



**Kamundu v Kamundu (Environment & Land Case E002 of 2022)
[2022] KEELC 15002 (KLR) (22 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15002 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND CASE E002 OF 2022
LG KIMANI, J
NOVEMBER 22, 2022
IN THE MATTER OF AN APPLICATION UNDER SECTION 38 OF
THE LIMITATION OF ACTIONS ACT CHAPTER 22 LAWS OF
KENYA
-AND-
IN THE MATTER OF ACQUISITION OF TITLE BY ADVERSE
POSSESSION
-AND-
IN THE MATTER OF LAND PARCEL NO. KISASI/MANZINI/635
SITUATED IN KISASI SUB COUNTY IN KITUI COUNTY**

BETWEEN

JOSEPH JOMO KAMUNDU APPLICANT

AND

NZUKI KAMUNDU RESPONDENT

JUDGMENT

1. Before this Honourable Court is an Originating Summons Application dated 31st January 2022 brought under Order 37 rules 7 and 14 of the *civil Procedure Rules*, Section 38, The *Limitation of Actions Act* CAP 22 Laws of Kenya seeking for the following Orders:
 1. That the Plaintiff herein be declared to be entitled by adverse possession for over 12 years to Land Parcel Title No. Kisasi/Manzini/635 now registered in the name of Nzuki Kamundu.



2. That the Plaintiff be registered as absolute proprietor in respect of Title No. Kisasi/Manzini/635.
 3. That the costs of these summons be awarded to the Plaintiff.
2. The Plaintiff claims that he has enjoyed continuous, uninterrupted and peaceful occupation of the land parcel No. Kisasi/Manzini/635 since June 1994 for the last 28 years with the full knowledge of the Defendant a period exceeding 12 years. He claims that prescriptive rights have accrued in his favour and that he is entitled by operation of the law to be registered as the absolute proprietor of the suit parcel of land.
 3. In his supporting affidavit, the Applicant confirmed that the Defendant is the absolute proprietor of all that Parcel of Land known as Kisasi/Manzini/635 as per the certificate of official Search attached to the affidavit. He further states that he took vacant possession and entered the suit property in June 1994 fenced and started developing and occupying a portion measuring three (3) acres.

The Respondent's Case

4. The Respondent opposed the application herein and swore a Replying Affidavit on the 25th of February 2022 stating that the Applicant is his brother with whom he has had a boundary dispute for a long time. He states that he is the registered owner of the suit property, Kisasi/Manzini/635 and that the Applicant extended his boundary into his land. He further claims that the Applicant has physically assaulted him severally and his wife on occasion and he has reported the matter to the police station but no action has been taken.
5. He claims that since he was ailing, he gave his son Muema Nzuki permission to file Kitui CMCC E023 OF 2021 against the Plaintiff in this case. He has attached copies of pleadings and stated that the Applicant has never attended Court. An order was issued by the Court that the Land Surveyor put back the original boundaries and even the area administration and police were involved but the Applicants refused to comply with the order and the surveyor was unable to put back the original boundary.
6. The Respondent avers that he has been living on that piece of land together with his family for the whole of his life. He therefore contends that this application is brought in bad faith and prays that the Applicant's application be dismissed with costs to the Respondent.

Evidence at the hearing

7. The Plaintiff applied for directions on the hearing of the Originating Summons by way of the application dated 9th March 2022 and the court directed that the originating summons proceed by way of viva voce evidence. Hearing of the suit proceeded on 18th July, 2022. The Respondent did not attend court though he was clearly served with a hearing notice and an affidavit of service by one Petronillar katheke Mutie sworn on 7th July 2022 was filed in court on 12th July 2022. PW 1 Joseph Jomo Kamundu, the Applicant herein testified and confirmed that the suit property is registered in the Respondent's name. He stated that he bought the land from the Respondent in 1994 but he refused to subdivide it and give him his portion. He stated that he entered the land in August 1994 and he has cultivated the land for 28 years by planting maize and other crops. Though the Applicant stated that he had attached a copy of the agreement, the same was however not attached. He requested the Court to give him a number for his land so that he could have a title.



