



**Sammy v Kiamba (Environment & Land Case E025 of 2021)
[2024] KEELC 5954 (KLR) (16 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 5954 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E025 OF 2021
CA OCHIENG, J
SEPTEMBER 16, 2024**

BETWEEN

JOSPHAT KYALO SAMMY PLAINTIFF

AND

PETER KIAMBA NDONYE ALIAS PETER COLLINS KIAMBA ... DEFENDANT

JUDGMENT

1. Through an Originating Summons dated the 5th November, 2021, the Plaintiff/Applicant seeks the following Orders:-
 - a. A declaration that title in the name of Peter Kiamba Ndongye in respect to Machakos/ Nguluni/339 measuring 0.36 Ha (suit land) has been extinguished by the Plaintiff/Applicant, Josphat Kyalo Sammy by dint of the *Limitation of Actions Act*.
 - b. A declaration that the Plaintiff, Josphat Kyalo Sammy is entitled to Adverse Possession to Machakos/Nguluni/ 339 measuring 0.36 Hectares and the Plaintiff/Applicant be registered as the proprietor of all that parcel of land situated in Machakos County and known as Machakos/ Nguluni/ 339 measuring approximately 0.36 Ha which said piece of land is comprised in a Certificate of Title registered in the Land Titles Registry at Machakos in place of Peter Kiama Ndongye.
 - c. That the Land Registrar Machakos do create a record in the Land Register in favour of Josephat Kyalo Sammy, the Plaintiff/Applicant herein as the registered proprietor of the parcel of land situated in Machakos County and known as Machakos/Nguluni/339 measuring approximately 0.36 Ha.
 - d. That the Land Registrar Machakos do issue Certificate of Title for the parcel of land situated in Machakos County and known as Machakos/Nguluni/339 measuring approximately 0.36 Ha in the names of the Applicant Josephat Kyalo Sammy.



- e. That the costs of this suit be in favour of the Plaintiff/Applicant.
2. The Originating Summons is premised on the grounds on the face of it and the Supporting Affidavit of Josphat Kyalo Sammy where he deposes that he has been in physical including actual possession of land parcel number Machakos/Nguluni/339 measuring approximately 0.36Ha, hereinafter referred to as the 'suit land', from the year 1997. He claims to have purchased the suit land from one Daniel Nthyomi Mukuna on the 3rd August, 1997 and have been in open, peaceful, continuous and uninterrupted possession since the said date for a period of twenty-four (24) years. Further, that after purchasing the suit land, he entered occupation, fenced it, erected fixtures thereon and started farming. He explains that he did a search on the 4th October, 2011 and discovered that the Defendant/ Respondent was registered as the proprietor of the suit land on the 23rd July, 2009, which was a mistake unknown to him. Further, upon realizing the mistake, he contacted a surveyor one Mr. Maele of Kasyiland Surveyors to assist in the rectification of the mistake but they were unable to do so. He avers that in December, 2019, the Area Chief called a meeting between the Defendant/Respondent and himself with the aim of addressing the issue.
 3. The Defendant/Respondent opposed the instant Originating Summons by filing a Replying Affidavit sworn by Peter Kiamba Ndonge alias Peter Collins Kiamba where he denied the averments in the said Originating Summons and insisted that the same is baseless, full of falsehoods, concealments and misrepresentation of facts. He averred that at no point was the Plaintiff/Applicant ever been in occupation of the suit land as alleged. He cast aspersions on the annexures in the supporting affidavit and contended that possession has to be actual which involves residing on the suit land. He confirmed that he was issued with the Certificate of Title for Machakos/ Nguluni/ 339 on 3rd November, 2014.
 4. The matter proceeded for hearing where the Plaintiff/Applicant had three witnesses while the Defendant/Respondent had two witnesses.

