



REPUBLIC OF KENYA



KENYA LAW

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**Sita & 459 others v Jipe Multi Purpose Co-operatvie Society
Limited & 4 others (Environment & Land Case 7 of 2023)
[2025] KEELC 3627 (KLR) (Environment and Land) (8 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3627 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT & LAND CASE 7 OF 2023**

EK WABWOTO, J

MAY 8, 2025

BETWEEN

**JOSHUA MUEMA SITA 1ST PLAINTIFF
HARRISSON KISWII NYAMAI 2ND PLAINTIFF
CHRISTOPHER MUTETI KANYINGI 3RD PLAINTIFF
NGANANA KISHAPUA 4TH PLAINTIFF
EZEKIEL MUTRO LEMUJINI 5TH PLAINTIFF
JOSHUA TIPTIP SARUNI 6TH PLAINTIFF
JOSHUA MUTWOTA MATHEKA 7TH PLAINTIFF
ROBERT MUTUKU KYENDO 8TH PLAINTIFF
PETER MUTHEI KIMEU 9TH PLAINTIFF
JOSEPH LENGU KAYIAN SADERA & 450 OTHERS & 450 OTHERS & 450
OTHERS 10TH PLAINTIFF**

AND

**JIPE MULTI PURPOSE CO-OPERATVIE SOCIETY LIMITED 1ST DEFENDANT
DEPUTY COUNTY COMMISSIONER, TAITA TAVETA COUNTY 2ND
DEFENDANT
OFFICER COMMANDING POLICE DIVISION, TAVETA 3RD DEFENDANT
REGISTRAR OF LANDS, MOMBASA 4TH DEFENDANT
ATTORNEY GENERAL 5TH DEFENDANT**



JUDGMENT

1. This suit was instituted vide a plaint dated 18th November 2020 which was amended on 17th October 2022 and later amended on 24th March 2024. The Plaintiffs sought the following reliefs:-
 - a. A declaration that in enacting Section 152E and G of the land laws (Amendment Act). Parliament elevated that section to a constitutional provision for public participation in line with Articles 188 and 10(2)(A), 118(I), (B), 69(I) D, 174(C), 184(1), (B), 232 and 4th Schedule Part 2(14) of *the Constitution*.
 - b. A declaration that by virtue of long an uninterrupted possession the Plaintiffs have acquired title by adverse possession of Plot LR No. 10287/3.
 - c. An order of cancellation of title of Plot No. LR No. 10287/3 in the name of the 1st Defendant and issue of titles in the name of the Plaintiffs.
 - d. A declaration that evicting the Plaintiffs a large number without compliance with Articles 188 and 10(2)(A), 118(1), (B), 69(1), D, 174(C), 184(1), (B) and 4th Schedule part 2(14) of *the Constitution* is null and void.
 - e. An order of injunction restraining the 1st Defendant by itself, its servants, agents or through the 2nd, 3rd and 5th Defendant from selling, auctioning, transferring, depositing the suit property or interfering with their peaceful occupation of the suit property.
 - f. A declaration that Plaintiffs have acquired title to Plot LR No. 10287/3 by virtue of their long uninterrupted continuous occupation.
 - g. An order of cancellation of the current Certificate of Title No. CR No. 97348/1 in the name of Jipe Multipurpose Co-operative Society Limited.
 - h. A further mandatory order, commanding the 5th Defendant through the relevant ministry to reposes LR No. 10287/3 and sub-divide it through the 4th Defendant into portions currently occupied by the Plaintiffs and issue new title deeds to each of the Plaintiffs over the portion of the suit property they currently occupy.
2. The suit was contested by the Defendants. The 1st Defendant filed a Statement of Defence dated 3rd September 2024.
3. The Plaintiffs averred that the property known as L.R No. 10287/3 situated in Jipe area, Taita Taveta County measuring approximately 1040.4 Hectares less a portion of reserve of 44.5 Ha is currently registered in the name of the 1st Defendant and the same was registered in the names of the 1st Defendant at a time when most of the Plaintiffs were residing on the suit property.
4. It was further averred that the Plaintiffs reside in the three main villages/clusters within the suit property. These villages are: Salaita, Majengo and Kasarani. Those who occupy Majengo village were transferred into the place in the year 1997 by the Government of Kenya during the El-Nino season and they remained in the property even after floods. Those who occupy the Salaita and Kasarani villages were there by the year 1972 with some residents having lived in those villages as far back as 1950s. It was also averred that the Plaintiffs have treated the said places as their only home. Since they have been residing in the property for uninterrupted period of over 15 years.



