



**Moherai v Kisioku (Land Case (Originating Summons) E002 of 2023)
[2025] KEELC 4060 (KLR) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4060 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
LAND CASE (ORIGINATING SUMMONS) E002 OF 2023**

MN MWANYALE, J

MAY 22, 2025

BETWEEN

RIOBA MOHERAI PLAINTIFF

AND

PARMANYARA OLE KISIEKU DEFENDANT

JUDGMENT

1. The Plaintiff Mr. Rioba Moherai, suing as the Chairman of Komongeta Men Group Mashangwe took out an Originating summons pursuant to Section 7 and 38 of the Limitation of Action. Act, Order 37 Rule 7 and 14 of the Civil Procedure Rules against Parmanyara Ole Kisioku seeking determination of the following issues.
 - a. The Honourable court be pleased to declare that the plaintiff and/or any persons claiming under it [sic] has acquired by adverse possession a portion measuring 21 acres of L.R No. Transmara/Moyoi/15 measuring 73.19 Hectares in total.
 - b. This Honourable court be pleased to declare that the plaintiff is the owner of the portion of L.R No. Transmara/Moyoi/15 measuring 21 acres to the exclusion of the Defendant.
 - c. This Honourable court be pleased to order for the transfer of the portion measuring 21 acres to the applicants of Transmara/Moyoi /15 and that the same be registered to the Plaintiff.
 - d. The Defendant be ordered and/or directed.
 - e. Costs of the suit.
2. The Original Defendant passed on necessitating an amendment to the Originating Summons so as to substitute Parmanyara Siampei vide the Amended Originating Summons dated 4th January 2024.



3. No directions were taken on the hearing of the Originating Summons but as the same proceeded by the way of viva vole evidence, the Originating Summons is deemed to have been converted to a Plaint as was held in the decision by the Court of Appeal in the case of Shadrack Bungei v Selina Jerotich [2021] eKLR.

Plaintiff Case and evidence

4. It is the plaintiff's case that; -
 - i. they are occupying 21 acres within Transmara/Moyoi/15 for a period of more than 12 years, even during the registration in favour of the Respondent.
 - ii. The Defendant has failed, and/ or refused to transfer to the plaintiffs the suit parcel of land despite pleas to him.
 - iii. The occupation by the plaintiff has been open long, open, continuous and uninterrupted for more than 20 years, a period that exceeds the period of 12 years; thus, the said occupation of the 21 acres constitutes overriding interest and their occupation merits their Registration.
5. The supporting affidavit by Rioba Moherai, the same reiterates the grounds in support of the Originating Summons and has annexed a copy of official search, and photographs.
6. In support of case, Mr. Rioba Moherai further testified as PW1 and the sole witness.
7. It was his testimony that he was the chairman of Komongeta men group the plaintiff herein and that they had they had been living on the suit property for more than 20 years living on 21 acres thereof while the suit property Was 73.91 hectares, they were utilizing 21 acres, having developed the same and planted trees, banana plants, maize and coffee crops.
8. He further stated that the original Defendant was deceased and had been substituted by his son, they had not been evicted from the suit property, he produced a search over the suit property as P.Exhibit 2.
9. He went on to further produce a copy of the death certificate of the original defendant as P.Exhibit 3 and a copy of Grant issued to the Defendant in High Court succession cases No. 406/2013 as P.Exhibit 4, while a copy of green card was produced as P.Exhibit 5.
10. He sought that the suit property be given to them.
11. On cross-examination the witness stated that the Komongeta Men's group was not registered by the Government but consisted of 12 people.
12. He had no minutes authorizing him to file suit on behalf of the group, he filed suit since they have lived on the suit property from 2004 till now, he went to suit property when he was 56 years old now, he is 77 years old. He confirmed that he had not bought the property neither was he allocated, gifted and/or inherited the same. The suit property had been a forest with no inhabitants they had cleared the forest and settled there in and that there were no other people living therein.
13. He stated that he had lived peaceful without any disturbance. When shown an Agreement for sale dated 31/8/2010 he confirmed having entered the same between the Plaintiff self-group and a Mr. John Oloishiwuo in respect of Transmara/Moyoi/728 but that he lived in Plot No. 15; which is different from 728.
14. In respect of the other Agreement dated 3/8/2024 between John Ole Kataka and himself the same related to parcel number Transmara/Moyoi/728.