Evidence of the Plaintiff/Applicant

5. The Plaintiff/Respondent as PW1 claimed he purchased the suit land in 1997, dug trenches, planted mango trees and cultivated it. He contended that he had been in possession of the suit land for 26 years and freely farmed thereon and had no issue with any of the neighbours. He confirmed that the Defendant/Respondent used to be his immediate neighbour as he occupied the land next to his. It was his testimony that by the time he took possession of the suit land, it had not been adjudicated but the person who sold him the said land had done survey and delineated his portion. Further, that adjudication was done in 1998 when he was already in occupation while titles were issued in 2011. He confirmed that, when he did the search, he discovered it did not reflect the true position on the ground as the suit land was registered in the name of the Defendant/Respondent while he was issued with title number Machakos/Nguluni/2995, which was the portion the Defendant/Respondent was occupying. It was his further testimony that they had a meeting with the Defendant/Respondent including a Private Surveyor to correct the anomaly and agreed not to collect their respective titles until the said mistake was corrected. He stated that he had never been evicted from his land ever since he took possession in 1997.
6. During cross-examination he confirmed that at the time of purchase, there was no title to the suit land, nor for the Nguluni area, but it was only indicated as Area No. 396. He explained that there was a mix up as at the time he did a search, his name appeared on Parcel No. 2995 which belonged to the Defendant/Respondent. He clarified that the Defendant/Respondent even paid for changeover/ adjustment of the property and receipts were issued to that effect. He stated that the Defendant/ Respondent picked his title in 2014 for parcel No. 339 but he also discovered that the title for Parcel



- No. 2995 was missing. Further, the Defendant/Respondent proceeded to sell parcel No. 339. He explained that they never swapped the two parcels of land. Further, that he settled on the Defendant's land as during adjudication they were all on their respective parcels of land. He was insistent that he was cultivating the suit land but had not constructed thereon.
7. During re-examination, he confirmed that the Defendant/Respondent was aware of the mix up and the Chief directed them to go to the Land Control Board to deal with it.
 8. PW2 Alphonse Wambua Kitonyi confirmed that no one had objected to the Plaintiff's occupation of the suit land. During cross examination, he stated that he commenced taking care of the Plaintiff's land in 1997. Further, that the land is known as Machakos/Nguluni/339 and he is the one thereon. He contended that the suit land is fenced but there is no structure thereon.
 9. PW3 John Bosco Ndambuki who was an Assistant Chief and later Senior Chief of Nguluni location testified that the Plaintiff/Applicant came to his office and complained of a mix up in the title deed numbers. Further, that his land bore some else's number being Machakos/ Nguluni/339. He confirmed that the Plaintiff/Applicant had been in occupation of the suit land for over twenty (20) years and no one came to him to complain about it. He explained that when the Plaintiff/Applicant came to his office, he summoned the Defendant/Respondent and advised them to go to the Land's Office since there was a mix up. During cross examination he confirmed that between 1993 to 1997, it is the Plaintiff who was occupying the suit land. He was emphatic that there was a mix up on registration and there are three parcels of land in contest, out of which two are owned by Peter Collins Kiamba, that he has sold. Further, that the parcel of land sold to Mr. Mutemba is registered in the name of Dr. Kyalo as there was a mix up.

Evidence of the Defendant/Respondent

10. The Defendant as DW1 insisted that the Plaintiff had never occupied the suit land. It was his testimony that he purchased the suit land in 1984, built a semi-permanent house, dug a bore hole and lived thereon with his family. Further, that he used a portion of the suit land for cultivation and leased the other section to other people for purposes of cultivation including grazing of animals. He claimed his deceased brother was the caretaker for the suit land between 1987 to 1994 but he frequently visited it. He testified that on 11th April, 2008, he sold 1½ acres of suit land to one Johnson Mwanzia Peter. He insisted that he is the one in actual possession of the suit land and that he was issued with the title to the said land on 3rd November, 2014.
11. During cross-examination he confirmed complaining about the Plaintiff's occupation of the suit land before the local chief. He admitted that the Plaintiff was cultivating his land and leased to a third party. He stated that he got his Certificate of Title for the suit land in November, 2014.
12. DW2 Nicholus Kioko Muoki testified that the Defendant was the owner of the suit land which he purchased from Daniel Nthyomi Mukuna. He claimed that the Defendant built a semi-permanent house and dug a bore hole on the suit land. Further, that the Defendant used a portion of the suit land for cultivation and leased the remaining area to third parties. He insisted that the Defendant had remained on the suit land but on 11th April, 2008, he sold ½ acre of the suit land to Johnson Mwanzia Peter.
13. During cross-examination, he said it is the late caretakers' who told him that on 11th April, 2008, the Defendant had sold land to Johnson Mwanzia Peter. He was insistent that the Defendant/Respondent bought suit land in 1981 from Daniel Mukuna and moved thereon. He testified that the Defendant/Respondent moved from Tala to Mombasa in 1997.



