



**Kamwara v Kagembe (Environment & Land Case E001 of 2021)
[2022] KEELC 14674 (KLR) (9 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14674 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT & LAND CASE E001 OF 2021**

CK YANO, J

NOVEMBER 9, 2022

BETWEEN

GEOFFREY KIANIA KAMWARA PLAINTIFF

AND

MWIKAMBA KAGEMBE DEFENDANT

JUDGMENT

1. By the Originating Summons dated February 16, 2021 and filed in court on February 17, 2021, the plaintiff is seeking for orders that:-
 - a. That the plaintiff is and has been occupying 7 (Seven) acres out of land known as Tharaka/chiakariga'A/1485 measuring approximately 3.57 Ha hereinafter referred to as the "subject matter" over a period in excess of 12 years since 1992.
 - b. A declaration that the plaintiff has acquired entitlement and ownership of 7 acres out of the subject matter which is comprised of L.R No. Tharaka/chiakariga"A"/1485 situated in Nkarini Location, Tharaka Nithi County.
 - c. That the plaintiff is entitled to 7 acres out of the subject land being composite of the title L.R No. Tharaka/chiakariga"A"/1485 by way of adverse possession as is envisioned by section 17 of the *Limitation of Action Act* and other provisions of the law.
 - d. An order that the defendant do execute a valid transfer instrument for land reference number Tharaka/chiakarigaA/1485 in favor of the plaintiff and in default the Executive Officer of this Honourable court be empowered to execute such transfer instrument.
 - e. Costs of this suit and any other relief that the court may deem fit and expedient.



2. The summons is supported by the evidence and facts set out in the supporting affidavit and verifying affidavit of Geoffrey Kiania Kamwara, the plaintiff herein sworn on February 16, 2021 and supplementary affidavit sworn on March 18, 2021.
3. The plaintiff averred that the suit land herein is registered in the name of the Defendant herein and attached a copy of the Green card marked GKK1.
4. That the plaintiff further averred that he entered on the suit land in the year 1992 where he resides up to date with his wife and children.
5. That during the adjudication process, he was working at Kerugoya and his family was at the suit land and that the adjudication officer signed the form on his part and said that his wife could not sign on his behalf.
6. That in 1996 he travelled from Kerugoya to Chiakariga so that he could sign the forms but he found that the land had already been registered in the name of the defendant herein.
7. The plaintiff averred that he lodged a complaint at the office of the Adjudication Officer but unfortunately the person who wrote the complaint indicated the wrong parcel number.
8. The plaintiff stated that he reported the matter to the area chief and the D.O (now the Assistant County Commissioner) and the D.O. called the clan committee who confirmed that the land belonged to him and the same should be registered in his name.
9. The plaintiff contended that the defendant was present when he had a meeting with the clan committee and the DO and he told the committee that he had been given the suit land by the officers at the Lands office at Chiakariga.
10. The plaintiff further contended that in 1997 the DO, while trying to solve the matter, said that they should divide the suit land into a half share each between him and the defendant but up to date the defendant has never come to implement the agreement they entered into at the D.O's office. A copy of the alleged agreement has been annexed and marked GKK 2.
11. That upon execution of that Agreement at the D. O's office, the defendant came and built a semi-permanent house on the far end of the subject land in 1997 but has never lived in that house to date.
12. The plaintiff stated that he has lived on the 7 acres out of the suit land for over 28 years without any permission or interruption from the defendant and has tremendously developed it by building houses where he lives, does farming and has planted various types of trees and rearing livestock and have also connected water (NIWASCO) and has attached photographs marked GKK3.
13. The plaintiff averred that he has lived on the suit land since 1992 and that is where he has buried some of his deceased children. He further averred that his stay has been open, uninterrupted and notorious and without the permission of the Defendant for more than 12 years thereby entitling him to be registered owner of the said 7 acres of the suit land.
14. The plaintiff stated that on a number of occasions, the defendant has been visiting the suit land with the ill motive of disposing him off the suit land and he is apprehensive that he will lose all his long life investments as he has sent him a notice to vacate the suit land. A copy of the demand letter marked GKK4 has been attached. It is that letter that has provoked this suit.



