



REPUBLIC OF KENYA



**Kogi v Kimani (Land Originating Summons E010 of 2023)  
[2024] KEELC 6479 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6479 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
LAND ORIGINATING SUMMONS E010 OF 2023  
LN GACHERU, J  
OCTOBER 3, 2024**

**BETWEEN**

**FRANCIS KAMANDE KOGI ..... APPLICANT**

**AND**

**NJUGUNA KIMANI ..... RESPONDENT**

**JUDGMENT**

1. The Originating Summons herein is dated 28<sup>th</sup> August, 2023, wherein the Plaintiff/Applicant Francis Kamande Kogi, has sought for Judgement against the Respondent and that the following orders be granted; -
  1. That the Applicant is entitled to be registered as the legal proprietor of the suit land, LOC.6/Kandani/379, under Section 38 of the *Limitation of Actions Act*, CAP 22 Laws of Kenya, on the ground that he has openly and exclusively possessed and occupied the subject land for a period of over 12 years immediately preceding the presentation of this summons in Court.
  2. That the Respondent's title to the suit land herein is and stands extinguished by the Applicant's Adverse Possession and occupation thereof for a period of over 12 years.
  3. The applicant be thus registered as the proprietor of land parcel number LOC.6/Kandani/379, and the Land Registrar, Murang'a, do register and effect the Order.
  4. The costs be provided for.
2. The Originating Summons herein is supported by the Supporting Affidavit of Francis Kamande Kogi (the Applicant), sworn on 28<sup>th</sup> August, 2023, wherein he contended that in year 2001, he executed a Sale Agreement with the Respondent for the disposal of land parcel No. LOC.6/Kandani/379, (the suit property) measuring approximately 0.17 Acres, and that he paid, the entire purchase price of Kshs.23,500/=, to the Respondent.



3. The Applicant further averred that he entered onto the suit land in year 2001, and has resided thereon to date. Further, that he has openly and exclusively possessed, cultivated and built on the suit land for a period in excess of twenty (20) years.
4. It was his further contention that despite numerous demands directed to the Respondent herein, asking for the suit land to be transferred to the Applicant's name, the Respondent has neglected and/or declined to honour the same.
5. It was the Applicant's further averment that the dispute regarding the Respondent's refusal to have the suit land transferred to the Applicant was presented before the District Officer, Maragua wherein, the Respondent agreed to effect the said transfer, but he subsequently failed to effect the same, without offering any explanation for such refusal.
6. Therefore, the Applicant urged the Court to declare him the registered proprietor of the suit property, having acquired rights over the same pursuant to the doctrine of Adverse Possession.
7. The Respondent did not Enter Appearance in the suit, despite being served with the requisite Summons to Enter Appearance and Notices to the satisfaction of this Court. The matter proceeded as a formal proof.

### **The Plaintiff's Case**

8. PW1, Francis Kamande Kogi, a peasant farmer who lives in Kandani area testified that he knows the Respondent herein and that the Respondent sold land parcel No. LOC.6/Kandani/379, to him. That the said land was registered in the Respondent's name, and it measures 0.17 Hectares, and that after the Respondent sold the said 0.17 Hectares, to him, he never transferred it to the Applicant. Further, that the Respondent has never lived on the said suit property.
9. Further, the Applicant adopted his Supporting Affidavit as part of his evidence in chief, and also testified that he rendered the full purchase price in respect of the suit land to the Respondent. That he has been utilizing the suit land since purchase, and has built a permanent house thereon as attested to by the photographs produced as exhibit. That there are mature trees growing on the suit land, and that the Respondent has never come to the suit land to lay any claim over the said land as being his property.
10. PW1 reiterated that he delivered the entire purchase price for the suit property, and that in year 2005, he took the Respondent to the Land Disputes Tribunal at MARAGUA, for the processing of title. That he handed over Kshs.20,000/=, to the Respondent for the purpose of procuring a title deed for the suit land. However, the Respondent failed to have the title deed processed.
11. He contended that the Respondent has never sued him in any forum and/or including lodging a complaint before the Chief. He testified that he has filed the instant suit seeking the title deed over the suit land.
12. After the close of the Applicant's case, the court directed the parties to file and exchange written submissions. The Applicant filed his submissions, and the Respondent never filed any submissions.

