



**Gitiha v Ite Farmers Co-operative Society Limited (Environment & Land Case 107 of 2020) [2022] KEELC 13664 (KLR) (13 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13664 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 107 OF 2020  
OA ANGOTE, J  
OCTOBER 13, 2022  
IN THE MATTER OF PROPERTY KNOWN AS L.R. NUMBER 12672/148  
AND  
IN THE MATTER OF SECTION 7, 37 & 38 OF THE  
LIMITATION OF ACTIONS ACT, CHAPTER 22, LAWS OF  
KENYA  
AND  
IN THE MATTER OF SECTION 25, 28, 36 & 38 OF  
THE LAND REGISTRATION ACT NO. 3 OF 2012  
AND  
IN THE MATTER OF ORDER 37 RULES 1A, E. G & 7 OF THE CIVIL PROCEDURE RULES**

**BETWEEN**

**ALEX NJUGUNA GITIHA ..... PLAINTIFF**

**AND**

**ITE FARMERS CO-OPERATIVE SOCIETY LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff, vide Originating Summons dated June 5, 2020, sought for the following orders:
  - a. A declaration that the Plaintiff, Alex Njuguna Gitiha, is entitled to the entire title, possession, occupation and transfer of property namely LR No. 12672/148 by adverse possession on account of continuous uninterrupted possession thereof of over 14 years since the year 2005.
  - b. A declaration that the property L.R. No. 12672/148 if registered in the names of the Defendants is held by the Plaintiff, Alex Njuguna Gitiha.



- c. A declaration that the property if registered in the name of the Defendant be cancelled and transferred to the Plaintiff's name as the plaintiff has acquired the title to the property by adverse possession.
  - d. An order directing the Defendant to execute and deliver to the Plaintiff within 10 days, a transfer of property L.R. No. 12672/148 together with the original title of the property, to procure, execute and deliver all documents necessary to the Plaintiff free from any encumbrances failing which the Deputy Registrar Environment and Land Court should execute the transfer.
  - e. An order directing the Land Registrar to dispense with the production of original title deed L.R. No. 12672/ 148.
  - f. An order be issued restraining the Defendant whether by himself, servants or otherwise howsoever from interfering with the Plaintiff and/or their servants and members' access to quiet possession of, accessing, advertising, offering for sale, leasing mortgaging, charging, T or assigning, subdividing and/ or otherwise dealing with property namely L.R. No. 12672/148.
  - g. A declaration that the Defendant is not entitled to enter or use a portion of Plaintiffs land and where an injunction should issue restraining the Defendant whether by themselves or their servants or otherwise howsoever from entering or using the said parcel of land.
  - h. The Costs of the Defendant be paid by the Defendant.
2. The grounds in support of the application are set out on the face of the application and the Supporting Affidavit of the Plaintiff, Alex Njuguna Gititha. The Plaintiff deponed that he has acquired interest and obtained title to L.R. No. 12672/148 in Runda area (the suit property) by adverse possession and that he is entitled to the suit property.
  3. According to the Plaintiff, he has been in possession of suit land for 14 years continuously, without interruption, and without the Defendant's consent since 2005.
  4. The Plaintiff deponed that he has cultivated crops, planted trees, undertaken farming and put up structures on the suit land without interruption; that the said possession was without collusion or fraud and that he has consequently acquired prescriptive rights over the suit property.
  5. The Plaintiff deponed that the Defendant has throughout the years of his occupation acknowledged the existence of his right to title and occupation of the suit property; that he has substantially invested in the suit property and is likely to suffer substantial loss if the orders are not granted and that all documents pertaining to the suit property, including the title, are held in trust by the Defendant for him.
  6. Despite service of summons upon the Defendant by way of substituted service vide an advertisement in the Standard newspaper on September 25, 2020, the Defendant failed to enter appearance. This suit proceeded as undefended. In his testimony, the Defendant adopted the depositions in his Affidavit, together with the annexures.

### Submissions

7. The Plaintiff's advocate submitted that the Plaintiff has satisfied the requirements for adverse possession because he has been in occupation of the suit property openly and continuously for more than 12 years. The Plaintiff's advocate relied on the case of *Wambugu vs Njuguna* (1983) KLR 173 as quoted in *Celina Muthoni Kithinji vs Safiya, Binti Swaleh & 8 others* [2018], *Mbira vs Gachubi* (2002)



IEALR 137, *Jandu vs Kirplal & Another* (1975) EA 225 and *Karnataka Board of Wakf vs Government of India & Others* (2004) 10 SCC 779.

8. Counsel submitted that the Plaintiff had obtained overriding rights over the suit property as defined under Section 30 of the [Registered Land Act](#) and Section 28 of the [Land Registration Act](#) 2012 and that this court has discretion to declare that the suit property belongs to the Plaintiff under Section 80 of the [Land Registration Act](#).