Plaintiff's Evidence

15. At the hearing the plaintiff testified as PW1. He was cross-examined and re-examined. He adopted his statement filed on February 17, 2021 as evidence-in-chief and produced a copy of Green Card, search, an agreement, photographs and eviction notice as P.Exh 1-5 respectively. In the said statement, the Plaintiff reiterated the averments in the originating summons and the affidavit in support thereof as well as the supplementary affidavit sworn on March 18, 2021.
16. The Plaintiff testified that parcel No. 1529 belongs to his son called Nathan Mugambi but the same was registered in his name since his son is still a minor.
17. On cross examination by Mr. Kimathi learned counsel for the Defendant, the Plaintiff stated that his clan is Kanjogu Karuti while the defendant belongs to Kanjogu Njiru Clan and that when adjudication was done, the land adjudication committee was giving land to people living on it. The Plaintiff stated that he was not allocated any land. The plaintiff further stated that whereas the proprietorship section of the Green card for parcel No.1529 shows that he was given the title, he stated that it was his son's land and not his.
18. The plaintiff stated that his child was born in 1982 and by that time he was 40 years old and that on January 22, 2021, he transferred the land to his son Nathan Mugambi Kiarua because the land was his.
19. The plaintiff further testified that he filed this suit on February 17, 2021 over land whose title was issued on July 27, 2016, the same date as the title for parcel No. 1529. He agreed that the title of the land he is claiming is for 5 years, which is less than 12 years.
20. The plaintiff averred that that they used to have disputes before the chief, Assistant chief and District Officer and that he is the one who took the dispute to the Assistant chief and the D.O. When shown a letter dated August 12, 1998 from the Land Adjudication Settlement officer to them over parcel No.1485 asking each party to maintain his own land as recorded/registered in the books of records, the plaintiff stated that he was not aware of that letter and that it was not written to him.
21. When re-examined by Ms. Mutegi, the plaintiff reiterated that he entered land Parcel No.1485 in 1992 and since then he has never vacated from the land and he is still living thereon to date. He further reiterated that Parcel No. 1529 was registered in his name because his son was still a minor, but was later told to transfer the land to him.
22. PW2 was Carlo Mutiga M'irangu who relied on and adopted his witness statement dated June 25, 2021 as his evidence-in-chief. He was also cross-examined and re-examined.
23. PW2 testified that the plaintiff was his neighbour, adding that when the adjudication process was being carried out in the year 1992, the Plaintiff was in occupation of the suit land and had already built on it and also carrying out farming activities. He stated that he later heard that the plaintiff and the Defendant had a dispute over the suit land which was taken before the area D.O., but did not know the verdict that was given.
24. PW2 stated that the defendant later built a semi-permanent house on the far end of the suit land, but never lived on it though he had put a woman there who stayed for a short time. He stated that the plaintiff has never been evicted from the suit land and still stays thereon to date. He further stated that a person by the name Nyaga is carrying out farming on a small portion of the suit land, though he did not know the person who permitted him to do so. His evidence is that the defendant lives in Kathwana and has never been in occupation of the suit land.



25. PW2 admitted that the plaintiff and the defendant had disputes over the suit land, therefore implying that the occupation by the plaintiff was not peaceful.
26. When re-examined by Ms. Mutegi, PW2 stated that he could not remember when the District Officer came, but that the land was adjudicated in 1992 and given numbers, and that that must be the time the District Officer came to the land. He stated that since then till 2021, he had not experienced any disputes between the plaintiff and the defendant.

The Defendant's Case

27. The defendant filed his response to the originating summons by way of a Replying Affidavit sworn by himself on March 5, 2021 and filed in court on March 8, 2021. He admitted that he is the absolute registered owner of land parcel Number Tharaka/chiakriga 'A'/1485 measuring 3.57 Ha and has annexed a copy of the Green Card marked "MK – 1". It was his contention that the Plaintiff has filed this suit as a way of oppressing and obstructing the defendant's right to ownership of the land as provided for in the Constitution. The defendant stated that this suit has been presented in bad faith and is intended to diminish or stifle the defendant from enjoying his inalienable right to property and as a means for the plaintiff to unjustly enrich himself at the expense of the defendant.
28. The defendant averred that the plaintiff failed to disclose to the court that the parties are neighbours who have been engaged in continuous boundary disputes over the suit land and the plaintiff's Parcel No. Tharaka/Chiakariga "A"/152 which escalated to the then District Officer who made a determination in the form of an agreement that allowed the plaintiff to remain in the property pending the determination of the boundary dispute. A copy of the said agreement has been annexed and marked "MK-2". That since the said agreement was made, the defendant has on several occasions asked the Plaintiff to vacate from the disputed portion that falls within the defendant's land. It is the Defendant's contention that the plaintiff has not met the requirements of the doctrine of adverse possession since the plaintiff's possession has been subject to boundary disputes. The defendant has exhibited a sketch map marked "MK – 3".
29. The defendant pointed out that the plaintiff intentionally transferred his parcel No. 1529 to his son, Nathan Mugambi Kiania on January 22, 2021 prior to filing this suit as an act of mischief aimed at deceiving this court and misusing the doctrine of adverse possession in order to deprive him of his property. A copy of the Green Card for Title No. Tharaka/chiakariga "A"/1529 has been annexed and marked "MK-4".
30. The defendant averred that he has built a semi-permanent structure on the suit land where he does seasonal subsistence farming to earn a living for his family. The photographs of the said structures have been annexed and marked "MK-5". The defendant contended that the plaintiff is not entitled to the orders sought in the originating summons and urged the court to dismiss the suit with costs.