5. It was also averred that the Plaintiffs have established permanent residences in the area and that there also exists various government facilities and churches in the area. These includes: Full Gospel Church of Kenya, St. Joseph Catholic Church Salaita which was started in 1982, Anglican Church of Kenya Kasarani, Lutheran Church Kasarani; The Power of Jesus Church Kasarani, African Inland Church Kasarani (built in 1998), Petra Church Kasarani which was started in 1991 and Soul Harvest Church, Kasarani which was started in 2002. Other facilities included the Water Pan, Kasarani Community and Anil Protection Project, several polling stations, Salaita Primary and Nursery School, Kasarani Pre-Primary School and Primary School and a Community Borehole at Salaita.
6. During trial, 8 witnesses testified on behalf of the Plaintiffs. Joshua Mwema Sita testified as PW1. He relied on his witness statement and Plaintiff's bundle of documents dated 18th November 2020 in his evidence in chief.
7. On cross-examination by Learned Counsel Mr. Kiarie for the 1st Defendant, he stated that they do not have title to the land. They did a search and confirmed that the land belongs to the government and it does not belong to the 1st Defendant. He also stated that the 1st Defendant did not buy the land.
8. Harrison Kiswii Nyamai testified as PW2. He relied and adopted his witness statement dated 10th November 2020. He stated that he was brought to the land by the Government in 1997 during the El-Nino rains and has been staying in the land ever since.
9. It was his testimony that in the year 2020, some people came to the land claiming ownership over the same but when they resisted, they never came back.
10. On cross-examination by Counsel for the 1st Defendant, he stated that he does not have the title to the land. He has not seen any title in the 1st Defendant's name. he does not believe that the 1st Defendant has a genuine title.
11. Christopher Muteti Kanyingi testified as PW3. He stated that he came to the land in 1997 after the El-Nino rains and he has remained there ever since. He also relied on his undated further amended witness statement and the Plaintiff's bundle of documents on record in his evidence in chief. He also told the court that together with the Plaintiffs, he was seeking to be given back the land.
12. When cross-examined by the Counsel for the 1st Defendant he stated that he was brought to the land in 1997 and he did not sign any document to confirm that he had been given the land. He also stated that the land belongs to the government. When asked whether he is in the 1st Defendant's land. He stated that he is not in their land.
13. When cross-examined by Learned Counsel for the 2nd to 5th Defendant Ms. Mwanazunga he stated that the 1st Defendant's land as indicated in their titles is not in Taveta. They were not given any documents to claim ownership. They are awaiting the outcome of National Land Commission on the issue. They have never been evicted from the suit land.
14. He further stated that they had sued the 1st Defendant because they had threatened to evict them from the land and not because they are the owners of the land.
15. Nganana Kishapua testified as PW4. He relied on his witness statement on record in his evidence in chief and stated that he was born on the land in 1982.
16. On cross-examination by Counsel for the 1st Defendant, he stated that, he sued the Defendants because they wanted to evict him and he did not know the L.R number of their title.