Plaintiff/Applicant's Submissions

14. The Plaintiff in his submissions reiterated his averments as per the Supporting Affidavit and relied on his oral testimony including exhibits produced. He contended that the suit land was registered in the name of the Defendant/Respondent on the 23rd July, 2009. Further, that it is a period of 12 years 4 months from the date the Defendant was registered as the owner of the property to 22nd November 2021 the date on, which this suit was filed. He submitted that he had fulfilled the tenets of adverse possession and was entitled to the orders as sought. He further submitted that he has been in notorious, open, peaceful and uninterrupted possession for 24 years. He argued that his possession was within the knowledge of the Defendant. To buttress his averments, he relied on the following decisions: *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR; *John Mukuba Mburu v Charles Mwenga Mulwa* [2018] eKLR and *Joseph Macharia Kairu v Kenneth Kimani Muiruri* [2021] eKLR.

The Defendant/Respondent's Submissions

15. The Defendant in his submissions relied on the averments in his Replying Affidavit as well as evidence presented. He contended that as per the map, the Plaintiff must have been referring to land No. 396 which is next to his land. He submitted that the Plaintiff had not proved his claim for adverse possession and the same should be dismissed with costs. To buttress his averments, he relied on the following decisions: *Damaris Kandoro v Gachaja Gitere & Another* (2005) eKLR; *Pauline Mpaka v Mark Mungiri Muguna* (2018) eKLR and *Rosemary Wairimu Munene Ex parte Applicant v Ibururu Dairy Farmers Cooperative Society Limited*.

Analysis and Determination

16. Upon consideration of the Originating Summons, respective Affidavits, oral testimonies, exhibits and rivaling submissions, the following are the issues for determination:-
- Whether the Plaintiff has acquired the suit land through adverse possession.
 - Whether the Plaintiff is entitled to the orders as sought.
 - Who should bear the costs of this suit.

I will deal with all these issues jointly.

17. Adverse possession is governed by Section 38 (1) and (2) *Limitation of the Actions Act* which stipulates thus:

“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this *Act*, 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. (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this *Act*.”

18. It is trite that for adverse possession, to mature into title to land, it must be demonstrated that there was actual, open, continuous, notorious, exclusive and uninterrupted possession for a period of at least twelve years. Further, for a party to qualify as an adverse possessor, they have to prove they did not have



permission to enter into the owner's land and their actions were inconsistent to the interests of the true owner of the land; who has been on notice that there is a trespasser on his/her land.

19. In this instance, the Plaintiff claims he purchased the suit land in 1997 and took possession, fenced it and commenced cultivating it. From the testimony of PW1 and DW1 they both admitted that the Plaintiff was on the suit land. PW1 explained that he purchased the suit in 1997 when it was still under adjudication and took possession. Further, that when the titles were issued, there was a mistake when the registration of titles was undertaken and this culminated in the Plaintiff being issued with a title for the Defendant's land while the Defendant got a title for the Plaintiff's land. PW1 contended that despite the registration including mix up he has been in his land while the Defendant was on his land.
20. From the exhibits produced, I note the Certificate of Title for the suit land indicates the register of title for Machakos/Nguluni/339 was opened on 23rd July, 2009. I find that this is when time for the Plaintiff's claim over suit land begun to run. The Defendant insists he obtained his title in November, 2014 hence the Plaintiff cannot be deemed to have been on a registered land for 12 years. I note in his Supporting Affidavit, the Plaintiff actually attached photographs showing the current position of the suit land. Looking at those photographs which were produced as an exhibit, I note it shows vacant land that has fruit trees and some cultivation but no semi-permanent house thereon as claimed by the Defendant. From a letter marked as annexure "JKS – 6" written by SNR Chief J. D Ndambuki, he stated that:-

“Last year in the month of December, I summoned Dr. Josphat Kyalo Sammy and Peter Kiamba who are both neighbours at Nguluni Tala due to the issue of their land. It was pertaining the issue of mix up of their title deeds by the land registry a thing that affected other landowners in my location. ... After listening to the two parties, I directed them to seek assistance of the land registry through Matungulu Land Board so that each gets the proper documents of their land and to bring the issue of the mixed titles to an end.”

