



REPUBLIC OF KENYA



**Kavere v Fedha & another; Trustees of the Association of Jehova  
Witness in Africa (Interested Party) (Environment & Land Case  
6 of 2022) [2022] KEELC 14728 (KLR) (10 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14728 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA  
ENVIRONMENT & LAND CASE 6 OF 2022  
E ASATI, J  
NOVEMBER 10, 2022**

**BETWEEN**

**SILVERS OLENGE KAVERE ..... PLAINTIFF**

**AND**

**JARAM EVANS FEDHA ..... 1<sup>ST</sup> DEFENDANT**

**VINCY AMIANI ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**THE TRUSTEES OF THE ASSOCIATION OF JEHOVA WITNESS IN  
AFRICA ..... INTERESTED PARTY**

**JUDGMENT**

1. Vide the Originating Summons dated June 18, 2013, the Plaintiff Silvers Olenge Kayere who claims to be entitled to ownership of a land Parcel known as Tiriki/Shamakokho/1223 (the suit land) by operation of the doctrine of adverse possession presented a total of 20 questions for the court's determination. He sought for the following orders;
  - a. A declaration to the effect that the title of the 1<sup>st</sup> Defendant was extinguished by adverse possession in favour of the plaintiff by the year 1999 on 15<sup>th</sup> March.
  - b. A declaration to the effect that all the transactions entered on the original parcel; the suit land after March 15, 1999 were null and void and all be cancelled and the title reverts to the original number.
  - c. A portion measuring 1 ½ acre of the suit land be registered in the name of the plaintiff Silvers Olenge Kayere in specific performance and by adverse possession and he be issued with a title deed to the same.



- d. Costs of this proceedings be paid by the Defendants.
2. The Originating Summons was supported by the averments in the Affidavit in Support of Originating Summons sworn by the Plaintiff on June 18, 2013.
  3. The Originating Summons was first filed on June 18, 2013 in the High Court of Kenya at Kakamega (Environment and Land Division) as Civil Suit No 176 of 2013 (OS). Thereafter the path of the suit has been long and winding. The first proceedings of what transpired between when the suit was filed to January 20, 2014 are not available in the file. However, the court record shows that on January 20, 2014 the matter was mentioned in the registry and fixed of mention before the trial court on June 30, 2014. On June 30, 2014, directions were given that the matter be mentioned before the Environment and Land Court on July 23, 2014. Vide the court order dated December 11, 2017, the matter was transferred to the lower court for hearing and determination. Further perusal of the court record shows that the matter proceeded to formal proof on 27/09/2018 before the lower at Kakamega where it had been transferred to and registered as Kakamega CMCC No 626 OF 2018. Though the matter was reserved for judgement on July 25, 2019, on the said date the court gave a ruling to the effect that it lacked jurisdiction to entertain the matter. Hence the matter was subsequently forwarded to the Environment and Land Court at Kakamega for disposal. Vide its order dated May 4, 2022, the Environment and Land Court Kakamega transferred the matter to Vihiga Environment and Land Court on the ground that the suit land is situated in Vihiga County. Directions were taken before this court on July 27, 2022 that the matter starts de novo.
  4. The Defendants and the Interested Party never responded to the Originating Summons and hence never participated in the proceedings. An Affidavit of Service in the file sworn by a court process server by the name of Paul Oketch on June 30, 2014 and filed in court on \*31/06/2041\* shows that the Interested Party and the 2<sup>nd</sup> Defendant were served with the Originating Summons and Affidavit in Support of Originating Summons on on June 20, 2014 and June 24, 2014 respectively. They never filed any response. The case therefore proceeded ex parte.