### **The Plaintiff's Submissions**

13. The Plaintiff/ Applicant's written submissions dated 11<sup>th</sup> April, 2024, were filed through the Law Firm of Kirubi Mwangi Ben & Co Advocates, wherein the Applicant reiterated that he paid the entire purchase price for the suit land as per the sale agreement dated 2<sup>nd</sup> March, 2001. Further, that he has lived and worked on the suit land from year 2001, and had built a permanent house thereon.



14. He reiterated that the Respondent has proven to be evasive on the matter of having the suit land transferred to his name, despite pocketing kshs.20,000/=-, through the District Officer Maragua, for the purpose of effecting the said registration, which the Respondent failed to carry out.
15. It was the Applicant's further submission that he has fulfilled the required legal ingredients for the grant of prescriptive rights over the suit property. Reliance was placed in the holding of the court in the cases of Peter Mbiri Michuki v Samuel Mugo Michuki [2014]eKLR; and, Public Trustee v Andaru [1984] KLR 314. He urged the Court to allow the reliefs sought in the suit.
16. The above are the Pleadings, the evidence adduced, and the submissions by the Applicant herein, which the court has considered and finds the issues for determination are;
  - i. Whether the Applicant is entitled to the Orders sought?
  - ii. Who shall bear the costs of the suit?

**i).Whether the Applicant is entitled to the Orders sought?**

17. The law on Adverse Possession is provided for under the *Limitation of Actions Act*. Section 7 of the Act *Limitation of Actions Act* provides as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person. Section 13 “(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land

18. Further, Section 13(1) of the *Limitation of Actions Act* provides as follows;

“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.”

19. Section 17 of the *Limitation of Actions Act*, extinguishes the rights of a registered owner where there is a successful claim for adverse possession. Further, Section 38 of the *Limitation of Actions Act* stipulates as follows:

“(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.”

20. While making a determination herein, this court will refer to various decided cases. In the case of *Richard Wefwafwa Songoi vs Ben Munyifwa Songoi [2020] eKLR,(Kisumu Civ App. No. 110 of 2016* ) the Court of Appeal held that a person claiming Adverse Possession must establish the following



- (a) On what date he came into possession.
  - (b) What was the nature of his possession?
  - (c) Whether the fact of his possession was known to the other party.
  - (d) For how long his possession has continued and
  - (e) That the possession was open and undisturbed for the requisite 12 years.
21. Further, in the case of *Christopher Kioi & another v Winnie Mukolwe & 4 others* [2018] Eklr(Nairobi CoA No. 218 of 2017), the Court reasoned as follows:
- “The appellants have laid great emphasis on the fact that Kituri did not use the suit property in his lifetime, but that in itself is not conclusive evidence of dispossession, because where the owner has little use of his land, others may use it without that possession amounting to dispossession or being inconsistent with the owner’s title”.
22. The court will also refer to the case of [\*Mtana Lewa v Kabindi Ngala Mwagandi\* \[2015\] eKLR \(Malindi App No. 56 of 2014\)](#), where the Court declared as follows:
- “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 nor 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.”
23. Further, in the case of *Mbira v Gachuhi* [2002] 1 EALR 137, the Court proclaimed as follows:
- “... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption...”
24. Again in the case of [\*Samuel Kihamba v Mary Mbaisi\* \[2015\] eKLR Kisumu Civil Appeal No. 27 of 2013](#), the Court held:
- “Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land”.
25. Further, in the case of Nairobi HCC Case No. 283 of 1990: *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, the Court held:
- “The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve



or more years. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown.”

