



Ololodi v Mbogo & another (Sued as the administrators of the Estate of Alfred Kimani Toronke - Deceased) (Environmental and Land Originating Summons 31 of 2017) [2024] KEELC 5398 (KLR) (11 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5398 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 31 OF 2017
LC KOMINGOI, J
JULY 11, 2024**

BETWEEN

SANCHAKA OLOLODI PLAINTIFF

AND

PATRICK LEMPERE MBOGO 1ST DEFENDANT

JAMES PARSANKA OLE MBOGO 2ND DEFENDANT

**SUED AS THE ADMINISTRATORS OF THE ESTATE OF ALFRED KIMANI
TORONKE - DECEASED**

JUDGMENT

1. By the Originating Summons dated 19th March 2010 brought under Section 38 of the *Limitation of Actions Act* and Order 36 Rule 3D of the Civil Procedure Rules, 2007 the Plaintiff seeks for orders that:
 - i. The Plaintiff be declared to have become entitled by adverse possession of over twelve (12) years, all that piece of parcel of land registered under the Registered *Land Act* chapter 300 of the Laws of Kenya and comprised in Title Number Kajiado/Osilalei/20 measuring approximately 466.5 hectares and situate in Kajiado.
 - ii. The said Plaintiff be registered as the proprietor of the said piece or parcel of land namely Kajiado/Osilalei/20 in the place of the Estate of Alfred Kimani Toronke (deceased) in whose name the said parcel is registered.
 - iii. That costs of the suit be provided for.
2. The Plaintiff states that the parcel of land Kajiado/Osilalei/20 (herein after referred to as “the suit land”) which measures approximately 466.5 hectares was initially registered in the name of Alfred Kimani Toronke alias Mbogo (deceased) sometime in the year 1973. However, his (the plaintiffs) family



moved to the suit land sometime in the year 1978 and have been residing thereon since then without hindrance, objection, authority or permission of the Defendants. He claims that his family members have all been buried on the suit land and he has openly utilised the property including constructing homes, keeping animals and growing crops. He thus sought to be registered as the owner of the property claiming that the Defendant's rights were extinguished sometime in 1990.

3. In his Replying Affidavit Patrick Lempere Mbogo the 1st Defendant contested the claim that the Plaintiff had been on the suit land for over thirty (30) years. He depones that the suit land Kajiado/Osilalei/20 belonged to their late father Alfred Kimani Toronke and upon his demise it devolved to his Estate/ beneficiaries. He deponed that the Plaintiff entered the suit land in the year 2003 to graze his animals due to the ongoing drought where the Plaintiff resided. His parcel number was 606 registered in his father's name Olodi Ole Surunta at the time. This permission was granted to the Plaintiff by a beneficiary of the Estate of the late Alfred Kimani Toronke, although the Administrators had not given their authority. The permission to allow the Plaintiff entry to the suit land was only temporary and he would return to his parcel of land once the drought was over. The Plaintiff and his family refused to vacate the suit land despite several requests and reports to the authorities. Several meetings were held to resolve this issue, including a complaint filed at the Kajiado land Dispute Tribunal and an Appeal thereafter. However, the Tribunal's ruling/award and consequent decision of the Appeal's Committee were quashed on 13th March 2015 in Machakos Miscellenous Civil Application 224 of 2011 on grounds that the Tribunal lacked jurisdiction to determine the dispute.

Evidence of the Plaintiff

4. PW1, Sanchanka Ololodi, the plaintiff and a resident of Mashuruu, adopted his witness statement as part of his evidence in chief. He also submitted a bundle of documents marked as P. Exhibit 1-9a-h. During cross-examination, he stated that he entered the suit property around 1978 or 1979. Born on 1st January 1968, he claimed he was born on the suit land. He denied that the land had been allocated to someone else in 1973. He stated that his grandmother and other family members were buried on the suit land, albeit without photographic evidence due to customary practices. He acknowledged that during dry season, community members allowed others to graze on their land. However, he insisted that he was neither invited to the suit land nor asked to vacate it. He also claimed he was unaware that the land belonged to Alfred Kimani Toronke, who had title to the land, passed away in 1990, and had succession proceedings initiated in 1994. He admitted that a case was filed at the Land Disputes Tribunal where it was decided that the family of Alfred Kimani Toronke would take 200 acres of the suit land. He denied that he was asked to vacate the land.
5. Upon re-examination, P.W.1 confirmed that he knew Alfred Kimani Toronke as Mbogo, who was not buried on the suit land, nor were any of his family members. He added that he was not known to the defendants, who had never resided on the suit property or sued him over the land.
6. PW2, Siango Nekitala Kitukei, a resident of Ngatataek, adopted his witness statement as part of his evidence in chief. During cross-examination, he admitted that he knew Mbogo, although he was not present in court. Kitukei testified that he was a committee member involved in the subdivision of the land before the group ranch was dissolved and that Mbogo was allocated 200 acres of the suit land. However, the certificate of official search shows that Mbogo's land measured approximately 466.5 hectares. He stated that he was unaware of any elders asking the plaintiff to vacate the suit land.
7. PW3, Tulito Ole Kamuana Siangoi, also adopted his witness statement as part of his evidence in chief. During cross-examination, he stated that he did not know the defendants but that the suit land belonged to his uncle Ololodi and that the plaintiff was his cousing. He confirmed that he knew Mbogo



