



REPUBLIC OF KENYA



**Ribese & another v Thuku (Enviromental and Land Originating Summons E003 of 2023) [2025] KEELC 457 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 457 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E003 OF 2023  
EC CHERONO, J  
FEBRUARY 7, 2025**

**BETWEEN**

**ZACHARIAH CHAHENZA RIBESE ..... 1<sup>ST</sup> APPLICANT**

**TIMINA ADEMA CHAHENZA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**FERDINAND KENNEDY THUKU ..... RESPONDENT**

**JUDGMENT**

1. The Applicants Commenced these proceedings vide an Originating Summons dated 21<sup>st</sup> September 2023 seeking determination of the following questions;
  1. That the Applicants be declared the owners of a parcel measuring 0.12 Ha. and 0.09 Ha. known as Land parcel NO. E.Bukusu/S.Kanduyi/6506 & E.Bukusu/S.Kanduyi/5978 respectively which they have been in adverse possession of having occupied the same for over 25 years.
  2. That an order that the Applicants have become entitled to and should be registered as the owners of 2 pieces of land measuring approximately 0.12Ha. and 0.09 Ha. known as land parcel NO. E.Bukusu/S.Kanduyi/6506 & E.Bukusu/S.Kanduyi/5978 by operation of law to viz section 7, 17, and 38 of the *Limitation of Actions Act* (CAP. 22 Laws of Kenya) in the place of the Respondent Ferdinand Kennedy Thuku
  3. That the Respondent's name on the said parcel of land be removed and cancelled on the said land parcel Measuring 0.12Ha. and 0.09Ha. to of land parcel NO. E.Bukusu/S.Kanduyi/6506 & E.Bukusu/S.Kanduyi/5978 and be replaced with those of the Applicants.
  4. That in the alternative and without any prejudice to para. 1, 2 & 3 above (Questions to be determined) a declaration that the Respondent holds title to a portion of land parcels L.R NO.



E.Bukusu/S.Kanduyi/6506 & E.Bukusu/S.Kanduyi/5978 in trust for and for the benefit of the Applicants.

5. That costs of this application be provided for and be paid by the Respondent.
6. That this court to grant any other relief that it may deem proper and fit to grant.
2. The suit is opposed by the Respondent vide a Replying affidavit and counter Petition sworn on 11<sup>th</sup> October, 2023.
3. At the close of pleadings and upon compliance with order 3, 7 and 11 of the Civil Procedure Rules, this court confirmed compliance of Order 11 CPR and by consent of the parties, this case was fixed for hearing where the Applicants testified on oath and called one witness and closed their case. The Respondent also testified on oath and closed his defence case

### **Applicants' Summary Of Facts.**

#### **Zachariah Chahenza Ribese (PW1)**

4. The 1st Plaintiff/Applicant was sworn and identified himself as a driver and a resident of Kanduyi constituency within Bungoma County. He stated that Timina Adema who is his co-Applicant and the 2<sup>nd</sup> Plaintiff/Applicant herein is his wife. He stated that he knew the Respondent as they marry from the same family. He stated that his wife and the wife of the Respondent are sisters. He referred to his witness statement dated 6/4/2024 which he adopted as his testimony-in-chief. According to the 1<sup>st</sup> Plaintiff/Applicant, they jointly took possession of the suit properties in 1998 and have been in quiet, notorious, continuous and uninterrupted occupation since then to date which is more than 25 years. He stated that they have built semi-permanent structures and planted trees on the suit land. He stated that in September, 2023, the Respondent issued them an eviction notice which prompted them to file this suit. He stated that the Respondent's Title to the suit land has been extinguished by operation of the law and urged the court to cancel the Respondent's name and issue a new title in their joint names. He referred to his list of documents dated 6<sup>th</sup> April, 2024 containing 3 items which he produced as P-Exhibits 1,2 & 3.

#### **Timina Adema Chahenza (PW2)**

5. She identified herself as the wife of the 1<sup>st</sup> Applicant (Zacharia Chahenza Ribese) and a resident of Kanduyi within Bungoma County. She referred to her witness statement dated 6/4/2024 which She adopted in her testimony-in-chief. She stated that they took possession of the suit land in 1998 and have been in quiet, peaceful, notorious continuous and uninterrupted possession since then to date which is a total of 25 years. She stated that they have built some semi-permanent structures and planted some trees on the suit land until the Respondent purported to issue them an eviction notice in September 2023 prompting the filing of this suit.
6. On cross-examination, the 2<sup>nd</sup> Applicant stated that the Respondent married her elder sister and is therefore her brother-law. She stated that her husband worked for the Respondent as a matatu driver. She stated that she was not surprised when she got to know that the suit land belonged to the Respondent.

#### **Rose Nanjala Wafula (PW3)**

7. The witness was sworn and identified herself as a resident of Elegant village in Kanduyi Constituency within Bungoma County where she is also the Village Elder. She referred to her witness statement recorded on 6/4/2024 which she adopted as her testimony-in-chief.