#### **The Plaintiff's case**

5. The Plaintiff's case, as contained in the Affidavit in Support of Originating Summons and his testimony in court, is that the suit land was originally registered in the name of the 1<sup>st</sup> Defendant, Joram Evans Fedha. That he (Plaintiff) bought a portion measuring 1½ acres of the suit land vide the sale agreement dated March 15, 1987 from the said registered owner at an agreed purchase price of Kshs 34,500/- which he paid in full and final settlement. That in the same year 1987, he constructed his house on the suit land and moved to settle thereon and that the land is presently home to himself, his wife his two sons who each have constructed one permanent and another semi-permanent house and his grandchildren. That he settled on the suit land to the exclusion of the 1<sup>st</sup> Defendant who moved with his family and relocated to a place called Chapararia in West Pokot.
6. That in addition, he has carried out other developments on the land including planting several fruit and ornamental trees, several stems of bananas, steel gate, a barbed wire and Cyprus fence, edible seed oil press machine, a Posho mill, a car garage, store and general beautification of the land all of an estimated value of Kshs 3.5 million.
7. That the 1<sup>st</sup> Defendant secretly transferred the whole land to his son the 2<sup>nd</sup> Defendant and the 2<sup>nd</sup> Defendant caused the suit land to be sub-divided into two parcels of land namely Tiriki/Shamakhokho/1223 and Tiriki/shamakhokho/1224 and the title in respect of original parcel closed.



- That thereafter the 2<sup>nd</sup> Defendant transferred parcel No Tiriki/shamakhokho/1224 to the interested party and No 1223 remained in his (2<sup>nd</sup> Defendant's) name.
8. That the Plaintiff's homestead is on parcel No Tiriki/shamakhokho/ 1223 which he still occupies and uses exclusively. He testified in court that the Interested Party occupies parcel No Tiriki/shamakhokho/1224 where it built a church in the year 2008 where its members occasionally hold their meetings. That immediately he learnt of the actions of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, he filed a complaint with the Provincial Administration and was advised to file a dispute with the Tiriki East Land Disputes Tribunal who decided the dispute but that the decision was not enforceable for lack of jurisdiction. That he has occupied the land for a period of 26 years without any interference.
  9. He testified that he had bought the entire of the suit land which measures 0.5 Hectares which is about 1 ½ acres and that he paid the purchase price for the entire land.
  10. He produced exhibits namely; a copy of register in respect of the suit land as exhibit P1, Land Sale Agreement as exhibit P2, acknowledgments for the payments as exhibits P 3(a) (b), (c), (d) , and ( e), Receipts as exhibit P4 (a) to (i), two letters from the Agricultural Finance Corporation dated 16/3/1987 and 10/10/1987 as exhibits P5(a) and (b), copies of register for Tiriki/Shamakhokho/1223 and Tiriki/Shamakhokho/1224 as exhibits P6 (a) and (b), proceedings of the Tiriki East Land Disputes Tribunal as exhibit P7 and photographs as exhibits P8(a) , (b) and (c ) He prayed that the suit be allowed.
  11. At the close of the Plaintiff's case Counsel for the Plaintiff filed written submissions dated October 11, 2022 in support of the Plaintiff's case. Counsel submitted that none of the Defendants is in occupation of the suit land. That the Plaintiff had been in peaceful possession and use of the suit land from the year 1987 to 2007 when the land was sub-divided and transfer made. That the title of the first Defendant got extinguished in the year 2000. That therefore none of the Defendants has any legally recognized property interest in the said parcel to transfer to themselves or sub-divide into new parcels. That therefore the entries on the land register of the suit land appearing after the year 2000 unless by the Plaintiff are all null and void and liable to cancellation.
  12. Relying on the decision in *Gateway Insurance Co Ltd -vs- Jamila Suleiman & Another (2018) eKLR*, Counsel submitted that the plaintiff has proved his case on a balance of probabilities and prayed that the suit be allowed with costs.

#### Analysis and Determination

13. From the pleadings, evidence and submissions presented to the court, the following emerge as the issues for this court's determination: -
  - a. Whether or not the Plaintiff has had peaceful, open, continuous and uninterrupted possession and occupation of the suit land for a period sufficient to acquired title thereto by adverse possession.
  - b. Whether or not the 2<sup>nd</sup> Defendant's and Interested Party's rights and titles to the suit land and land parcel known as Tiriki/Shamakhokho/1224 as the registered proprietors have been extinguished by operation of law.
  - c. Whether or not the Plaintiff is entitled to the relief sought.
  - d. Who pays the costs of the case.
14. Though the Defendant and the Interested Party herein failed to respond to the Plaintiff's claim, the Plaintiff still has the burden to prove his case to the required- standard and degree of proof. See the



provisions of sections 107(1), 108 and 109 of the Evidence and the case of *Charter House Bank Limited (Under Statutory management –vs- Frank N Kamau [2016] e KLR* where the Court of Appeal when discussing the burden of proof on the plaintiff in a situation where the defendant failed to adduce evidence stated that:

' We would therefore venture to suggest that before the trial court can conclude that the Plaintiff's case is not controverted or is proved on a balance of probability by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence from the defendant.

