



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mugo & 2 others (Suing as Chairman, Secretary & Treasurer of Gatundu Air Garage) v Patel (Environmental and Land Originating Summons 18 of 2020) [2022] KEELC 15112 (KLR) (1 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15112 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU**  
**ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 18 OF 2020**  
**YM ANGIMA, J**  
**DECEMBER 1, 2022**

**BETWEEN**

**JOHN MUGO ..... 1<sup>ST</sup> APPLICANT**  
**MAURICE OGOLLA ..... 2<sup>ND</sup> APPLICANT**  
**EPHANTUS GICHUKI ..... 3<sup>RD</sup> APPLICANT**  
**SUING AS CHAIRMAN, SECRETARY & TREASURER OF GATUNDU AIR GARAGE**

**AND**

**VITHABHAI ASHBAI PATEL ..... RESPONDENT**

**JUDGMENT**

**A. The Applicants' Claim**

1. By an originating summons dated August 21, 2020 grounded upon section 38 of the *Limitation of Actions Act* (cap 22) and order 37 rule 7 of the *Civil Procedure Rules, 2010*, the applicants sought determination of the following questions:
  - a. Whether Gatundu Open Air Garage through its members has acquired title deed by adverse possession over LR No Nyahururu Municipality Block 6/451 (Parcel No 6585/254)
  - b. Whether Land Reference No Nyahururu Municipality Block 6/451 (Parcel No 6585/254) should forthwith be registered in the names Gatundu Open Air Garage and the defendant be ordered to sign all the necessary transfer instruments and in default the Executive Officer of the court be authorized to sign the same.
  - c. Whether the District Land Registrar Nyandarua should dispense with the production of the original lease certificate for the suit plot while transferring the land to the plaintiffs.



- d. Who shall bear the costs of the suit.
2. The said originating summons was supported by the supporting affidavit sworn jointly by John Mugo, Maurice Ogolla and Ephantus Gichuki on August 21, 2020 together with the exhibits thereto. The deponents stated they were members of Gatundu Open Air Garage and had been operating from the suit property with effect from 1999. They contended that they had been in open, continuous and exclusive possession of the suit property without any interruption from the respondent for a period exceeding 12 years. The applicants consequently contended that they had acquired adverse possession of the suit property by operation law.

### **B. The Respondent's Response**

3. The respondent did not enter an appearance or file any answer to the originating summons despite service. The record shows that he was served through substituted service by advertising the institution of the suit in the Nation Newspaper of February 24, 2021 giving him 30 days to enter appearance to the suit.

### **C. Directions on the Hearing of the Suit**

4. When the originating summons came up for directions on the hearing thereof it was directed that the same shall be canvassed on the basis of the pleadings, affidavits and documents on record without calling for oral evidence. The applicants were also granted an opportunity to file their written submissions. The record shows that the applicants' submissions were filed on September 12, 2022.

### **D. The Issues for Determination**

5. The court has considered the originating summons, the supporting affidavit and the exhibits thereto. The court is of the opinion that the main questions for determination herein are the following:
- a. Whether the applicants have demonstrated their claim for adverse possession of the suit property.
  - b. Whether the applicants are entitled to the reliefs sought in the suit.

### **E. Analysis and Determination**

#### **(a) Whether the applicants have demonstrated their claim for adverse possession of the suit property.**

6. The court has considered the material and submissions on record on this issue. The applicants deposed in their joint affidavit that their members had been operating their businesses on the suit property since 1999 and that they had been in open, continuous and exclusive possession and occupation thereof. They further contended that the respondent who was the owner thereof had never taken any steps to have them evicted from the suit property for a period exceeding 12 years.
7. The nature of the doctrine of adverse possession was considered by the Court of Appeal of Kenya in the case of *Kasuve -vs- Mwaani Investments Ltd & 4 others* [2004] 1KLR 184.

“...and in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, *Wanja vs Sakwa No2* [1984] KLR 284. A



title by adverse possession can be acquired under the Limitation of Actions Act for part of the land...”