but claimed he was never allotted the suit land. He also stated that unaware of any cases related to the suit land.

8. PW4, Semera Surunta Mugesu, adopted his witness statement as part of his evidence in chief. During cross-examination, he admitted that he knew Mbogo resided in Mashuuru with his wife and had businesses there. He was not aware that Mbogo was given the land which the plaintiff is claiming and did not understand why the plaintiff had filed the suit. Upon re-examination, he confirmed that Mbogo lived in Mashuuru and not on the suit land. He said he did not know the defendants.

Evidence of the Defendants

9. DW1 Patrick Lempere Mbogo, the 1st defendant, adopted his witness statement as part of his evidence in chief. He confirmed that he had asked the plaintiff to vacate the suit property, but the plaintiff refused, prompting him to file several suits for his removal. In 2010, community elders also asked the plaintiff to vacate, but he refused.
10. During cross-examination, he stated he was born in 1956, and his father was Alfred Kimani Toronke, also known as Mbogo, and his mother was Phyllis Wanjiru Mbogo. His father had three wives: Phyllis, with whom he had eight children; Lucy Njoki, who had two children; and Jane Njeri, who had eight children. He also stated that his father was a member of Osilalei Group Ranch and was allocated the suit property, although his name was not in the list of the members of the group ranch. His father had another piece of land at Mashuuru trading centre, where he lived with his two wives, Lucy and Jane. After his father's death, he was buried in Ngong/Ngong/144, where PW1 resides, and Jane was given the plot at Mashuuru.
11. He also confirmed that his brother filed several cases against the plaintiff, including one at the Land Dispute Tribunal in 2008. The Tribunal ruled in his favour, but the plaintiff appealed. The Appeal's Committee visited the land and ruled that his father had been allocated only 200 acres of the suit land. However, the Machakos High Court quashed this decision along with the earlier one. He stated that the plaintiff entered the suit property in 2003 with the defendants' permission and occupied a portion of the suit land, but this was an informal, arrangement.
12. On re-examination, he confirmed that Siango Nekitala Ketukei's statement, claimed that his father was allocated 200 hectares of land. He also confirmed that the plaintiff's pleadings stated that Alfred Kimani Toronke was allocated 466.5 hectares of land.
13. DW2 Kelo Ole Kikwa adopted his witness statement as part of his evidence in chief and produced his documents. He confirmed that Alfred Kimani Toronke was allocated the suit land in 1973, measuring approximately 466.5 hectares. He was familiar with the plaintiff and his family, who were allotted property known as Kajiado/Osilalei/606 in 2006. He stated that he was among the officials who allocated the said parcels. He also stated that the plaintiff and his family resided about 5 kilometres from the suit property in Enkutoto. He also stated that he was an official of the group and they allocated land to the Plaintiff's brother (Semera). He also questioned Siango Nekitala Ketukei's statement for inconsistencies regarding the land allocated to Alfred Kimani Toronke.
14. On cross-examination, he stated that he was born in 1956 and was part of the Irkitoip age set. He confirmed that he was member number 471 with parcel number 318, measuring 186 hectares. He validated the legitimacy of the green card bearing Alfred Kimani Toronke's name. He explained that the Ilyangusi age group members subdivided the land, and Moses Ole Kina was one of them. As vice-chairman from 1991 to 2012, he confirmed that the sons of Mbogo were not allocated additional land because they would inherit their father's land.