15. He stated that the original Defendant had passed on in 2012, and that's when he learnt that the parcel number was Transmara/Moyoi/15, and not Transmara/Moyoi/728.
16. He stated that he had no letter from the chief nor surveyor to confirm his occupation, and that he had been misled on the parcel number, which he learnt in 2024.
17. On Re-examination, the witness stated that they [members of the group] resided on parcel number Transmara/Moyoi/15; which is the same property, he is claiming.
18. With the testimony of the sole witness the plaintiff's case was closed.

Defence case and evidence

19. It is the Defendant's case that; -
 - i. The Plaintiffs have not been occupying parcel No. Transmara/Moyoi/15 for more than 12 years as they claimed; but have been in occupation on a different parcel, to wit, Transmara/Moyoi/728.
 - ii. That the Plaintiff entered an Agreement for sale with one John Oloishiwo Ole Kataka who sold them 21 acres out of Transmara/Moyoi/728 and have been in occupation therein from 2010, and the Plaintiff had also initially purchased portions of land from John Oloishiwo Ole Kataka in 2004 and took possession therein.
 - iii. That the plaintiff trespassed into the suit property in January 2023 and thus no prescriptive rights have crystallized.
 - iv. That the suit is a deliberate falsehood and does not capture the ingredients of adverse possession.
20. The Defendant testified as DW1 it was his testimony, that the late Parmanyara Ole Siampei was his father and he produced a copy of death certificate as D.Exhibit 1.
21. DW1 further testified that he had taken out letters of Administration in respect of his father's Estate and produced the same as D.Exhibit 2.
22. The witness indicated that his father was the registered owner of the suit parcel and he produced a search dated 15th June 2022 as D.Exhibit 3, a copy of the green card as D.Exhibit 4 and a copy of the title deed as D.Exhibit 5.
23. He stated that the plaintiffs were not known to him, he did not know parcel No. 728 and that John Ole Kataka was not his late father's agent. He produced the Agreement dated 31.08.2010 as D.Exhibit 6 and an Agreement dated 03.03.2004 as D.Exhibit 7. He urged the court to dismiss the plaintiff's case.
24. On cross-examination, the witness stated that the Plaintiffs are trespassers and he had asked the chief to evict them but they filed suit in court.
25. He answered in further cross-examination that John Ole Kataka was once a chief in the area but was never an agent of his late father. His late father's agent had been had someone called Chacha who was now deceased.
26. The witness indicated that he usually leases the suit property and that his late father informed him of all happenings. That the Agreements predate occupation by the Plaintiff on the suit property.



27. On re-examination, the witness indicated that he had not seen any documents authorizing John Ole Kataka to be his father's agent.
28. With the testimony of the Defendant as the sole witness, the Defence case closed.
29. Parties were directed to file written submissions, the Plaintiff's counsel opted not to file written submissions instead indicating that the principles for Adverse possession were clear and left the same to the court.

Defendants Submissions

30. The Defendant filed written submissions and submitted generally without framing any issues for determination.
31. The defendant submitted that the Plaintiff had not shown that the parcel of land that they bought was Transmara/Moyoi/15.
32. The Defendants submit that the plaintiff did not prove occupation of the suit property at all.
33. On the strength of the above submissions and the authorities cited in the said submissions, the Defendant argued the court to discuss the plaintiff's suit.

Issues for determination

34. Having analysed the pleadings, evidence and submissions of the parties, considered the applicable law, the court frames the following issues for determination?
 - i. Whether or not the plaintiff's suit is merited? In determining this issue, the court shall determine the following sub-issues under it.
 - a. Whether the plaintiff has proved the elements of adverse possession?
 - b. Whether the plaintiff is entitled to the reliefs sought?
 - ii. What orders ought to issue?
 - iii. Who bears the cost of the suit?

Analysis and Determination.

35. On sub-issue 1, the court shall look at the elements needed to prove adverse possession and whether the plaintiff has proven them.
36. The elements to be proven in adverse possession have been stated in many judicial decisions.
37. In *Mtanalewa v Kahinchi charo Mwangondi*, the court held as follows in respect of adverse possession, "Adverse possession is essentially a situation where a person takes possession of land and asserts rights on it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12 years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that possession of the adverse possession is neither by force or stealth nor under licence of the owner.