26. Being guided as above, this court turns to the pleadings and the evidence adduced herein and finds as follows; - In the instant suit, the Applicant attached a copy of the Certificate of Official Search in respect of the suit property bearing a stamp of 10<sup>th</sup> August, 2023, being the date of its certification. It is indicated thereon that the Respondent is the registered proprietor of the suit land measuring approximately 0.17 Acres, from
27. The Plaintiff/ Applicant alleged that he purchased the suit land in 2005, and paid the full purchase price, but the Defendant/Respondent declined to transfer the suit land to his name, even after raising a complaint before the District Officer- Maragua, and even paying ksh 20,000/= to the Respondent, to effect the said transfer.
28. It is evident that the suit land is in the name of the Respondent, and as a registered owner, he has all the rights and privileges appurtenant thereto, as provided by Section 27 of the Registered Land Act Cap 300 LOK(repealed), which provision of law is reflected in Section 24(a) of the Land Registration Act, 2012. The suit land was registered in the name of the Respondent on 14<sup>th</sup> November 1967, and so falls under the Regime of Registered Land Act Cap 300 Laws of Kenya(repealed).
29. As a registered proprietor, the Respondent title can only be defeated as provided by the Act. See Section 28 of Cap 300( repealed), which provisions of law is mirrored in section 25 of Land Registration Act, which provides;
- “ 25.
- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
    - a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
    - b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
  - (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”
30. The Plaintiff/Applicant wants this court to extinguish the Respondent’s title by operation of law, or adverse possession. Adverse Possession is the process whereby a non-owner occupant of a piece of land



gains title and ownership of that land after a certain period of time. See the case of *Kasuve v Mwaani Investments Ltd & 4 Others* [2004] eKLR 184, where it was held that:

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right without interruption for a period of 12 years after dispossession the owner or by discontinuation by the owner of his own violation.”

31. As stated above, the title of a registered proprietor can only be defeated by the provisions of law. Prescriptive rights is one of the methods that can defeat a proprietors right to own a specified parcel of land. The suit land was registered in the name of the Respondent on 14<sup>th</sup> November 1967, herein and therefore CAP 300, is the applicable Law. See Section 30(f) of the said Act, which provides;

“Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register –

(f) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

32. Further, the above provisions of law are found in Section 28(h) of the *Land Registration Act*, which provides;

“28. Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

(h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;”

33. It is therefore evident that adverse possession is one of the different means of acquiring ownership of land in Kenya.

See Section 7(d) of the *Land Act* No. 6 of 2012, which provides;

Title to land may be acquired through—

(d) prescription;

34. However, for the court to determine that an applicant is entitled to own land by adverse possession, such Applicant must call sufficient evidence to establish the ingredients for prove of adverse possession. One of such ingredients is that the entry into the suit land, must be without permission of the owner, and such possession and occupation, must be within the knowledge of the owner, and without interference for a period exceeding 12 years.

35. The Plaintiff/Applicant alleged that he entered into the suit land through purchase. So his entry was with the permission of the owner, and on the face of it, a claim of adverse possession cannot succeed. However, every rule has exemptions and where the entry was through purchase, then time start running



from the date of final payment of the last instalment, or payment of the purchase price. See the case of Gabriel Mbui v Mukindia Maranya [1993] eKLR, the Court reasoned as follows: -

“Where adverse possession arose out of a sale of agreement under which the payment of the purchase price by the adverse possessor was by installments, and the agreement fails, the period of limitation affords an action for adverse possession only after the last and final payment has been made to complete the agreed purchase price. The period of limitation starts to run on the date of the payment of the last installment of the purchase price (Todd, J, in Wanyoike v Kahiri [1979] Kenya LR 236 at 239; also see among others, Simpson J (as he then was), in Hosea v Njiru and others [1974] E A 526 at 529, 530).”

36. . See also the case of Stephen Mwangi Gatunge vs Edwin Onesmus Wanjau (Suing in her capacity as the administrator of the estates of Kimingi Wariera (Deceased) and of Mwangi Kimingi (Deceased) [2022] eKLR, where the Court declared as follows:

“The Applicant’s occupation having been permissive, it will follow that a claim for adverse may not issue. However, Courts have found that such claim can be sustained after payment of the last installment.”

37. In the instant claim, the Plaintiff/Applicant alleged that he paid the full, on 2<sup>nd</sup> March 2001, and that he even raised a complaint before the District Officer Maragua, and even paid for the transfer of the suit land, but the Respondent failed to transfer the suit land into his name. Further, that even after the said transaction, the Respondent has never claimed the suit land from the Applicant, and that the Plaintiff/Applicant has been in occupation and possession of the suit with the knowledge of the Registered owner that is the Respondent. Therefore, his entry is without force or permission.