21. From the averments in this excerpt, it is evident that there was indeed a mix up of titles. DW1 and DW2 contended that it was the Defendant on the suit land and that the Plaintiff had never been thereon. I note PW3 in his testimony confirmed that the Plaintiff came to his office and complained of a mix up in the title deed numbers. It was his testimony that the Plaintiff had been in occupation of the suit land for over twenty (20) years and no one came to him to complain about it. He contended that when the Plaintiff came to his office, he summoned the Defendant and advised them to go to the Land's Office since there was a mix up. During cross-examination he confirmed that between 1993 to 1997, it was the Plaintiff who was occupying the suit land. DW2 during cross-examination admitted that the Defendant/Respondent moved from Tala to Mombasa in 1997.
22. Judge Angote, outlined the ingredients of adverse possession in the case of *Haro Yonda Juaje V Sadaka Dzengo Mbauro & Another* (2014) eKLR where he stated that:-
 - a) That one has made physical entry on the land and is in actual possession of the land for the statutory period; b) That the said occupation is non permissive; c) That the occupant has the clear intention of excluding the owner from the property (animus possidendi); d) The acts done by the claimant are inconsistent with the owners enjoyment of the land for the purpose which he intended to use it; and e) that the possession was continuous, uninterrupted and unbroken for the statutory period.”



23. In the case of *Daniel Kimani Ruchine & Others versus Swift Lotherford & Co. Ltd and Anor* (1977) eKLR on proof of adverse possession, the court held that:-
- “The Plaintiffs have to prove that they used the land as of right, *nec vi, nec clam, nec precario* (no force, no secrecy, no evasion).”
24. While in the case of *Wambugu Versus Njuguna* 1983 KLR 174 cited in *Karuntimi Raiji v. M'makinya* (2013) eKLR, the court of appeal held that:-
- “In order for a person to acquire title by the operation of the statute of limitation to land which has a known owner, the 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 suit for purposes for which he intended to use it. The Plaintiff is required to prove that he has dispossessed the defendant of the suit land or that the Defendant had discontinued possession of the suit land for a continuous period of 12 years so as to entitle the plaintiff to the title to the suit land by adverse possession.”
25. Based on the evidence that I have analyzed above, I find that the Applicant did not enter the suit land with permission of the Defendant/Respondent. Further, I find that the Plaintiff/Applicant has been on the suit land for more than twelve (12) years and this was within the Defendant's knowledge. Further, his actions of having fenced the suit land, grown fruits thereon and cultivated it, are acts inconsistent with the Defendant's enjoyment of the suit land for the purpose which he intended to use it. In my view, I find that the Plaintiff's possession of the suit land was continuous, uninterrupted and unbroken for the statutory period.
26. In the circumstances while associating myself with the judicial authorities cited above, I find that the Plaintiff/Applicant has proved his case on a balance of probability and hence entitled to the suit land through adverse possession. On the issue of costs, since there was a mix up in the titles and the Plaintiff has been in possession and use of the suit land, I direct each party to bear their own costs.
27. In the circumstances, I find the Originating Summons dated the 5th November, 2021 merited and will allow it in the following terms:
- A declaration be and is hereby issued that title in the name of Peter Kiamba Ndonge in respect to Machakos/ Nguluni/339 measuring 0.36Ha (suit land) has been extinguished by the Plaintiff/Applicant, Josphat Kyalo Sammy by dint of the *Limitation of Actions Act*.
 - A declaration be and is hereby issued that the Plaintiff, Josphat Kyalo Sammy is entitled to Adverse Possession to Machakos/Nguluni/339 measuring 0.36 Hectares and the Plaintiff/Applicant be registered as the proprietor of all that parcel of land situated in Machakos County and known as Machakos/Nguluni/339 measuring approximately 0.36 Ha, which said piece of land is comprised in a Certificate of Title registered in the Land Titles Registry at Machakos in place of Peter Kiama Ndonge.
 - That the Land Registrar Machakos be and is hereby directed to create a record in the Land Register in favour of Josephat Kyalo Sammy, the Plaintiff/Applicant herein as the registered proprietor of the parcel of land situated in Machakos County and known as Machakos/ Nguluni/ 339 measuring approximately 0.36 Ha.



- d. That the Land Registrar Machakos be and is hereby directed to issue a Certificate of Title for the parcel of land situated in Machakos County and known as Machakos/Nguluni/ 339 measuring approximately 0.36 Ha in the names of the Applicant Josephat Kyalo Sammy.
- e. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 16TH DAY OF SEPTEMBER, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Mutungu for Plaintiff

No appearance for Defendant

Court Assistant – Simon/Ashley