Defendant's Evidence

31. The defendant testified as DW1 and adopted his statement dated March 5, 2021 as his evidence-in-chief and produced the documents in his list of documents as D. Exhibits 1 to 6 respectively. He also produced the documents in the further list of documents as D. Exhibits 7 to 12 respectively, save for document number 3. He was cross-examined and re-examined.
32. The defendant testified that he belongs to Kanjogu clan together with the plaintiff, adding that during adjudication, land was adjudicated to people according to their clans, and that he was allocated parcel No. 1485 while the Plaintiff was allocated parcel No. 1529. That both parties are neighbours and the



Plaintiff encroached on a portion of about 0.25 acres of the defendant's land in 1993 resulting to a boundary dispute that went before the provincial administration.

33. The defendant stated that both parties were issued with title deeds for their respective parcels on July 27, 2016, and on January 22, 2021, the plaintiff transferred his land parcel No. 1529 to his son Nathan Mugambi Kiania before filing this suit. The defendant stated that he has had disputes with the plaintiff from 1996 in which he tried to have him vacate the suit land, but in vain. The defendant asked the court to dismiss the plaintiff's suit and to order for his eviction from the disputed portion.
34. DW2 was Kagwima Chakari Njarawho stated that he was one of the committee members of the Land Adjudication Board, appointed by Kanjogu – Njiru clan of which he is a member. He testified that both the plaintiff and the defendant were allocated their respective parcels of land. He denied that minors were being allocated land. DW2 stated that the plaintiff entered and is using the defendant's land, but added that the parties have been having long outstanding disputes over the suit land.

Plaintiff's Submissions

35. In his submissions dated June 16, 2022, the plaintiff submitted that he has tendered sufficient evidence to prove that he was in occupation and possession of 7 acres out of the defendant's land without the consent of the defendant since 1992. It is his submissions that the possession of the suit land has been adverse. The plaintiff relied on the case of *Francis Gitonga Macharia v Muiruri Waitbaka*, Civil Appeal No. 110 of 1997 as quoted in the case of *Titus Kigoro Munyi v Peter Mburu Kimani* [2015] eKLR where the Court of Appeal held that the limitation period for purpose of adverse possession only starts running after registration of the land in the name of the respondent. The plaintiff submitted that from the evidence on record, it has been demonstrated that the suit land was registered in the name of the defendant immediately after adjudication, and that the defendant did not do anything to gain possession.
36. The plaintiff also relied on the case of *Peter Kamau Njau v Emmanuel Charo Tinga* [2016] eKLR as quoted in *Joseph Macharia Kairu v Kenneth Kimani Muiruri* 2021 where it was held that "in order to stop time from running, it must be demonstrated that the owner of land took positive steps to assert his right by, for instance taking out legal proceedings against the person on the land or by making an effective entry into the land." It is the Plaintiff's submissions that he has proved his case on a balance of probabilities and urged the court to allow it with costs.

Defendants's Submissions

37. In his submissions dated June 29, 2022 and filed in court on July 5, 2022, the Defendant submitted inter alia, that the plaintiff's occupation was with the authority and permission of the defendant as the owner of the land. The defendant referred to the agreement entered into by the parties before the District Officer in which the Plaintiff was to remain in the property pending the determination of the boundary dispute between them. The defendant relied on the case of *Richard Wafwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR.
38. The defendant further submitted that the plaintiff's occupation was not peaceful, open, continuous, exclusive and without interruption, and that the occupation was through force. The defendant relied on the Court of Appeal case of *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR and *Peter Okoth v Ambrose Ochido Andajo & Benedict Odhiambo Oketch* [2021] eKLR.
39. The defendant further submitted that the plaintiff was dishonest and of unclean hands by not disclosing that he was the owner of Parcel No. 1529 which borders the suit land and which he transferred to his son in January, 2021 and filing this suit in February, 2021. He relied on the case of



Esther Nugari Gachomo v Equity Bank Limited [2019] eKLR and *Mohamed Shally Sese (Shah Sese) v Fulson Company Ltd & another* [2006] eKLR.

40. The defendant further submitted that in this case, a title registered and issued in the year 2016 could not be subjected to a claim for adverse possession in the year 2021. This is because according to the Law of Kenya, the minimum period of a claim of adverse possession is 12 years. The defendant relied on the case of *Joseph Kibaara M'Icuca v M'Chabari Kinoro*, Chuka ELC (OS) No. 15 of 2019. It was further submitted that the defendant did not acquire his title fraudulently or unprocedurally. The Defendant relied on the case of *Joseph Maingi v Rose Nambura & 2 others* [2021] eKLR, *Celina Muthoni Kithinji v Safiya Binti Swaleh & 8 others* [2018] eKLR and urged the court to dismiss the plaintiff's suit with costs.