17. Ezekiel Mutero Lemujini testified as PW5. He stated that he was born on the land in 1987 and he had equally sued the Defendants because they wanted to evict them.
18. When cross-examined by Counsel for the 1st Defendant, he stated that his parents are also staying in the land and that the land that they occupy does not have a title.
19. When cross-examined by Counsel for the 2nd to 5th Defendants, he stated that the police have never evicted them from the land and that he did not know the L.R number of the land.
20. Joshua Tiptip Saruni testified as PW6. He adopted and relied on his undated witness statement that was on record in his evidence in chief.
21. On cross-examination, he stated that he did not agree with the search that was done showing that the 1st Defendant owned the land since the land belongs to them.
22. Joshua Mutwota Motuka testified as PW7. He stated that he came to the land in 1997 after the El-Nino rains and he is the current village Headman. He also stated that before the events of October 2020 there was no person claiming ownership of the land. He also stated that he had produced a document dated 28th August 2014 which shows that his kiosk was found to be on the road reserve and he was to be compensated before it was demolished. He also added that the said document confirmed that he was in the land. He also relied on his undated witness statement in his evidence in chief.
23. On cross-examination, he stated that he did not know the people who had been sued in Mombasa HCCC No. 15 of 2007. He also stated that he has never seen the current title of the land. He also stated that the L.R No. 10287 was for the entire block number and does not belong to anyone.
24. The last witness to testify on behalf of the Plaintiffs was Joseph Lengu Kayian Sadera who testified as PW8. He adopted and relied on his witness statement which was undated in his evidence in chief. He also added that the suit was filed after the events that happened in October 2020 where some people had threatened to evict them from the property. He stated that the people who had threatened to evict them stated that they had been sent by the 1st Defendant and that is why they sued the 1st Defendant.
25. When cross-examined, he stated that he did not have any documents to show that the land belongs to him. He also stated that he did not have any documents confirming that the 1st Defendant owns the land.
26. The 1st Defendant filed a Statement of Defence dated 3rd September 2024. It was averred that the 1st Defendant is the registered owner of the property known as Grant No. I.R 17933 L.R No. 10287 (Original No. 7331) which was purchased from Mama Ngina Kenyatta and Basil Criticos in the year 1989 for a consideration of Kshs. 3,567,000/=
27. It was also averred that the Plaintiffs are invaders in the land after entering the land in the year 2016. It was also averred that there was an earlier suit in Mombasa HCCC No. 15 of 2007 Jipe Multipurpose Co-operative Society Ltd =Versus= Elijah Saronge & 59 Others where the court ruled in favour of the 1st Defendant and ordered all the 60 squatters to be evicted from the land.
28. It was further averred that the compensation of the Plaintiffs for their structures on the land had nothing to do with the title since the National Land Commission had already compensated the 1st Defendant as the registered owner of the land used for the construction of the Mwatate – Taveta road.
29. The 1st Defendant prayed for the dismissal of the Plaintiffs' suit with costs.
30. During trial, Kipasha Laurent Mlondwa DW1 testified on behalf of the 1st Defendant and the sole defendant's witnesses in the matter. It was his testimony that the land was bought from Mama Ngina



Kenyatta and Basil Criticos for Kshs. 3,567,000/= on 30th January 1997 and later a certificate of title issued on 12th November 2004. It was also his testimony that the land was bought for use by its members, however the subdivision was never completed because of an ongoing case at the time due to the squatters who had invaded the land. He also stated that the 1st Defendant filed case No. HCCC No. 157 of 2007 wherein the court ruled in their favour but they were not able to evict the squatters who were on the land. He also stated that the Plaintiffs were aware of the said case. Some of the current squatters came to the land after the previous case had been completed. He also stated that the 1st Defendant's title has never been cancelled. He also relied on his witness statement dated 19th October 2023 in his evidence in chief together with the 1st Defendant's bundle of documents that were on record.

31. On cross-examination by the 1st Plaintiff he stated that the 1st Defendant was registered in 1987 and they bought the land in 1989. He also stated the suit land was private land and it was vacant at the time of purchase.
32. When cross-examined by the 2nd Plaintiff, he stated that the name of Mutinda Ndolo did not appear anywhere in his bundle.
33. When cross-examined by the 3rd Plaintiff, he stated that he had not filed the KRA PIN Certificate and Tax Compliance Certificate of the 1st Defendant in his bundle of documents since the same was not a requirement in the matter.
34. When asked about their AGM meeting, he stated that the last AGM meeting was held on 14th December 2024.
35. He also stated that the 1st Defendant's title had no error on its face and that the caveat that had been placed was due to the differences between Mama Ngina Kenyatta and Basil Criticos and they had nothing to do with it.
36. When cross-examined by the 4th Plaintiff, he stated that the members of the 1st Defendant contributed funds for the purchase of the land. He also stated that the members of the public were notified and sensitized about the said purchase and those who did not get the information cannot blame the Plaintiff.
37. When cross-examined by the 5th Plaintiff, he stated that members of the 1st Defendant were entitled to a share which was equivalent to 5 acres. However, some people did not pay for the 5 acres.
38. When cross-examined by the 6th Plaintiff, he stated that they have not made any developments on the land. The beacons that were placed by the Surveyors were uprooted.
39. On cross-examination by the 7th Plaintiff he stated that he was not paid any compensation. The initial beacons were uprooted. There is a railway line and a hill on the area and that their map was not fake.
40. When cross-examined by the 10th Plaintiff, he stated that he did not have the sale agreement in court.
41. When re-examined, he stated that a certificate of title is different from a title deed. They were compensated for the construction of the road and were paid about Kshs. 5 Million.
42. The 2nd to 5th Defendants closed their cases without calling any witnesses nor filing any pleadings in the matter.
43. The Plaintiffs filed written submissions dated 17th February 2025. It was submitted that the 1st Defendant had not adduced any documents confirming how they acquired the land. The 1st Defendant