15. On re-examination, he reiterated that Mbogo's sons inherited the 466.5 hectares of land given to their father.
16. DW3 Mbutu Orumoi Menkejo treasurer of the Group Ranch adopted his witness statement as part of his evidence in chief. He stated that the plaintiff entered the suit land during the dry season for pasture for his livestock. He knew the plaintiff's land and confirmed that Siango Nekitala was never an official of the group ranch. During cross-examination, he said he was born in 1964 and was member number 751. He was allocated parcel number 1004 measuring 35 hectares. He also confirmed that the plaintiff's name was not on the members' list. He stated that not every age group member was allocated land and that he moved to his land in 1992. He acknowledged that the group ranch had not been subdivided in the 1960s and 70s. He stated that he did not know PW2 but confirmed that the plaintiff currently resided on the suit property.
17. On re-examination, he clarified that the certificate of incorporation does not bear names of the current ranch officials and that he was not on the list of members who incorporated the ranch.
18. DW4 Mooko Loyempu adopted his witness statement as part of his evidence in chief. He stated he was a founding group ranch member and knew Alfred Kimani Toronke. That the said Alfred Kimani was allocated the suit property, measuring approximately 466.5 hectares, registered in his name in 1973. He also denied that the plaintiff entered the suit land in 1978 as claimed. He stated that as a committee member, they summoned the plaintiff to explain his occupation of the Defendant's land, but he did not attend. The committee resolved that the plaintiff should vacate the suit property. On cross-examination, he admitted that he knew Moses Ole Kina, the first Chairman of the Committee, and Sadera, the subsequent chairman. He referred to Piros Ole Sadera's statement and minutes dated 10th October 2006, indicating that neither Moses Ole Kina nor Samuel Sadera were present. He reiterated that Sanchaka (Plaintiff) refused to attend the meeting and that they were unaware of the dispute at the tribunal and the visit by the Provincial Appeal's Committee to the suit property.
19. On re-examination, he restated that Moses Ole Kina had passed away and that Sanchaka (Plaintiff) refused to honour the summons, though two of his siblings attended the meeting.
20. DW5 George Toronke also adopted his witness statement as part of his evidence in chief and produced his bundle of documents as exhibits in this case. He stated that the Plaintiff and his family resided at the group ranch and their land was about three kilometres from the suit property. In the year 2003, the Plaintiff sought permission to graze his animals on the suit land during the dry season. In 2004 when it rained, they asked him to leave but he refused. They reported the matter to the chief who convened a Baraza to discuss the issue. The Plaintiff refused to attend the meeting, but his brothers attended. The elders asked the Plaintiff to vacate but he refused. He then filed the case at the Land Disputes Tribunal who ruled in his (DW 5) favour. The Plaintiff appealed this decision to the Appeal's Committee and the committee gave the Plaintiff a portion of the land. The defendants sought a review of this decision at the High Court and the decision was reversed.
21. On cross-examination he stated that he was the son of Jane Njeri Mbogo and worked with the County Government of Kajiado. He stated that in 2002 the grant was confirmed but he was not one of the Administrators of the Estate. He admitted that they did not give the Plaintiff a written notice asking him to vacate the suit property. He admitted that he was a complainant against the Plaintiff in Criminal Case 1928 of 2014 for an offence of malicious damage to property. He stated that he was born in 1982, resided with his mother Jane on the suit property, went to Mashuuru primary school and later Kitisya Secondary School. He also confirmed that the Plaintiff was at the time of this testimony residing on the suit property.



