



**Gutwi v Mwita (Environment & Land Case 90 of 2019)  
[2022] KEELC 15476 (KLR) (22 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15476 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MIGORI  
ENVIRONMENT & LAND CASE 90 OF 2019**

**MN KULLOW, J**

**NOVEMBER 22, 2022**

**IN THE MATTER OF CLAIM FOR ADVERSE POSSESSION PURSUANT  
TO SECTION 38 OF THE LIMITATIONS OF ACTIONS ACT**

**AND**

**IN THE MATTER OF: L.R. NO NYABASI/BOMERANI/402**

**BETWEEN**

**DANIEL WEREMA GUTWI ..... PLAINTIFF**

**AND**

**PETER MAGABE MWITA ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff herein commenced this suit by way of an originating summons dated December 10, 2019 against the defendant for a determination of the following issues: -
  - i. That this honourable court be pleased to declare that the plaintiff and any other person claiming under him has acquired by way of adverse possession a portion measuring 2 ½ acres of LR No Nyabasi/bomerani/402.
  - ii. This honourable court be pleased to declare that the plaintiff is the owner of the said 2 ½ acres of LR No Nyabasi/bomerani/402 to the exclusion of the defendant.
  - iii. This honourable court be pleased to order for the transfer of a portion measuring 2 ½ acres of the suit parcel and that same be registered into the plaintiff's name.
  - iv. The defendant be ordered and/or directed to execute and/or sign all the necessary instructed to sub-divide and facilitate the transfer and registration of the 2 ½ acres of suit property into the names of the plaintiff, in default of which the deputy registrar to execute the same in order to facilitate the transfer.



- v. This honourable court be pleased to order the defendant to bear costs of this suit.
2. The originating summons is premised on the 10 grounds thereon and on the plaintiff's supporting affidavit sworn on December 10, 2019. The plaintiff avers that on or about the July 27, 1974, his late father Joram Gutwi Chacha *alias* Gutwi Chacha Getamani and the late Harun Chacha Machage entered into a sale of land agreement for the purchase of a portion of land in LR No Nyabasi/bomerani/402 which is currently registered under the defendant's name through unknown means. The plaintiff further avers that since the purchase of the land by his late father, he has been in full and open occupation of the suit parcel.
  3. The plaintiff claims that despite being notified of the transfer process, the defendant has been reluctant to comply leaving the plaintiff frustrated since he has been in occupation of the land together with his family for an uninterrupted period of more than 20 years.
  4. It is his contention that the defendant has never taken any legal action or step to interrupt with his occupation in the suit parcel despite him having occupied the same for a period of more than twelve years which means that he has Adverse interest as protected by section 28 of the *Land Registration Act* (No 3 of 2012).
  5. He therefore urged the court to find that he had acquired rights and interests over the suit property which are adverse to the defendant's interest and to order that a portion of the suit land measuring 2 ½ acres be transferred and registered in his name.
  6. The defendant neither entered appearance nor filed a replying affidavit in response to the claims levelled against him within the stated timelines. The evidence by the plaintiff is therefore deemed uncontroverted and/or unchallenged.

### **Trial**

7. On March 17, 2022, this court certified the matter ready for hearing and scheduled the matter for hearing on May 31, 2022. On the scheduled hearing date, the court being satisfied that there was an affidavit of service on record, showing that the defendant was duly notified/properly served with the said hearing date; the matter proceeded for hearing *ex-parte* the defendants absence notwithstanding.
8. Plaintiff testified as PW1; he stated that he did not know the defendant personally but the defendant went to live on the suit parcel after a portion of the same had already been purchased by his late father. He further stated that he had filed his statement dated December 10, 2019 and adopted the same as his testimony and evidence. he further stated that a search from the land's office confirmed that the suit parcel was registered in the defendant's name.
9. He produced the following documents in his list of documents dated December 10, 2019 as exhibits in support of his case as follows;
  - a) copy of official search Nyabasi/bomera/402 dated July 15, 2019 – PExhibit 1
  - b) copy of green card -PExhibit 2
  - c) copy of photographs showing plaintiffs homestead. PExhibit 3
  - d) copy of sale of land agreement dated July 27, 1974. – PExhibit 4
  - e) copy of order dated June 16, 2021 restraining the defendant - PExhibit 5
10. Mohatse Chacha testified as PW2; he adopted his statement dated February 16, 2022 as his testimony and evidence in chief. The plaintiff thereafter closed his case.