Applicant's submissions

8. In his written submissions, the Applicant has submitted that the fact that the Respondent filed a replying affidavit but did not attend court and did not testify means that his claim is uncontroverted. Counsel relied on the holding in the case of Nairobi HCCC 680 of 2000 *Insurance Company of East Africa-vs Eva Vivian Wanjiru Mbagaro*. and *Janet Kaphi Ouma and Another vs Marie Stopes International* Kisumu HCCC 68 of 2007.
9. The Applicant cited several authorities that have held that in order to succeed in a summons for adverse possession, it must be shown that the Respondent had open knowledge of the possession, it was continuous and uninterrupted for a period of at least 12 years and that the possession was adverse to the possessor. The Applicant cited the cases of *Peter Mbiri-vs Samuel Mugo Michuki*(2014)eKLR, *Patrick Magu Mwangi Kimuyu-vs Joneth Ltd* 2015 eKLR and *Wambugu vs Njuguna* 1983 KCR 174 cited in *Karuntimi Raiji-vs M'makinya* 2013 eKLR.
10. The Applicant submitted that he has made out a case for adverse possession and proposed an order directing the Land Registrar Kitui to register the Applicant as the owner of the suit land.

Analysis and Determination

11. I have considered the Originating Summons dated 31st January 2022, the replying affidavit by the Respondent sworn on 25th February 2022, the evidence of the Applicant during trial and submissions by his Counsel.
12. The Applicant seeks to enforce a right of adverse possession over the suit property Land Parcel Title No. Kisasi/Manzini/635. Section 7 of the *Limitation of Actions Act* CAP 22 provides that:

“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.”
13. The procedure for making such an application is set out under Order 37 Rule 7 of the Civil Procedure Rules(2010) which provides that:

“An application under section 38 of the *Limitation of Actions Act* shall be made by originating summons. (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.”
14. The first issue for consideration is the Applicants submission that since the Respondent did not testify in court by giving oral evidence as per the directions given by the Court, the Applicants evidence should be considered as uncontroverted and the statements made by the Respondent are deemed to be mere allegations. He cited the cases of Nairobi HCCC 680 of 2000 *Insurance Company of East Africa-vs Eva Vivian Wanjiru Mbagaro*. and *Janet Kaphi Ouma and Another vs Marie Stopes International* Kisumu HCCC 68 of 2007. However, I do find that those cases are distinguishable from the present case since in the said suits the parties had filed defences to the suit which were not on oath whereas in the present case the Respondent filed a replying affidavit and attached documents which he relied on. Order 37 Rule 7 (1) and (2) of the Civil Procedure Rules on Adverse Possession provides that:
 1. “An application under section 38 of the *Limitation of Actions Act* shall be made by originating summons.



2. The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed”
17. I find that in the first instance the procedure for filing a claim for adverse possession is by way of originating summons supported by a supporting affidavit. Having been served the Respondent filed a replying affidavit setting out issues of fact. I do not find any justification for not considering the replying affidavit already on record even though the Respondent did not testify. However, I am cognizant of the fact that the said testimony contained in the affidavit has not been tested by way of cross-examination as would have been the case had the Respondent availed himself at the hearing of the suit.
18. Although the Applicant states that he had purchased the suit land, there is no Agreement for sale attached to the supporting affidavit or put in evidence. The Applicant stated that he has been in occupation of the land since the year 1994 for the last 28 years. In the case of *Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others* [2018] eKLR, where the Court enumerated the required elements to prove adverse possession as follows:
- “Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non-permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12years as espoused in the Latin maxim, nec vi nec clam nec precario.”
15. In *Karnataka Board of Wakf –vs- Government of India & Others* [2004] 10 SCC 779 quoted in the Court of Appeal case of *Ruth Wangari Kanyagia vs Josephine Muthoni Kinyanjui* [2017] eKLR the court stated thus:-
- “In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won’t affect his title. But the position will be altered when another person takes possession by clearly asserting title in denial of the title of the true owner. It is a well settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, and hostile and continued over the statutory period.”
16. From the oral and affidavit evidence it has been proved that the Applicant’s occupation of the suit land has been non-permissive, open and notorious since the Respondent states in his Replying Affidavit that he has had a boundary dispute with his brother, the Applicant, for a long time. The Respondent’s son filed a case at the Kitui Chief Magistrate’s Court Land Case 23 of 2021 Muema Nzuki versus Joseph Nzomo Kamundu where the Respondent accused the Applicant of not allowing the Surveyor into the land as ordered by the Court.
17. It is trite law that in a claim for adverse possession, time ceases to run when the owner of land subject to a claim of adverse possession asserts their rights over the property. This was held in the case of *Gitbu vs Ndeete* [1994] KLR quoted by the Court of Appeal in *Kenya Commercial Bank (Suing as*