22. On re-examination he stated that he filed the cases as a beneficiary of the Estate of the Deceased.
23. DW6 Alfred Mbokenyai Toronke adopted his witness statement as part of his evidence in chief. He also stated that the Plaintiff entered the suit property in 2003 during the dry season. His family allowed him together with others to graze their animals on the land. When the drought stopped, they asked them to leave. The other people who had entered the land left but the Plaintiff refused to leave.
24. On cross-examination he stated that he was born in 1972 and that the Plaintiff was his age mate. His mother was Jane Njeri Mbogo who lived on the suit property and his father operated a business and a clinic at Mashuuru trading centre. He thus lived in both Mashuuru and on the suit property. He stated that his father never filed a suit against the Plaintiff because at that time the Plaintiff was not on the suit property. He stated that he currently works at Machakos County and his family resides in Mashuuru.
25. DW7 Jane Njeri Mbogo adopted her witness statement as part of her evidence in chief. Her statement indicates that she got married to the late Mbogo in 1965 and moved to the suit property in 1967. Mbogo was given title to the land in 1973. She stated that she has resided on the suit property for 55 years and was aware that the Plaintiff entered the property during the dry season in 2003 to graze his animals.
26. On cross examination she confirmed that her husband relocated from Kiserian to Mashuuru a long time ago. She got married to Mbogo in 1965 as the third wife. She is aware that the Toronke family adopted him as their son. She stated that he resided at the plot at Mashuuru where she raised her children. She confirmed that Mbogo was a member of the Osilalei group ranch and she was present when he was allocated the land. The suit documents in relation to the suit property were then kept by Phyllis, the first wife. She confirmed that she lived with Mbogo and in 2002 his Estate was distributed. However, the suit property was not distributed because the Plaintiff was on it.
27. On re-examination she confirmed that Mbogo was allotted the suit property and issued with a title in 1973.
28. DW8 Piros Ole Sadera the area chief of Osilalei adopted his witness statement as part of his evidence in chief. In the statement, he stated that Osilalei was within Mashuuru area and he learnt about this land dispute in October 2006. There was evidence to show that the Mbogo's family had been on the suit property for close to six decades and the Plaintiff did not start residing on it in 1978. He stated that he knew the Toronke family since they came from his area of jurisdiction and also knew their land. He stated that some people were given parcels of land before the group ranch was formed and their names cannot not be on the list of members of Osilalei group ranch. He also stated that Moses Ole Kina was not a member of Osilalei Group Ranch because he was a resident of Bissil.
29. On cross-examination he stated that he had been the area chief from the year 1995. He confirmed that parcel Kajiado/Osilalei/20 was a registered parcel of land. He also confirmed that he chaired the meeting held on 10th October 2006 as per the minutes produced. He indicated that he called the meeting with the aim of resolving the land dispute. He confirmed that Samuel Sadera Paita was the former area chief of Osilalei but he did not attend the meeting, Moses Ole Kina also did not attend. He also confirmed that he is aware that the dispute was taken to the Land Dispute Tribunal and also to the Provincial Appeal's committee, but he was aware that the Appeal's Committee visited the suit land. He confirmed that he was also allocated land by the group ranch and he was well aware that the Plaintiff's father was also allocated land. He could not confirm that the plaintiff had been allocated any land.
30. On re-examination he confirmed that there was no dispute as to the owner of the suit property which was registered in Alfred Kimani Toronke's name. He confirmed that the decision of the Appeal's



committee was set aside by the Machakos High Court. He also confirmed that the Plaintiff's father was allocated parcel number 606.

31. This marked the close of the Defendants' case.

Additional Evidence of the Plaintiff

32. PW2 Siango Nekitala Kitukei was recalled to give further evidence. He confirmed that he knew Moses Ole Kina who was the chairman and Samuel Sadera who was the vice chairman of the Matapato Section. They were an age-set ahead of him. However, he did not know DW3. He stated that Matapato area was the bigger section which was subdivided into five (5) individual ranches and 7 group ranches. The group ranches were: Osilalei, Mailua, Oldonyoorok, Meto, Lorngosua, Nentonai and Partimaru. He stated that he was a member of the committee of sixty which gave Mbogo the land. He indicated that he was not personally acquainted with DW2 who was younger than him in age and was not a member of the original committee. He stated that he knew the plaintiff was in possession of the suit land, and denied DW3's allegation that he was an imposter. He stated that he had about 1000 acres of land in the area. He indicated that he was never summoned by Chief Piros Ole Sadera to attend any meeting to resolve the land dispute. He also pointed out that there were very few members of his age set still alive.
33. On cross examination he stated that he was a member of the Matapato group ranch. Mbogo relocated from Ngong and was assimilated by the Toronkei family. On being asked about the witness statement that stated that "Toronkei is a Matapato family..." he stated that Matapato is the name of a Maasai sub clan. He confirmed that he knew the Toronkei family and they reside in Osilalei. He confirmed that they allocated Mbogo 200 acres but could not confirm whether it was acres or hectares. He also confirmed that the Plaintiff's father was allocated land in the group ranch but stated that he was not sure of the exact location because he was not among the elders who showed him the land. On being shown the list of Osilalei group ranch and that the Plaintiff's father's land was parcel 606 measuring approximately 91.99 hectares he stated that he was not aware that the Plaintiff's family had been allocated another land. He also confirmed that he knew DW4 Mooke Loyempu who was a neighbour of the Toronkei family. He however stated that he was not sure if DW4 was among the elders who asked the Plaintiff to leave Mbogo's land.
34. On re-examination he stated that when Mbogo came from Ngong, he was given '200' from Matapato section. He reiterated that the Plaintiff's father resided on the suit land.
35. This marked the close of the Plaintiff's case.
36. At the close of the oral testimonies parties tendered final written submissions.