38. See the case of Munyaka Kuna Company Limited v Bernado Vicezo De Masi (The Administrator of the Estate of Domenico De Masi (Deceased) [2018] eKLR, where the Court stated; -

“To establish adverse possession, a litigant must prove that he has both the factual possession of the land and the requisite intention to possess the land (animus possidendi). Secondly, one must prove that he has used the suit land without force, without secrecy, and without persuasion (nec vi nec clam nec precario), for the prescribed limitation period of twelve years.

Third, he must demonstrate that the registered owner had knowledge (or the actual knowing) that the adverse possessor was in possession of the suit property. Fourth, the possession must be continuous; it must not be broken or interrupted.”

39. The above allegations, were never controverted by the Respondent herein, but the Plaintiff/Applicant still had a duty to call sufficient evidence and prove his claim on the required standard of balance of probabilities. See Section 107 of the *Evidence Act*, which provides;

“ 107.

- (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.”



40. The suit herein was undefended and proceeded by way of formal proof. In the case of Rosaline Mary Kahumbu v National Bank of Kenya Ltd [2014] eKLR, the Court held:

“In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits.”

41. In the case of Samson S. Maitai & Another v African Safari Club Ltd & Another [2010] eKLR, the Court opined as follows: -

“..... I have not seen a judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand, according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption.”

42. In the instant suit, the Plaintiff/Applicant had the onus of adducing such evidence that is sufficient as to satisfy the Court as to the truthfulness of his claim. The Applicant attached a Sale Agreement written in the Kikuyu language dated 2<sup>nd</sup> March 2001, plus a Certificate of Translation thereto in English dated 28<sup>th</sup> August 2023.

43. From the above sale agreement, it stated that the Respondent disposed of the suit property to Applicant on 2<sup>nd</sup> March, 2001, for entire purchase price of Kshs. 23,500/=, which purchase price was fully paid. The Applicant further annexed photographs marked P-EXHIBIT 2, being photographs of a permanent house, which house he argued and submitted that he constructed on the suit property, and he continues to live and occupy the said house, without any interference from the Respondent.

44. In the case Wambugu v Njuguna [1983] KLR 172, where the Court held that:

“In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.”

45. The Court has considered the totality of the evidence presented by the Applicant herein, including his oral evidence adduced before this Court. The said evidence remained consistent, and was uncontroverted. It is clear that the Plaintiff/ Applicant entered into the suit land after paying the full purchase price, but the Respondent did not transfer the title to him. The Plaintiff has enjoyed quiet possession and occupation for a period of over 12 years. Therefore, he had acquired the suit land through prescriptive rights or operation of the law.

46. Therefore, it is the holding of this Court that the Plaintiff/Applicant has established that he has been in open, continuous and uninterrupted occupation of the suit land for the requisite statutory period



of 12 years, and thus he is entitled to be registered as the proprietor thereof, pursuant to the doctrine of prescriptive rights or adverse possession.

47. Accordingly, the Court finds and hold that the Plaintiff/Applicant has proved his case as against the Respondent on the required standard of balance of probabilities. For the above reasons, Judgement is entered in favour of the Plaintiff/ Applicant, as prayed in his Originating Summons dated 28<sup>th</sup> August, 2023 and the court finds that he has acquired the suit property by virtue of adverse possession.
  48. Consequently, Judgement is entered for the Plaintiff/Applicant against the Respondent herein in terms of prayers No. (1), (2) and (3) of the Applicant's Originating Summons dated 28<sup>th</sup> August, 2023.
  49. On the issue of costs, the suit herein being undefended, the Plaintiff/Applicant shall bear his own costs.
- It is so delivered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 3RD DAY OF OCTOBER, 2024**

**L. GACHERU**

**JUDGE**

**3/10/2024**

Delivered online in the presence of;

Joel Njonjo - Court Assistant Though Judgement date taken in

N/A for the Plaintiff/Applicant the presence of the Plaintiff's

N/A for the Defendant/Respondent advocate on 22/7/2024.

**L. Gacheru**

**Judge**

**3/10/2024.**