## Defence Case

### Ferdinand Kennedy Thuku (DW1)

8. Ferdinand Kennedy Thuku who is the defendant herein identified himself as a medical Doctor by profession. He stated that Timina Adema Chahenza, the 2<sup>nd</sup> Plaintiff/Applicant herein is his sister-in-law and the 1<sup>st</sup> Plaintiff/Applicant is her husband. He stated that he used to work at Bungoma District Hospital and also operated a private hospital at Kanduyi. He stated that while he was working in Bungoma District Hospital, he purchased two plots which are the subject of this suit being L.R NO. E.Bukusu/S.Kanduyi/6506 and E.Bukusu/S.Kanduyi/5978. He stated that he also purchased a vehicle registration KAJ 282G which he used as a matatu. The defendant stated that his sister-in-law who is the 2<sup>nd</sup> Applicant herein approached his wife and told her that they had no money and requested him to employ her husband as a driver in his matatu business. As a relative, he felt concerned and agreed and employed the 1<sup>st</sup> Plaintiff/Applicant as his driver. He stated that later, his wife and children joined him and lived in rental premises within Bungoma township. He stated that after sometime, the 1<sup>st</sup> Plaintiff/Applicant caused a serious Road accident involving his matatu where many people died and several got serious injuries leading to his matatu vehicle being declared a write off. He said that he was sued by the families of the people who were injured and died in the accident. He stated that because of the civil claims arising from the families of the deceased and injured victims of the road accident caused by the 1<sup>st</sup> Plaintiff/Applicant, he decided to resign and went to Nakuru and later to Nairobi. He stated that in 2012, he heard that the Applicants were occupying his two plots which are the subject of this suit. He said that he called and told them not to occupy his land. He instructed his Advocate to write a demand letter asking them to vacate but they refused and instead, filed the instant suit.

### Applicants Submissions

9. The Applicants through the Firm of M/s Were & Co. Advocates submitted on two issues as follows;
- i. When did the plaintiffs take possession of the land?
  - ii. Whether the defendant had knowledge of the Plaintiffs' occupation?

### When Did The Plaintiffs Take Possession Of The Land?

10. On this issued, the learned Counsel submitted that the Applicants/Plaintiffs contend that they took possession of the suit land on the year 1998. He argued that the averments by the plaintiffs have not been controverted.

### Whether The Defendants Had Knowledge Of The Plaintiffs' Occupation

11. The Counsel for the plaintiffs submitted that the Defendant/Respondent was all along aware of the plaintiffs 'illegal' occupation of his land. He relied in the case of Alfeen Medhimohammed v Basil Feroz Mohamed & 223 Others (2016) eKLR.

### Respondent's Submissions

12. The Respondent through the Firm of N.A Owino & Company Advocates submitted that the Applicants knew that the two plots legally belonged to their brother-in-law, the Respondent herein and that they did not believe that they have a right to the property. She submitted that the Respondent brought the Applicants to Bungoma in good faith and gave the 1<sup>st</sup> Applicant a job as a driver of his matatu business. She submitted that the 1<sup>st</sup> Applicant caused an accident which killed and injured many



people which forced their families to institute civil claims against the Defendant/Respondent. She submitted that the Defendant/Respondent was forced to leave Bungoma for Nairobi. She submitted that the Applicants who are close relatives to the Respondent knew that the two plots belonged to him and cannot therefore benefit under the doctrine of adverse possession. She relied on the following cases; Kweyu Omutut (1990) KLR 709; Gabriel Mbui v Mukindia Muranya (1993) eKLR; Bejoy Chundra v Kally Prosonno (1878) 4 CAL 1327; Sisto Wambugu v Kamau Njuguna (1993) eKLR; Wallis's Cayton Bay Holiday Camp Ltd v Shell-Mex And Bp Ltd (1975) QB 94; Juletabi African Adventures Limited v Daniel Ojwang Achoka & Christopher Michael Lockely (2017) eKLR.

### **Analysis And Determination .**

13. I have considered the pleadings, the testimony by the parties and the witnesses, the rival submissions and the applicable law. From the pleadings by the parties, it is clear that the Plaintiffs/Applicants' claim against the Defendant/Respondent is for adverse possession. From the material placed before me, the following are the issues for determination;
- I. Whether or not the applicants have acquired the suit properties by way of adverse possession?
  - II. Whether adverse possession can be claimed against the defendant/respondent herein?
  - III. Who will bear the costs of this suit?

### **Whether or not the applicants have acquired the suit properties by way of adverse possession?**

14. Section 7 of the *Limitation of Actions Act* (Cap.22) Laws of Kenya provides as follows;
- ‘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 is first accrued to some person through whom he claims, to that person.
15. Section 13 of the same Act also provide 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 section 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date, a right of action does not accrue unless 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 occurred 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 takes adverse possession.
  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.
16. Section 17 of the same Act stipulates that upon the expiry of twelve (12) years, the title of that person stands extinguished.