The Plaintiff's Submissions

37. Counsel submitted that the Plaintiff's witnesses testified that Alfred Kimani Toronke alias Mbogo migrated from Ngong to Mashuuru where he set up his businesses. He would then approach officials of the Matapato section and was allocated 200 acres at Noondepen Village within Oloitiko area, which upon subdivision became part of the Osilalei Group Ranch. It is therefore bizarre how the title deed for the suit property measuring 466.5 hectares which was registered on 7th August 1973 was in the name of Alfred Kimani Toronke instead of first being registered in the Group ranch's name. He added that Mbogo never asserted rights over the suit land and lived at Mashuuru with his two wives and children. It was only until 2008 when George S. Toronke filed a complaint at the Kajiado Land Dispute's Tribunal. And by this time, the 12 year period had lapsed. The Tribunal ruled that the Plaintiff's family be evicted from the property. But upon appeal, the Appeal's Committee ruled that the Mbogo family was



only entitled to 200 acres. However, this decision was quashed by High Court at Machakos in Misc. Application No. 224 of 2011.

38. Counsel also submitted that DW4 an elderly man also confirmed that the Plaintiff's family had been on the suit land from the year 1978. That at all material times, the Ololodi family, which is the Plaintiff's family was on the suit land. Therefore, time lapsed in 1990 and the Defendants could not lay claim on the suit land as stipulated by Section 37 of *Limitation of Actions Act*. Reference was made to Mtana Lewa vs Kahindi Ngala Mwangandi [2015] eKLR and William Gatuhi Murathe vs Gakuru Gathimbi [1998] eKLR.
39. Therefore, the Plaintiff was entitled to the orders sought and proprietorship of the suit property, save for the 200 acres of land occupied by Mbogo's third wife Jane Njeri Mbogo.

The Defendants Submissions

40. Counsel submitted that if the Plaintiff claims that his family has been in possession of the suit property from the year 1978, why would he seek adverse possession for his property? Counsel also pointed out the discrepancies in the Plaintiff's statements. On one hand, they claim that Mbogo was allocated 200 acres of land and on another hand they claim that he was allocated 200 hectares of land. He also submitted that the Plaintiff's witness Tulito Siangoi who claimed to be aware of the ongoings of Osilalei group ranch was false because he was the Vice Chairman of Lorngosua group ranch. He was neither a member nor an official of Osilalei group ranch. Therefore, he could not be privy to matters of a group ranch he did not belong to.
41. Counsel submitted that six of the defendants' witnesses confirmed that the Plaintiff together with other members of the community moved to the suit land in the year 2003 due to persistent drought in the area. However, when the conditions improved in 2004, they all moved back to their parcels, save for the Plaintiff who refused to vacate Mbogo's land. From the year 2004, the Defendants made several attempts to evict the Plaintiff from the suit land including filing reports with the local administration as well as the Land Disputes Tribunal but the Plaintiff ignored them and remained on the property. Therefore, a claim for adverse possession could not stand because the Plaintiff's possession was never peaceful from the year 2004 when the Defendants revoked the permission granted in 2003. Reference was made to: Gabriel Mbui v Mukindia Maranya [1993] eKLR and Samuel Miki Waweru vs Jane Njeru Richu, Civil Appeal No. 122 of 2001. Counsel also submitted that a claim for adverse possession could only be made against the registered owner, and the registered owner was their late father. They only became registered owners in 2010. The suit should therefore be dismissed with costs.
42. In conclusion, Counsel submitted that Kelo Ole Kikwa a former vice chairman of the group ranch, stated that he was part of the allocating committee and the Plaintiff's family land was allocated parcel Number Kajjado/Osilalei/606. This witness also stated that there was a difference between private individual ranches, which is the category of the Defendants' land and community group ranches, which was the category of the Plaintiff's land.