- did not adduce nor produce any KRA PIN and Tax Compliance nor any gazette notice and any other documentation to confirm its legitimacy and that of its members.
44. It was also submitted that failure to produce a sale agreement before court showed that the land was not properly acquired and the title was not genuine. It was also submitted that the 1st Defendant did not call any other witness to corroborate the testimony of DW1.
 45. The Plaintiffs urged the court to grant the reliefs sought in their plaint.
 46. The 1st Defendant filed written submissions dated 20th March 2025. Counsel submitted on the following issues:-
 - a. Whether the Plaintiffs have acquired the suit property by adverse possession.
 - b. Whether the Plaintiffs are entitled to be registered as owners of the suit property.
 47. It was submitted that the Plaintiffs' evidence was controverted by DW1 when he was called upon to testify. He identified himself as the Treasurer and member of the 1st Defendant. He informed court that the 1st Defendant purchased the suit property in 1989. He produced a Certificate of Title as DW1 EXH-1. He also produced Part of Development Plan for the suit property LR 10287 (Orig No. 7331 and Crown land) as DW1 EXH-2.
 48. That prior to purchasing the suit property, public awareness meetings were held in various villages through chief barazas in 1987 to inform people to register as Cooperative members so as to purchase the land from Basil Criticos and Mama Ngina Kenyatta. He produced bundles of the public awareness meetings dated 18th November 1987 as DW-EXH-3.
 49. It was submitted that DW1 had informed court that if the Plaintiffs had homes on the suit property, as they allege, they would have registered as members of Jipe Multipurpose Co-operative Society or objected to the sale at that time, which they didnot. It was his testimony that the Plaintiffs invaded the property in 2016 or thereabout after the conclusion of the above mentioned cases and therefore they should not remain on the suit property.
 50. It was submitted that it was DW1's evidence that after purchasing the property, the 1st Defendant did prepare subdivision scheme of the suit property which measures 1040 Hectares or 2570 Acres with a view to distributing it to its members but the same could not be completed as the land was invaded by the 60 squatters who the 1st Defendant took to court and obtained a judgment and eviction orders against them in HCCC No. 157 of 2007 Jipe Multipurpose Co-operative Society Limited =Versus= Elijah Saronge & 59 Others. The Plaintiffs were not on the suit property at the time of conclusion of the suit case in 2015.
 51. Citing several cases including the case of Wesonga Kweyu =Versus= Kweyu Omuto (1990) KECA 63 (KLR), it was argued that the Plaintiffs had not tendered any evidence confirming their actual possession on the land. The sketchy photographs and maps produced were not accompanied by an affidavit of any expert who took the photos.
 52. It was also submitted that the issue of the validity of the title held by the 1st Defendant had been raised by the Plaintiffs and as such the Plaintiffs cannot allege to have acquired right of adverse possession over the said land.
 53. The court was urged to dismiss the Plaintiffs suit with costs.
 54. The court has considered the pleadings filed, the written submissions together with the oral and documentary evidence and is of the view that the following are the key issues for consideration herein:-



- i. Whether the Plaintiffs have proved their case to the required standard.
 - j. Whether the Plaintiffs are entitled to the reliefs sought.
55. The gist of the Plaintiffs claim is that they are entitled to ownership of the land by way of adverse possession having been on the said land for over 12 years. The Plaintiffs claim that it is an adverse possessor find statutory expression in sections 7, 13, 17 and 38 of the *Limitation of Actions Act*. Section 7 states that,
- “An action may not be brought by any person to recover land after the end of 12 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.”
56. It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the *Evidence Act*, which provides as follows:
- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
57. Sections 109 and 112 of the same Act states;
- “109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
58. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M’Nabea vs David M. Wachira* [2016] eKLR stated as follows:
- “In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.
- ...The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’airanyi & Others v Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:
- “Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”



59. With respect to the burden of proof, the learned Judges of Appeal in the case of Palace Investments Limited vs Geoffrey Kariuki Mwenda & another [2015] eKLR, posited thus:

“Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties... are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

60. The Court will be guided by the aforementioned provisions and cases.

61. Order 37 Rule 7(2) of Civil Procedure Rules stipulates that a person seeking a claim to the land by way of adverse possession must annex a certified extract of the title. The gist of this provision is that the said party must confirm and recognize the authenticity of the said title before he or she can claim any right to the land by way of adverse possession.