11. Since the defendant had been served with the hearing notice and the pleadings in the case but failed to enter appearance or file a response; I directed that the defence case be marked as closed.
12. Upon close of the defence case, I issued directions on the filing of submissions. The plaintiff, through the firm of M/S Abisai & Co Advocates filed his submissions dated June 3, 2022.

### **Plaintiff's Submissions**

13. The plaintiff submitted on 3 main issue to prove that he had established a case of adverse possession and that he was entitled to the orders sought. It was his submission that the plaintiff and those claiming under him have been in occupation and possession of the suit property since the year 1974 to date; the said possession has been open and without the permission of the respondent, without secrecy or force for a duration of over 12years and he adduced evidence in support of the same.
14. He thus opined that the sale agreement confirmed that his father bought a portion of the suit parcel from Haruni Chacha Machage who is deceased and PExh-2 confirmed that Haruni Chacha Machage was the first registered proprietor of the suit land. The plaintiff further averred that despite not having a Title, he is now entitled to an adverse title in his own right and not on behalf of his deceased father.
15. The plaintiff further argued that the defendants rights over the suit parcel were extinguished upon the lapse of 12 years that the plaintiff continued to reside on the suit parcel.

### **Analysis And Determination**

16. I have carefully considered the originating summons and the exhibits produced by the plaintiff in support of his claim together with the plaintiff's submissions in totality. In view of the same, the issues arising for determination are as follows: -
  - a. Whether the claim of adverse possession has been proved by the plaintiff.
  - b. Whether the plaintiff is entitled to the reliefs sought.

#### **A. Whether the claim of adverse possession has been proved by the plaintiff.**

17. The legal framework for adverse possession is provided for in various statutory provisions to wit; sections 7,13, 17 and 38 (1) and (2) of the [Limitation of Actions Act](#) and section 28 (h) of the [Land Registration Act](#).
18. In the case of *Mbira v Gachubi*, 2002] IEALR 137, the court outlined the requirements for adverse possession 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....”
19. It is the plaintiff's contention that his late father, Joram Chacha entered into an agreement for the sale of land with one Harun Chacha for a portion of the suit land measuring approx. 2 ½ acres in the year 1974. Pursuant to the said agreement, he immediately took possession of the said portion where he has remained in occupation and use to date; no legal action has ever been taken to interrupt his possession and occupation thereof.



20. The defendant neither entered appearance nor filed a response to the averments made by the plaintiff. He also did not attend the hearing and thus the evidence of the plaintiff remains unchallenged.
21. The main issue in dispute herein is whether the plaintiff's occupation and use of a portion of the suit parcel, vested him with proprietary rights and interests over the said suit parcel which are adverse to the defendant's rights over the said portion of land measuring 2 ½ acres.
22. The plaintiff entry into the disputed portion of land as indicated earlier was vide a sale agreement dated July 27, 1974 between his late father and the late Harun Chacha Getamani, for the purchase of a portion measuring approx 2 ½ acres. He however contends that the defendant has been reluctant to comply with the transfer process and hence the suit land has never been transferred and registered in his name to date. By virtue of the sale agreement produced as Pexh 4; it is clear that the plaintiff's entry into the said portion of land was permissive and consensual.
23. Adverse possession is a hostile possession by clearly asserting a wrongful disposition in denial of the title of the rightful owner. It must start with a wrongful dispossession of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period of 12 years.
24. Possession and occupation in a claim for adverse, must be open, continuous and uninterrupted for a period of 12 years. An applicant must also establish and demonstrate whether he has acquired rights and overriding interests over the suit property which are adverse to the rights of the defendant as the registered proprietor of the suit land.
25. The plaintiff contends that he has been in continuous uninterrupted possession and occupation of the portion of the suit property since 1974 when he took immediate vacant possession of the land and has remained in occupation and use to date.
26. In the case of *Peter Okoth v Ambrose Obido Andajo & Benedict Odhiambo Oketch* [2021] eKLR it was held that; -