The Plaintiff must adduce evidence, which in the absence of rebutted evidence by the Defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgement merely because the Defendant has not testified.'

15. In the present case, the plaintiff has the burden to adduce some credible and believable evidence to prove on a balance of probabilities that he has acquired the prescriptive rights. That his possession of the suit land was as of right and in a manner inconsistent with the rights of the registered owner that is to say: the occupation has been open, actual, continuous, uninterrupted, peaceful, exclusive and with the knowledge but without the consent or permission of the registered owner for the prescribed period of 12 years. In *Kimani Ruchure vs Swift Rutherfords & Co Ltd (1980)KLR 10* 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)

16. In the case of *Gabriel Mbui vs Mukindia Maranya [1993]eKLR* adverse possession was defined as

' The non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owner's enjoyment of land for purposes for which the owner intended to use it.'

17. The first issue for determination is Whether or not the Plaintiff has had peaceful, open, continuous and uninterrupted possession and occupation of the suit land for a period sufficient to acquired title thereto by adverse possession. Parcels No 1223 and 1224 were a product of subdivision of land parcel no Tiriki/Shamakhokho/178. The green card produced show that before sub-division, land no Tiriki/Shamakhokho/178 was registered in the name of the 1<sup>st</sup> Defendant who is the 2<sup>nd</sup> Defendant's father. And that upon sub-division, land parcel No 1223 on which the Plaintiff has his home and developments was registered in the name of the 1<sup>st</sup> Defendant on July 6, 2007. The suit land in the Originating Summons is parcel no 1223 ( see first paragraph of the Originating Summons where it is stated that the Plaintiff claims to be entitled to LP Tiriki/Shamakhokho/1223 through adverse possession). The Plaintiff's evidence as shown in his exhibits and his testimony is that he has had exclusive occupation and use of the entire of the original parcel of land since 1987 to 2007 and of the suit land since then to date.

18. Adverse possession is a doctrine of law vide which a person obtains legal title to land by reason of actual, open and continuous occupation of it to the exclusion of the registered owner for a prescribed



period. In Kenya, the prescribed period is 12 years. Though frowned upon in some jurisdictions in Kenya adverse possession is recognized as one of the methods to acquire title to land under section 7 of the [Land Act](#).

19. The doctrine is anchored inter alia on the provisions of Section 7, 13 and 38 of the [Limitation of Actions Act](#). Section 7 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.'

Section 13 of the [Limitation of Actions Act](#) provides:

- (1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of Limitation can run (which possession is this Act referred to as adverse possession), where under sections 9, 10, 11 and 12 of this 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.
- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land cease to be in adverse possession, the right of action is no longer taken to have accrued and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- (3) For the purpose of this section, receipt of rent under a lease by a person wrongfully claiming in accordance with section 12 (3) of this Act, the land in reversion is taken to be adverse possession of the land.

The procedure for seeking relief on a claim based on adverse is provided for in Section 38 of the [Limitation of Actions Act](#) and Order 37 of the [Civil Procedure Rules, 2010](#)

Section 38 (1) provides;

- (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 sub-section (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

And Order 37 Civil Procedure Rules provides

- ' (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.'

Article 162(2) of the [Constitution](#) of Kenya 2010, Section 13 of the [Environment and Land Court Act](#) and Section 38 of the [Limitation of actions Act](#) confer jurisdiction on this court to handle claims premised on adverse possession.



20. In [\*Kisumu Civil Appeal No 27 of 2013, Samuel Kihamba vs Mary Mbaisi \(2015\) eKLR\*](#) the Court of Appeal held that;

' Strictly, for one to succeed in a claim of adverse possession, one must prove and demonstrate that he has occupied the land openly, that is without force, without secrecy and without license or permission of the land owner with the intention to have the land. There must be an apparent disposition of the owner. These elements are contained in the Latin Phraseology, nec vi, nec clan nec precario. The additional requirement is that of animus possidendi, or intention to have the land'.