17. In the case of *Wambugu v Njuguna* (1983) KLR 172, the court held;

“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 of which he intended to use it..

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 of the requisite number of years.

18. In order to determine whether the Applicants’ rights accrued, the court will seek to answer the following questions;

1. How did the Applicants take possession and occupation of the suit properties
2. When did the Applicants take possession and occupation of the suit properties
3. How long has the Applicants been in possession and occupation of the suit properties.

19. In this case, it is not in dispute that the Applicants are husband and wife while the Respondent is their brother-in-law. The 2<sup>nd</sup> Applicant who is the wife of the 1<sup>st</sup> Applicant are sisters with the wife of the Respondent.

20. It is not also in dispute that the suit properties being L.R NO.E.Bukusu/S.Kanduyi/5978 and E.Bukusu/S.Kanduyi/6506 are plots within the heart of Bungoma County set aside, either as commercial or a residential plots depending on the County spatial plan and/or land use zoning. It is also trite that any person who owns a plot within the county spatial plan or land use zoning area and wishes to develop or occupy such plot must seek and obtain permission and/or approval from the County Government of Bungoma. I say so because those are acts consistent with the enjoyment of the soil for the purpose of which the law requires the owner of a plot in the town to obey.

21. At paragraph 6 of his affidavit in support of the originating Summons, the 1<sup>st</sup> Applicant stated that they have extensively developed the suit properties by building semi-permanent houses and cultivating crops. However, the Plaintiffs/Applicants did not annex/attach or produce a payment receipt for approval of the buildings and crops. There are also no photographs of the purported buildings and crops that the Applicants are indeed in possession and occupation of the suit properties. Without evidence that the county Government of Bungoma approved any construction or occupation of the suit properties, the Applicants cannot be heard to say that they dispossessed or discontinued the Respondent’s possession of the suit properties.

22. In order to succeed in a claim for adverse possession, the Applicants are also required to show that the title holder has been dispossessed or discontinued his possession for a statutory period of twelve (12) years. In their testimony and that of their witnesses, the Applicants simply stated that they have been jointly in an open, peaceful, quiet, notorious, continuous, uninterrupted possession of the suit properties since the year 1998. Adverse possession is an operation of law which applies on arithmetic matrix. It has to have a point within which time starts to run. The Applicants have not provided the date and month of 1998 when they purportedly took possession and occupation of the suit land. Without stating the date and month when the Applicants took possession and occupation of the suit property, it would be impossible to compute when the time started to run. In my view, the doctrine



of adverse possession did not apply in the present instance as the Plaintiffs/Applicants have not given a specific time and date they purportedly took possession and occupation of the suit properties. The statutory period of twelve (12) years within which adverse possession is said to operate in law must have a point within which time starts to run.

**Whether adverse possession can be claimed against the defendant/respondent herein?**

23. From the evidence on record, it is not in contention that the suit properties Land parcels NO. E.Bukusu/S.Kanduyi/5978 and E.Bukusu/S.Kanduyi/6506 are registered in the names of Ferdinand Kennedy Thuku, the Respondent herein. It is not also in contention that the Applicants came to Bungoma, courtesy of the Respondent who upon request, agreed to employ the 1<sup>st</sup> Applicant as a driver in his vehicle registration NO. KAJ 282G which was operating as a matatu. As an employee of the Respondent, it is possible that the Applicants could have become privy to some properties of his boss, the Defendant/Respondent herein who is also a close relative. Under African customs and tradition, it was common for families who are relatively well off to allow close relatives who were in need to live together and even allow them to till part of their land for food crops until they are sufficiently strong to start their own life.
24. In the case of; Samuel Kihamba V Mary Mbaisi CA Civil Appeal NO. 27 of 2013 (2015) eKLR, the case was for adverse possession involving a son and the step-mother and the court of Appeal held;  

“could the doctrine of adverse possession apply against the suit before learned judge who were related by being mother and step son? We think not. We are persuaded by various dicta which we have quoted and relied upon in this judgment and must state that it would create havoc for families and the society of Kenya generally if the principle of adverse possession applied within families against close relatives.”
24. I agree with the findings of the Superior Court which is binding on me.
25. As regards Costs, it is trite that costs follow the event. In this case, the parties are close family relations. In the circumstances, I am of the view that it would not enhance family cohesion to order the Applicants to pay costs to the Respondent. As such, I order each party to bear their own costs.
26. Ultimately therefore, this suit is without merit and the same is hereby dismissed.
27. In the alternative, I allow the Respondent’s counterclaim for eviction of the Applicants from the suit properties. Since the Applicants and the Respondent are close relatives, I order each party to bear their own costs.
28. Orders accordingly.

**READ, DELIVERED AND SIGNED AT BUNGOMA THIS 07<sup>TH</sup> FEBRUARY, 2025.**

**HON. E.C CHERONO**

**ELC JUDGE**

In the presence of;

Mr Were for the Applicant.

M/S Owino for the Respondent.

Bett C/A.