Analysis and Determination

43. I have considered the pleadings, the evidence on record, the written submissions and the authorities cited. I find that the issues for determination are:
 - i. Whether the Plaintiff has proved his claim for adverse possession;
 - ii. Whether the Plaintiff ought to be declared the rightful owner of the suit property.
 - iii. Who should bear costs of this suit?



44. The Plaintiff has approached this Court seeking a declaration that he is the rightful owner of property Kajiado/Osilalei/20 by virtue of adverse possession.
45. The Plaintiff asserts that his family has occupied the suit property since 1978. He acknowledges that the title deed to the suit property is in the name of Alfred Kimani Toronke, alias Mbogo, but contends that Mbogo has never resided on the property. The Plaintiff's witnesses stated that the Plaintiff had been residing on the suit property since 1978. The Plaintiff's witness statement and that of PW4 additionally state that the suit property belonged to their grandfather and was passed down to their father and then to the Plaintiff. They also stated that they were aware that one of Mbogo's wives resided on the neighbouring plot of land which was separated by a small water trench.
46. From the foregoing, it is evident that the Plaintiff presents conflicting claims regarding the suit property. On one hand, he claims that the property has always been his family's, while alleging that the Defendants' parcel is adjacent, measuring approximately 200 acres or hectares (noting the discrepancies in acreage). The Plaintiff contends that the Defendants' family is attempting to encroach upon the entire property. Critical questions arise from these assertions: If the property was demarcated by a water trench and the Plaintiff knew it was registered in Alfred Kimani Toronke's name, why did he not pursue legal action to establish rightful ownership? Why did the Plaintiff seek adverse possession if the property was indeed his family's?
47. The second conflicting position is that the property belonged to the Defendants family, although they never resided on it. Thirdly, that the suit property belonged to the Defendants' father and one of his wives resided on a portion of the said property.
48. It is on record that the Plaintiff acknowledged that the Mbogo's family lived on the adjacent land. The Plaintiff's statement and submissions also acknowledged the fact that one of Mbogo's wife resided on part of the suit property. The submissions read, "The Plaintiff humbly seeks to be declared to have become entitled by adverse possession to the entire parcel of land registered as Kajiado/Osilalei/20, save for 200 acres occupied by Jane Njeri Mbogo."
49. The Plaintiff's assertion that the late Mbogo never resided on the property conflicts with his concession that Jane Njeri Mbogo, Mbogo's third wife, occupied 200 acres of the land. If the Plaintiff admits that Mbogo's wife resided on part of the property, is it not inconsistent to claim adverse possession on the basis that the Defendants never occupied it?
50. It is trite law that in a claim for adverse possession, the claimant must show that he was openly utilising the property in issue without the owner's permission for a period of at least 12 years as stipulated under Section 38 of the *Limitation of Actions Act* which provides;

"Section 38 (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 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."
51. Moreover, he who alleges must prove. The Court of Appeal in *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR categorically stated that the burden of prove is on the person claiming adverse possession. The court stated thus;

"... Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse



possession to prove, not only the period but also that his possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it..."

52. The Plaintiff claimed to have entered the suit property in 1978, but the Defendants averred that the Plaintiff entered the suit property in 2003 with their permission. The Court of Appeal in *Mtana Lewa v Kahindi Ngala Mwagandi* [2015] eKLR held that for adverse possession to apply, the possession must be without the consent of the true owner and for a continuous period of at least 12 years. It stated thus;

"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 or under the 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.

...

... before one can claim title to land by adverse possession and a part from proving 12 years of uninterrupted, open and peaceful possession, certain strictures must be satisfied. Those strictures are summarized in the Latin maxim, *nec vi, nec clam, nec precario*, that, one's possession has not been through use of force, not in secrecy and without the authority or permission of the true owner. "

53. The Plaintiff's testimony contains additional discrepancies. The Plaintiff testified that he did not know the Defendants and he had never been asked to vacate the suit property. Yet, there is substantial evidence of various cases filed by both the Plaintiff and the Defendants regarding the suit property. The Defendants' witnesses also highlighted inconsistencies in the Plaintiff's statements. For example, Siango Nekitala provided conflicting accounts regarding the acreage of the land allocated to Mbogo, stating at different times that it was 200 hectares and 200 acres.

54. The Court of Appeal in *Juma & 10 others v Wali & 2 others* [2024] KECA 577 (KLR) espoused thus;

"In the case of *Wambugu vs Njuguna* (1983) KLR 173, this Court restated the principles for adverse possession and held as:

1. The general principle is that until the contrary is proved, possession in law follows the right to possess.
2. ... 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 as to enable him, the respondent, to title to that land by adverse possession.
3. The *Limitation of Actions Act*, on adverse possession, contemplates two concepts: dispossession and discontinuance of possession. The proper way 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."