8. The court is satisfied on the basis of the uncontroverted affidavit evidence and documentary evidence on record that the applicants and their fellow members of Gatundu Open Air Garage have been in open, continuous, exclusive and uninterrupted occupation of the suit property for a period exceeding 12 years prior to the institution of the suit. The court is further satisfied that their occupation has been without the consent or permission of the respondent who could not be traced for service of court process.
9. The only unusual aspect about the instant suit is that the applicants did not produce an extract of the title to demonstrate that the suit property is registered under any system of land registration in Kenya. They, however, produced a copy of a letter of allotment dated July 20, 1977 in the name of the respondent which described the suit property as LR No 6585/254. The applicants submitted that such a letter is adequate evidence of the respondent’s proprietary interest in the suit property and they cited the case of *Benson Mukuwa Wathira –vs- Assumption Sisters of Nairobi Registered Trustee* [2016] eKLR in support of their submission.
10. In the said case, it was held by the Court of Appeal, *inter alia*, that:

“...The effect, of the allocation and allotment by Government was to divest the latter of its legal interest in the suit land and to constitute the appellant the new owner thereof... But after the government allocated the land to the appellant in 1981, and thus divested itself of interest in it, the appellant became the new owner hence the doctrine of adverse possession became applicable.

As equity looks on that as done which ought to be done, it is plausible to assert that where, as here, a trespassing claimant (the respondent) was in continuous and uninterrupted possession and control of land belonging to a person (the appellant) who, as here, had an allotment to such land which was surveyed and delineate and had a title number and was registered under the RTA, such trespassing claimant, for all intents and purpose, must be deemed to have been in adverse possession to the title of the owner notwithstanding that such title is issued after the 12 year period of adverse possession or after time in adverse possession had started to run. The requirement of section 38 of the Limitation of Actions Act is for the land claimed to be registered under any of the statutes referred to in section 37 of the Act. It is not for the owner of the land to have a formal title deed. As long as the land claimed is registered under a statute and is owned by the person against whom a claim for adverse possession claim is made, that is sufficient.”

11. The court is, however, not persuaded that the circumstances of the instant case are similar to those of the Benson Wachira case. The court is of the opinion that the two cases are clearly distinguishable. In the *Benson Wachira* case, the suit land had already been registered in the name of the applicant before the suit was filed. There was thus no risk that by the time of making the declaration for adverse possession that he land was still registered in the name of the Government of Kenya.
12. The applicants’ only evidence in the instant suit to demonstrate the respondent’s interest in the suit property is a copy of the letter of allotment dated July 20, 1977. There is no indication on record whether or not the allottee ever accepted the offer in the first place. There is no evidence to demonstrate



that the allottee complied with the terms and conditions of allotment. One of the conditions in the said letter stated that:

“If acceptance and payment respectively are not received within 30 days from the date hereof the offer herein contained will be considered to have lapsed.”

13. The court is thus of the opinion that if the offer was never accepted and payment made within the prescribed period then the offer may have long lapsed and the land reverted to the Government of Kenya. There is thus a real danger of the court making a declaration for adverse possession of public land vested in the Government of Kenya in contravention of the *Limitation of Actions Act* (cap 22). That is why the law requires that an applicant for adverse possession should annex a copy of the extract of title to the relevant application.

#### **F. Conclusion and Disposal**

14. The upshot of the foregoing is that the court is not satisfied that the applicants have satisfied all the legal requirements for adverse possession. Accordingly, the applicants’ originating summons dated August 21, 2020 is hereby dismissed with no order as to costs.

- 15 It is so decided.

**JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 1<sup>ST</sup> DAY OF DECEMBER, 2022  
AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

In the presence of:

Mr. Waichungo holding brief for Ms. Wanjiru Muriithi for the Applicants

N/A for the Respondent

C/A - Carol

**Y. M. ANGIMA**

**JUDGE**