administrator of the Estate of Paul Njoroge Muchene) v Serah Njeri Muchene (sued on behalf and as the administratrix of the Estate of Perminus Muchene Mwangi)

“time ceases to run under the *Limitation of Actions Act* either when the owner takes or asserts his rights or when his right is admitted by adverse possession. Assertion occurs when the owner takes legal proceedings or makes an entry into land.”

18. In the present case, the suit before the Chief Magistrate’s Court whose pleadings are attached was not filed by the Respondent as the registered owner of the suit land and further the suit was filed in the year 2021, 27 years after the Applicant took possession of the land in 1994 and time started running. I do find that the said case cannot be said to have broken the continuity of time for purposes of a claim for adverse possession.
19. It is noted that in his replying affidavit the Respondent did not specifically deny the claim that the Applicant entered into the land in the year 1994 as claimed. He further did not deny that the Applicant occupies a portion measuring three acres of the suit land and he did not state the measurement of the portion of the suit land the Applicant occupies. It is noted from the official search that the entire suit land measures 2.39 Hectares and it has been confirmed by the Respondent in his replying affidavit that the Applicant occupies a portion thereof.
20. The Applicant has sought that the title to the suit land be registered in his name in place of the Defendant’s name. The Court in *Maweu v Liu Ranching & Farming Cooperative Society* [1985] eKLR found that this is a possibility by virtue of Section 38 of the *Limitation of Actions Act* when the Court found that:

“But in the instant case an action based on adverse possession is clearly maintainable, notwithstanding that a certificate of title has been issued, because section 38(1) of that Act, to which Mr Mugo, who now appears for the Appellants referred us, expressly provides that a person claiming to be so entitled may apply to the High Court for an order that he be registered in place of the person then registered as the owner of the land.”
21. It is however noted that the Applicant claims in the originating summons the entire suit land; the supporting affidavit clearly indicates that the Applicant occupies a portion of three acres out of the said land. The evidence of the Respondent in the replying affidavit further shows that the Respondent also resides on the suit land together with his family. It cannot therefore be true that the Applicant occupies the entire land as claimed.
22. I do find that the applicant has proved his claim on a balance of probability and allow the Originating Summons dated 31st January 2022 in the following terms:
 1. That the Plaintiff/Applicant be and is hereby declared to be entitled by adverse possession for over 12 years to a portion of three acres out of Land Parcel Title No. Kisasi/Manzini/635 now registered in the name of Nzuki Kamundu.
 2. That the Plaintiff/Applicant be registered as absolute proprietor in respect of the said three acres out of land parcel No. Kisasi/Manzini/635.
 3. Costs of this suit to be paid to the Applicant.

DELIVERED, DATED AND SIGNED AT KITUI THIS 22ND DAY OF NOVEMBER 2022.

L. G. KIMANI

JUDGE ENVIRONMENT AND LAND COURT



Judgement read in open court in the presence of-

Musyoki Court Assistant

M/S Ngala Advocate holding brief for Kalili for the Plaintiff/Applicant

No attendance for the Respondent