62. In the instance case and having considered the testimony of the 8 Plaintiffs witnesses who testified, they denied that the land belonged to the 1st Defendant and they also disputed the title held by the 1st Defendant. According to the Plaintiffs witnesses they even stated that the said land belonged to the Government and it was not properly acquired by the 1st Defendant because the 1st Defendant had not produced any sale agreement nor any documentation confirming the legitimacy of the title and the 1st Defendant’s entity.

63. From the evidence tendered by the 8 Plaintiffs’ witnesses, what becomes evident and apparent is that the Plaintiffs are contesting the validity, legality and propriety of the 1st Defendant’s title. Simply put, the Plaintiffs have neither acknowledged nor admitted that the 1st Defendant is the lawful and legitimate owner of the suit property.

64. In the premises, the question that does arise that the Honourable court must grapple with; is whether the Plaintiffs herein, who are challenging the validity of the 1st Defendant’s title, can in the same vein also stake a claim premised on adverse possession.

65. My understanding of the Doctrine of adverse possession is that the claimant (the person contending to be in adverse possession) must first and foremost concede to, acknowledge and admit the title of the owner of the property which is in question. Indeed, the doctrine of adverse possession is hinged on the provisions of Section 7, 13, 17, 37 and 38 of the Limitations of Actions Act, Chapter 22 Laws of Kenya.

66. In my humble view, the moment the person claiming adverse possession contests and impugns the validity of the registered proprietors title, the claim for adverse possession is defeated and thus becomes legally untenable. In such a situation, the claimant is at liberty to pursue a cause of action for fraud or better still, trust, which causes of action are antithetical to and cannot co-exist with a claim for adverse possession.



67. To buttress the position that one cannot implead fraud and adverse possession or better still trust and adverse possession in the same cause of action; it is instructive to take cognizance of the holding of the Court of Appeal in the case of Catherine Koriko & 3 Others v Evaline Rosa (2020)eKLR, where the Court of Appeal held as hereunder;

“A claim for adverse possession is inconsistent with the claim for being a beneficiary of the estate of a deceased person. In the original suit, the appellants did not concede that indeed the respondent was the true owner of the suit property. The appellants’ application to amend the statement of defence and counterclaim was nothing but an indirect attempt to re-open litigation over the suit property with a view to circumventing the substantive effect of, and the rights of the parties as had been determined in the Kisii High Court Succession Cause No 105 of 2010. I cannot be blind to this attempt and I decline to condone the same.”

68. Furthermore, the position that one cannot advance a claim for fraud and adverse possession in the same cause was also discussed in the case of Haro Yonda Juaje v Sadaka Dzenge Mbauro & Kenya Commercial Bank (2014) eKLR, where the Court stated:

“(29) One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession. If the Plaintiff’s averment is that the title which was issued to the Defendant was fraudulently acquired, then his cause of action would be for the rectification of title by cancellation pursuant to the provisions of Section 143 of the Registered *Land Act* and not adverse possession. He cannot use the doctrine of adverse possession to go around the decision of the Minister.”

69. Clearly, the Plaintiffs herein cannot be heard to impugn the 1st Defendant’s title and allege that same was procured by fraud, illegality and misrepresentation, on one hand, while advancing the claim for adverse possession on the other hand.

70. As such it is the finding of this court that the Plaintiffs have not proved their case to the required standard to warrant the acquisition of the said land by way of adverse possession. As concerns the burden of proof, it suffices to point out that same laid on the shoulders of the Defendants, (in accordance with the provision of Section 107, 108 and 109 of The *Evidence Act*, Chapter 80 Laws of Kenya), to place before the Honourable court credible evidence and in the event of default, then their claim must no doubt, fail.

71. Consequently, it is the finding of this court that the Plaintiffs suit has not been proved to the required standard and their claim fails. The same is dismissed in its entirety and each party to bear own costs of the suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT VOI THIS 8TH DAY OF MAY 2025.

E. K. WABWOTO

JUDGE

In the presence of:-

Joshua Muema Sita the 1st Plaintiff.



N/A for the 2nd Plaintiff.

Christopher Muteti Kanyingi the 3rd Plaintiff.

Nganana Kishapua the 4th Plaintiff.

Ezekiel Lemujini the 5th Plaintiff.

N/A for the 6th Plaintiff.

Joshua Matheka the 7th Plaintiff.

Robert Mutuku the 8th Plaintiff.

Peter Kimeu the 9th Plaintiff.

Joseph Lengu the 10th Plaintiff.

Mr. Kiarie for the 1st Defendant.

Ms. Mwanasudi for the for 2nd to 5th Defendants.

Court Assistants: Mary Ngoira and Norah Chao.

