was executed on April 29, 1991 when the Plaintiff asserted he took possession thereof and put up shop structures on the portion, wherefrom he has to date been running a barber shop. He produced P Exhibit 1 as evidence of the purchase. He estimated the period of uninterrupted occupation as 31 years, well and above the minimum twelve (12) years that the law requires for such an occupation to run. In the present case it was upon the plaintiff to prove that he has been in actual occupation of the suit land for a period more than 12 years in a notorious peaceful and uninterrupted manner adverse to the interests of the registered owner. I have carefully analysed the certified copy of the handwritten agreement which was signed on the material date. It does not show when or upon when the Plaintiff was to take possession of the land. It, however, shows that the Plaintiff completed the purchase price on May 11, 1991. Granted that it is true that the Plaintiff took occupation upon execution, without any further evidence of permission to do so, he became a trespasser on the portion of the land he occupied, and which he claims. Further, without a Land Control Board consent for sale and subdivision having been granted his presence on the land was not lawful. Again, he testified that the suit land is registered in the name of the defendant. Produced evidence to that effect.

22. The totality of the evidence adduced by the Plaintiff herein is that he has proved his case against the Defendant on a balance of probabilities and is entitled to judgment against him and enter it accordingly. Thus, I make the following orders:

- a. A Declaration be and is hereby issued that the Applicant has obtained title to the portion of land and measuring 50ft x 100ft forming part of the Respondent’s title, namely, Trans- Nzoia/ Geta/190 (the suit land) by way of adverse possession.
- b. An order is hereby issued directing the County Surveyor Trans-Nzoia County to carve the portion of 50ft x 100ft, occupied by the Applicant, out of Title deed No Trans- Nzoia/ Geta/190 and the same be transferred into the name of the Applicant by the Land Registrar Trans-Nzoia County, both exercises to be done at the Applicant’s cost.
- c. The Respondent to sign the transfer documents in favour of the Applicant within a period of thirty (30) days from the date of completion of the Survey and preparation of the



mutation forms, in default of which the Deputy Registrar of this Court to execute the transfer documents in that behalf.

- d. A Permanent injunction be and is hereby issued restraining the Respondent, his servants, agents, successors in title or legal administrators, and all those claiming under him from interfering in any manner with the Applicant's portion of land measuring 50ft x 100ft, being the suit land herein.
- e. Each party to bear the costs of this suit.

23. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED VIA ELECTRONIC MAIL THIS 19<sup>TH</sup> DAY OF OCTOBER, 2022.**

**DR IUR FRED NYAGAKA**

**JUDGE, ELC, KITALE.**