55. The Defendant's case is that their father was allocated the suit property in 1973, as evidenced by the title deed, and that one of their mothers resided thereon. During a period of drought in 2003, they permitted the Plaintiff to graze his animals on the suit property. However, the Plaintiff refused to vacate after the drought ended in 2004, which instigated this dispute.
56. The witnesses called by the Defendants confirmed this position. Elders of the group ranch and the chief confirmed that the land belonged to the Defendants' father and attested to their involvement in attempting to resolve the dispute when it was brought to their attention in 2006. Reference was made to minutes of a meeting held on 10th October 2006 which reads: "... Mr. Ntaimasi Saitabau who was the first mzee to stand and said the land belong to the family of Toronke. Mzee Mooke who was the committee which gave the land to the Toronke family said the land belong to the family of Toronke because they all agree to issue the land to Alfred Toronke and there was no any place left there. Mr. Lesordon Tetile said the land was known for so many years that it belongs to the Toronke family and don't see why to waste time discussing an issue which is known by everybody... was concluded that the aggressor should vacate from the Toronke family land..."
57. It is imperative for the court to have no doubts when deciding cases, especially when considering a decision that would divest a person of their property. It is uncontested that the suit property is registered in the name of Alfred Kimani Toronke. Section 26 of the [Land Registration Act](#) protects the sanctity of title unless there is evidence that the title was acquired illegally, fraudulently, or un-procedurally or through a corrupt scheme.
58. Adverse possession, which involves claiming property from the registered owner by demonstrating open and unpermitted use, is a doctrine that courts should apply only under extremely clear circumstances. Article 40 of [the Constitution](#) of Kenya guarantees every person the right to own property, and no person should be deprived of their property in an unscrupulous manner. Courts should grant claims of adverse possession only in the clearest of circumstances to prevent unjust enrichment. Otherwise, every person who wants to reap where they did not sow would run to court every other day claiming adverse possession. The Court of Appeal in *Samuel Kihamba v Mary Mbaisi* [2015] eKLR cited with approval Kuloba J.'s decision in *Mbui v. Maranya* [1993] KLR 726 where he stated: "The doctrine of adverse possession if not reasonably qualified and properly trimmed shall destroy the cherished ideals and sound cultural foundations, and destabilize the society."
59. In the case of *Jaber Mohsen Ali & Another Vs. Priscillah Boit & Another* (2014) eKLR, Munyao J stated;
- "For one to prove adverse possession, he must demonstrate that he has occupied the land openly, without force, without secret, and without licence or permission of the land owner that is contained in the later phaseology, nec vi nec claim, nec precario. The additional requirement is that of animus possidendi, or intention to have the land."
60. It is the defendant's contention that the Plaintiff was given permission to enter the land in the year 2003 to graze his livestock during a prolonged drought. The plaintiff's occupation has also not been peaceful. There have been several suits and/or complaints filed before the elders of the community, the Land Disputes Tribunal to mention some. It should be noted that the award by the Land Disputes Tribunal that stated that Alfred Kamani Toronkei was only allocated 200 acres was later reviewed by the High Court in Machakos.
61. I find that the claim by the Plaintiff under the doctrine of adverse possession is not maintainable and it fails.



62. Has the Plaintiff proven that he and his family have been in continuous possession of the suit property for over 12 years? I find that he has not. There are discrepancies regarding the timelines of the Plaintiff's claim of ownership. It is a fundamental principle of law that parties are bound by their pleadings. Pleadings, evidence, and testimonies are crucial for courts to administer justice. A court cannot rely on unproven facts, evidence, or assumptions in its determination. The evidence presented to this court is contradictory and inconsistent, leaving more questions than answers. This court cannot purport to import unsupported facts or assumptions in a judgement.
63. The upshot of the matter is that the Plaintiff has failed to prove his case against the defendants on a balance of probabilities.
64. The Plaintiffs suit is hereby dismissed with costs to the Defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 11TH DAY OF JULY 2024.

L. KOMINGOI

JUDGE.

In The Presence Of:

Mr. Kibet Korir for Mr. Githuka for the Plaintiff.

Mr. Mwicigi for the Defendants.

Court Assistant - Mutisya