### **Analysis and Determination**

9. Upon considering the Plaintiff's Originating Summons, the Supporting Affidavit, the evidence and submissions, the issue for determination is whether the Plaintiff has acquired title to the suit property by way of adverse possession.
10. The Plaintiff's case is that he has been in possession of the suit land since 2005, and that the said possession has been open, exclusive, peaceful and adverse to the interests of the Defendant. The Plaintiff produced photographs of the suit property to evidence his possession. According to the Plaintiff, he has acquired prescriptive rights and obtained title to the suit property by adverse possession and should be registered as the owner.
11. The doctrine of adverse possession in Kenya is embodied in Section 7 of the [Limitation of Actions Act](#) which 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.”

12. The [Limitation of Actions Act](#) makes further provision for adverse possession at Section 38 as follows:

- (1) 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.
- (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.
- (3) A proprietor of land who has acquired a right to an easement under section 32 of this Act may apply to the High Court for an order vesting the easement in him, and may register any order so obtained in the register of the land or lease affected by the easement and in the register of the land or lease for whose benefit it has been acquired, and the easement comes into being upon such registration being made, but not before.
- (4) The proprietor, the applicant and any other person interested may apply to the High Court for the determination of any question arising under this section.”



13. The Court of Appeal in *Mtana Lewa vs Kabindi Ngala Mwangandi* [2015] eKLR summed up what adverse possession entails:

“... 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...”
14. The requirements for adverse possession were set out in *Mbira vs Gachubi* (2002) IEALR 137 in which the court held as follows:

“...a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption...”
15. Where the person occupies land with the consent of the owner, the Court of Appeal in *Ndiema Samburi Soti vs Elvis Kimtai Chepkeses* (2010) eKLR, held that such a person cannot be said to be in adverse possession as in reality, he has not dispossessed the owner and the possession is not illegal. Such possession only becomes adverse when such a licence determines, as was held in *Wambugu vs Njuguna*, (1983) KLR 172:

“Where the claimant is in exclusive possession of the land with leave and license of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined.”
16. It is trite law that he who alleges must prove. Guided by Section 107 (1) as read with Sections 108 and 109 of the *Evidence Act*, the burden of proving adverse possession is upon the person who alleges that he has acquired title by way of adverse possession. Even when a claimant’s evidence is uncontroverted or where the claim is undefended, as in this case, a claimant must discharge his burden of proof.
17. Whether the Plaintiff is in adverse possession of the suit land is a matter of evidence. Has the Plaintiff discharged his burden of proof to lead this court to the finding that he has acquired title by way of adverse possession?
18. The Plaintiff gave affidavit and oral evidence in which he asserted that he has been in possession of the suit land since 2005, and that the said possession has been open, exclusive and peaceful. The Plaintiff produced as evidence a copy of a search of the title and a copy of the Certificate of Title which was registered in favour of the Defendant on December 23, 2001.
19. The Plaintiff produced in evidence two photographs of the purported land which appeared to have maize crops growing on it. The purported photographs of the suit land are the only evidence in support of the testimony of the Plaintiff. These photographs are however not useful as they are not accompanied by a certificate indicating who took them or even which year they were taken.
20. In fact, other than the Plaintiff’s assertion that these photographs show the state of the suit land as at the time and date they were taken, there is nothing else to support that assertion. The said photographs,



without a certificate indicating the person who took them, and the date when they were taken are of no evidential value.

21. In the case of *Joseph Macharia Mwangi vs Jonab Kabiru S/O Kabuthi* [2013] eKLR, the Court of Appeal held that moving into another person's land without such person's consent and carrying out cultivation from time to time without showing that such cultivation was continuous and without interruption for 12 years may not meet the threshold under the doctrine of adverse possession.
22. The court in *Joseph Macharia (supra)* went further to state that going onto the land of another person periodically to cultivate may not amount to adverse possession even where the total period of cultivation may amount to 12 years unless it is shown that the cultivation was conducted continuously from season to season and the trespasser had control of the land claimed throughout.
23. Where possession is predicated on the fact of cultivation, it must be shown clearly that the claimant openly and continuously, from season to season, cultivated and had control of the land for 12 years or more with the knowledge of the owner but without the owner's permission or consent.
24. In the present case, the Plaintiff did not adduce evidence to prove that he cultivated the suit property every season with the knowledge of the Defendant for 12 years. Indeed, no records of the proceeds of the alleged cultivation were availed to this court.
25. The upshot of the foregoing is that the Plaintiff's evidence falls short of the standard required to prove that he has acquired the suit property by way of adverse possession. He has not made a case to be granted the orders he sought.
26. This suit is consequently dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 13<sup>TH</sup> DAY OF OCTOBER, 2022.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Ms Onsembe for Plaintiff

No appearance for Defendant

Court Assistant - June