In *Jandu vs Kirplal & Another (1975) EA 225*, the court held that

' To prove title by adverse possession, it is not sufficient to show that some acts of adverse possession, possession must be adequate in continuity in publicity and in extent to show that it is adverse to the owner. It must be actual visible, exclusion, open and notorious'.

21. I have carefully examined the evidence adduced. It is clear that the Plaintiff has had exclusive occupation of the suit land for a period in excess of 12 years. He has demonstrated the activities and developments he has carried out on the suit land over the years. These activities are inconsistent and adverse to the title and interests of the 1<sup>st</sup> Defendant over the suit land. The evidence is uncontroverted. I am satisfied that the Plaintiff has had adverse possession of the suit land. Under section 28 (h) of the Registered [\*Land Act\*](#), the Plaintiff has acquired an overriding interest over parcel No 1223 to which the 2<sup>nd</sup> Defendant's title is subject.

22. Concerning parcel No 1224, it is not clear whether the Plaintiff bought and occupied the entire of the original land known as Tiriki/Shamakhokho/178. In the first paragraph of the Originating Summons, the suit land is described as Tiriki/Shamakhokho/1223. In paragraph 3 of the Affidavit in Support of Originating Summons, the Plaintiff refers to 'a portion thereof'. However, in his testimony he stated that he bought the entire of the original parcel No 178. Be that as it may, if indeed the Plaintiff initially occupied the entire of the original parcel of land, he was disposed of the portion thereof that became parcel No 1224 when the same was given to the Interested Party in the year 2008. The Plaintiff testified that the Interested Party has had exclusive possession of parcel No 1224 since. That it has built a church house thereon where its members congregate occasionally. One of the ways that adverse possession is terminated is by dispossessing the adverse possessor of possession. Adverse possession will run with the land in case of change in proprietorship if only the adverse possessor remains in possession. In the case of [\*Joseph Gachumi Kiritu vs Lawrence Munyambu Kabura; civil Appeal no.20 of 1993\*](#) quoted in [\*Presbyterian Church of East Africa \(Uthiru Church\) & another vs Kiboro & 3 Others \(Civil Appeal 303 of 2018/2022/KECA 49 \(KLR\) \(Civ\)\*](#) (4 February 2022) the court of appeal held that

' time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land.'

The same position was stated in the case of *Githu -vs- Ndeete [1984] e KLR 776* cited by the plaintiff, where it was held that

'Time ceases to run under the [\*Limitation of Actions Act\*](#) when the owner takes of asserts his right or when his right is admitted by the adverse possessor. Assertion occurs when the owner takes legal proceedings or makes effective entry into the land.'



The owner in the present case took possession of parcel No 1224 away from the Plaintiff and gave it to the interested Party.

23. On whether the 2<sup>nd</sup> Defendant's rights to the Parcel No 1223 have become extinguished, the court on the basis of the evidence adduced find in the positive. The court further finds that the Plaintiff is entitled to the orders sought in respect of land parcel No 1223.

In the Premises, I find that the Plaintiff has proved his case on a balance of probabilities and enter Judgment in his favour as follows:-

- i. A declaration that the Plaintiff has acquired title to the suit land namely Tiriki/Shamakhokho/1223 by adverse possession.
- ii. A declaration that the 2<sup>nd</sup> Defendant's rights and title to the suit land NO Tiriki/Shamakhokho/1223 as registered owner have been extinguished by operation of the law.
- iii. An order that the 2<sup>nd</sup> Defendant do forthwith transfer the suit land namely Tiriki/Shamakhokho/1223 to the Plaintiff in default of which the Deputy Registrar of this court to sign all documents necessary so as to effect transfer and registration of the suit land in favour of the Plaintiff.
- iv. Each party to bear its own costs.

Orders accordingly.

**DATED, DELIVERED AND SIGNED IN OPEN COURT AT VIHIGA THIS 10<sup>TH</sup> DAY OF NOVEMBER 2022.**

**E. ASATI**

**JUDGE.**

**In the presence of:**

Neville Court Assistant.

Mulama advocate holding brief for Shijenje advocate for the Plaintiff

No appearance for the Defendants

No appearance for the Interested Party

E. ASATI

JUDGE.