“..... for one to stake a claim on a parcel of land on the basis of adverse possession, he must show that he entered the parcel of land more or less as a trespasser as opposed to by consent of the owner. In other words, his entry must be adverse to the title of the owner of the land. It is also possible to enter the land with the consent of the owner, but if the owner at some point terminates the consent and the applicant does not leave but continues to occupy the land and the owner takes no steps to effectuate the termination of the consent for a period of twelve years after then, such applicant would be perfectly entitled to sue on account of adverse possession. Besides adverse entry into the land, the applicant must also demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner. The occupation must be open, uninterrupted, adverse to the title of the owner, adequate, continuous and exclusive as already stated. The burden of proving all these is on the person asserting adverse possession. So that a claim of adverse possession would not succeed if the entry to the land was with the permission of the owner and remains that way throughout, or before the permission is terminated or if before the expiry of the period, the owner of the land takes steps to assert his title to the land.....”

27. Although the plaintiff's entry into the land was by virtue of a sale and hence permissive, it is worth noting that the said sale was in 1974. It is however important to note that the said sale became unenforceable for the failure to obtain the land control board consent within statutory period of 6 months and further that the transfer process as not finalized within the required timelines.



28. Guided by the above decision and having held that the said contract for the sale of and was unenforceable; I find that the plaintiff's continued occupation and use consequently became non-consensual. There has not been any demonstration of any legal action or steps taken by the defendant to interrupt the plaintiff's possession and occupation or evict him from the portion thereof.
29. It is therefore my considered view that the plaintiff's continued possession and occupation has since become adverse; thus at the time of filing the suit, the plaintiff had occupied and used the suit land for more than the 12 years' statutory period required in a claim for adverse possession.
30. In view of the foregoings+, I find and hold that the plaintiff has satisfactorily proved on a balance of probabilities that his occupation and use of a portion of the suit property measuring 3acres to warrant the reliefs sought.

### **B. Whether the plaintiff is entitled to the reliefs sought**

31. In view of the foregoing, having held that the plaintiff has proved his claim on adverse possession against the defendant' title to the required standard, I find that he is entitled to the reliefs sought.

### **Conclusion**

32. The upshot of the above is that the plaintiff has proved his claim on adverse possession on a balance of probabilities and I accordingly allow the originating summons dated December 3, 2014 as follows;
  - a. A declaration be and is hereby made that the plaintiff and any other person claiming under him has acquired a portion of LR No Nyabasi/bomerani/402 measuring 2 ½ acres by way of adverse possession.
  - b. Consequently, an order is hereby made that the plaintiff is the owner of the said portion of LR No Nyabasi/bomerani/402 measuring approx 2 ½ acres to the exclusion of the defendant.
  - c. An order is hereby issued order for the transfer of a portion measuring 2 ½ acres of the suit parcel and that same be registered in the name of the plaintiff's name.
  - d. The defendant is hereby directed to execute all the necessary instruments to sub-divide and facilitate the transfer and registration of the 2 ½ acres of suit property into the names of the plaintiff within 45 days from the date of this judgment, in default of which the deputy registrar is hereby directed to execute the said documents in order to facilitate the said transfer and registration.
  - e. Each party to bear their costs of the suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 22<sup>ND</sup> DAY OF NOVEMBER, 2022.**

**MOHAMMED N. KULLOW**

**JUDGE**

**In presence of; -**

**Ms. Okota for the Plaintiff**

**Nonappearance for the Defendant**

**Court Assistant - Tom Maurice/ Victor**