It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner,"



38. In the most recent decision on adverse possession the court of Appeal in *Andafu v Akbuonya [Civil Appeal 70 of 2019]* 2025 KECA 714 KCR delivered on 25th April 2025 summarized all the elements needed to prove a claim in adverse possession as espoused by various Judicial pronouncements at paragraph 33 and 34 of the said decision the court held as follows: - “33 courts; on the other hand have Judicially developed the elements which must be satisfied before a claimant can succeed in an action for adverse possession. The leading cases from this court in this regard include: *Titus Mutuku Kasuve v Mwaani Investments limited and 4 others* [2024] eKLR, *Titus Kigoro Manyi v Peter Mburu Kimani Civil Appeal No. 28/2014*, *Wambuga v Njuguna* [1983] KLR 172 and *Karuntimi Ranji is M’Mukinya* 2013 eKLR.

“34 The principles distilled from those cases, are that in order to establish a claim of adverse possession, the possession must be;

- a. “Adverse to the interests of the owner meaning that the claimant is in possession as owner in contradistinction to holding in recognition of or subordination to the true owner or to a recognized supervisor claim of another.
- b. Actual – as opposed to constructive possession where the test is in the degree of the actual use and enjoyment of the parcel of land involved by the claimant or his agent, tenant or license.
- c. Open and notorious – meaning the possession must be open and conspicuous to the common observer so that the owner or his agent on visiting the land might readily see that the owner’s rights are being invaded. Differently put, the possession must be manifest to the community.
- d. Without force – meaning that the possession and occupation must have been achieved peacefully not through actual or threatened violence.
- e. Exclusive meaning that the possession must be of such exclusive character that it will operate as an outser of the owner of the legal title. Differently put the claimant must demonstrate that she wholly excluded the owner from possession for the required period.
- f. Continuous and uninterrupted for the period of 12 years – meaning that the owner did not re-enter the property under circumstances showing her intension to assert dominion against the adverse user for at least twelve years.”

39. Applying the above elements to our case the plaintiff testified that the entry into the suit property was in 2004, he produced photographs of the utilization of the suit property by way of houses as well as farming thereon.

40. The defendant produced a copy of an Agreement between the Plaintiff and one John Ole Kataka over Transmara/Moyoi/728 which was entered into in 2004, a different parcel altogether.

41. It was incumbent upon the plaintiff to produce evidence on the occupation on the suit property Transmara/Moyoi/15 so as to prove their occupation, as the court is not able to discern where the photographs were taken, but a surveyor’s and/or ground report would have sufficed.

42. It was apparent on cross-examination, that the plaintiff did not call additional evidence, towards this.

43. The plaintiff did not present a surveyor’s report for example to show the occupation was in the suit property and that it was 21 acres as he had pleaded on open and notorious occupation, no neighbour,



nor area chief or village elder was called by the plaintiff to corroborate the actual occupation on the suit property, by the plaintiffs.

44. The court finds the plaintiff did not discharge his burden of proof required under Section 107 to 109 of the *evidence Act*, put differently, the plaintiff did not prove actual occupation on the suit property, neither proof open and notorious occupation which could only be proven by the members of the community nearby, having not called any witnesses, he failed to prove all the elements required in adverse possession.
45. Thus, in answer to sub-issue 1, the plaintiff thus did not prove all the elements of adverse possession, specifically the actual occupation, and open and notorious occupation elements.
46. On sub-issue [2] the court finds that having not proven all the elements of adverse possession, the plaintiff is not entitled to the reliefs sought as his claim is not merited; having not been proven, on a balance of probability.
47. Thus, in answer to issue 1 the court finds the plaintiff claim is not merited.
48. On issue 2, as to whether what orders ought to issue.
49. Having found that the plaintiff has not proven all the elements of adverse possession especially actual occupation, open and notorious occupation elements and that he is not entitled to the reliefs sought, as the suit is not merited, it follows that the orders sought by the plaintiff cannot issue as his suit fails; and the same is dismissed.

Disposition

50. The plaintiff has not proven his case and the suit is hereby dismissed with no orders as to costs.

DATED AND DELIVERED AT KILGORIS THIS 22ND DAY OF MAY 2025.

HON. M.N. MWANYALE

JUDGE

In the presence of

CA – Emmanuel/Sylvia

Mr. Ochwangi for the Defendant

N/A for Mr. Mwita for the Plaintiff duly notified