Analysis And Determination

41. This court has carefully considered the pleadings, the evidence and the submissions filed by the parties to support their respective positions. I have also taken into account the legal authorities cited by the parties. The issues for determination are whether the Plaintiff has proved his claim for adverse possession to the required standard and whether the Plaintiff is entitled to the reliefs sought.

1. In deciding whether or not the plaintiff has proved his claim for adverse possession, the plaintiff must prove that he has been in occupation a portion of the suit land measuring 7 acres for a period of over twelve (12) years; that such occupation was open, peaceful and continuous without interruption from the registered owner and that such occupation was adverse i.e inconsistent with the right of the registered owner.

43. In *Wambugu v Njuguna* (1983) KLR 173, the Court of Appeal restated the principles for adverse possession and held as follows:

1. The general principle is that until the contrary is proved, possession in law follows the right to possess.
2. In order to acquire by the statute of Limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The Respondent could and did not prove that the Appellant had either been dispossessed or had discontinued possession of the suit land for a continuous statutory period of twelve years to enable him, the Respondent, to title to that land by adverse possession.
2. The *Limitation of Actions Act*, on adverse possession contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years."

44. In the case of *Mtana Lewa v Kabindi Mwangandi* [2015] eKLR, the Court of Appeal (Makhandia JA) stated as follows:

“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 license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

45. The doctrine of adverse possession is embodied in section 7 of the *Limitation of Actions Act* which provides:

“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.”

46. Section 13 of the same Act further makes provision for adverse possession as follows:

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 in this Act referred to as adverse possession), and, 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 possession of the land.
2. Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases 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.”

47. Section 38(1) of the *Limitation of Actions Act* provides that:

“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.”

48. Order 37 rule 7 of the *Civil Procedure Rules* states 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.
3. The court shall direct on whom and in what manner the summons shall be served.”

49. In the instant case, the court has noted that the plaintiff has annexed a certified extract of the title to the suit land to the affidavit in support of the summons. The same has also been exhibited by the defendant in his replying affidavit.

50. In this case, it is not in dispute that land parcel Number Tharaka/Chiakariga“A”/1485 measuring 3.57 hectares is registered in the name of the defendant. The plaintiff’s claim is that he has acquired ownership of 7 acres out of the said parcel of land by way of adverse possession.

51. I have perused the certified extract of the title to the suit land exhibited by the parties in this case. It is clear that the land was registered in the defendant’s name and title issued on July 27, 2016. The Plaintiff filed this suit on February 16, 2021. The period from July, 2016 upto February, 2021 is less than five (5) years. Based on the threshold set out for adverse possession, and especially the prerequisite period



of twelve (12) years, I am not convinced that on a balance of probabilities the plaintiff has proved his case for adverse possession. In my considered view, registration presupposes the opening of a register by the state, and that is when time starts running. Adjudication, surveying and getting a number alone in my view, cannot suffice. That in my opinion, explains why the civil Procedure Rules requires that one must annex an extract of title for adverse possession claim to succeed.

52. In my considered view, the plaintiff cannot purport to have been in occupation and possession adverse to the defendant for the requisite period of twelve (12) years when the evidence on record reveals that the title held by the defendant was only registered in his name on July 27, 2016 while the suit was filed on February 16, 2021, which is a period of about five (5) years.
53. It is also a well settled principle that a party claiming adverse possession ought to prove that his possession was “nec vi, nec clam, nec precario,” that is, peaceful, open and continuous. From the material on record, it is clear that in this case, the plaintiff and the defendant are neighbours and have had boundary disputes for a while. Therefore, the plaintiff’s claim of quiet possession, cannot stand. Based on the evidence on record, the claim of adverse possession cannot succeed since the plaintiff has not been in peaceful and quiet possession of the suit land for the statutory period of twelve (12) years.
54. Considering the totality of the evidence availed in this case, and applying the legal principles as outlined above, I am not satisfied that the Plaintiff has proved his case on a balance of probabilities. It is my finding that the plaintiff has failed to bring himself within the limits of the doctrine of adverse possession.
55. Consequently, the plaintiff’s claim is without merit and must fail. The same is dismissed. The costs of the suit shall be in favour of the defendant against the plaintiff.
56. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 9TH NOVEMBER 2022 IN THE PRESENCE OF:

CA: MARTHA

KIMAKIA FOR DEFENDANT

MS. MUTEGI FOR PLAINTIFF

C. K. YANO,

JUDGE.

