



**Wambui v Kiwiri (Environmental and Land Originating Summons
E006 of 2022) [2024] KEELC 13661 (KLR) (5 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13661 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E006 OF 2022
LN GACHERU, J
DECEMBER 5, 2024**

BETWEEN

HARON MWANGI WAMBUI APPLICANT

AND

LYDIA WANJIKU KIWIRI RESPONDENT

JUDGMENT

1. Vide an Originating Summons (O.S.) dated 19th April 2022, which is premised under Order 37 Rule 7 of the Civil Procedure Rules, as read together with Sections 37 and 38 of the [Limitation of Actions Act](#), the Plaintiff/Applicant has sought for Judgement against the Respondent for orders:
 - a. That the applicant is entitled to be registered as the proprietor of all that portion comprising 0.1 Hectares or 0.125 acres under Section 38 of the [Limitation of Actions Act](#), Cap 22 Laws of Kenya on grounds that the applicant and his family comprising of a wife and three children have been openly, peacefully, notoriously and as of right in exclusive possession, use and occupation of the said portion, that is to say for a period of 12 (twelve) years immediately preceding the filing of this Originating Summons in Court.
 - b. That the Respondent being the registered owner of land parcel No.Loc.2/KANGARI/400, where the portion of 0.1 Hectares or 0.125 Acres is situate and the successor of title from the original owner GEORGE KIWIRI NJIHIA, since deceased be ordered to transfer the portion of 0.1 Hectares or 0.125 Acres to the applicant as the title to the aforesaid portion of land has been extinguished by the Applicant's Adverse Possession thereof for a period of over twelve (12) years under Section 17 of the [Limitation of Actions Act](#).
 - c. That the applicant be registered as the absolute proprietor of all that portion measuring 0.1 Hectares or 0.125 Acres out of land parcel No.Loc.2/KANGARI/400 Section 38 of the [Limitation of Actions Act](#).



- d. That the Deputy Registrar of the honourable court be directed to sign all those documents and/or applications on behalf of the respondent to facilitate subdivision of land parcel No.Loc.2/KANGARI/400 and transfer of the portion of 0.1 Hectares or 0.125 Acres to the Applicant.
 - e. That the costs of this Originating Summons be provided for.
2. This Originating Summons is supported by the sworn Affidavit of HARON MWANGI WAMBUI (the Applicant herein) dated 19th April 2022, wherein he averred that the Respondent is the registered proprietor of land parcel No.Loc.2/KANGARI/400 (the suit property), which measures approximately 5 Acres as attested to by a copy of a Certificate of Official Search in respect of the suit land dated 27th January 2022.
 3. The Applicant also averred that the Respondent is the widow and successor-in-title to GEORGE KIWIRI NJIHIA (deceased), the original registered owner of the suit land. That the Applicant entered into the suit property in year 1997, then aged 17 years, in the capacity of a “helper”, and since the Respondent and her husband (who was then alive) did not have a male offspring, as their three daughters were married and residing away from the suit land, while the last-born daughter was still attending secondary school, and he was received well.
 4. It was his further contention that upon being circumcised in year 1999, he assumed occupation of a portion of the suit land measuring 0.125 Acres, and proceeded to construct an iron-sheet house thereon during the lifetime of the then registered owner of the suit property namely, GEORGE KIWIRI NJIHIA.
 5. The Applicant further averred that in year 2003, he constructed a four-(4) bedroom house on the suit land, which development took place following the Respondent’s registration as the proprietor of the suit land, and without any objections from the Respondent herein regarding the erection of the said building.
 6. Further, that the Applicant has carried out several developments on the portion of the suit property measuring 0.125 Acres, wherein he has been a resident including building a main house comprising of a sitting room and two bedrooms; a kitchen abutted by two rooms constructed using corrugated iron sheets; and, a water tank, poultry/goat shed, cow shed, pig shed, ablution block and soak pit.
 7. That the Applicant has fenced off with barbed wire the portion of the suit land measuring 0.125 Acres, which he has been in occupation as attested to by his annexure HMW2 being an Occupier’s User Report prepared by Upcountry Valuers dated 31st January 2022.
 8. The Applicant further contended that he contracted a marriage in year 2012, with one JANE WARUINU, which union has been blessed with three issues who have all been raised up on the said portion of the suit property measuring 0.125 Acres. That since year 1999, he has been in exclusive possession and occupation of the said section of the suit land, which possession has been open, exclusive, uninterrupted and notorious; which has entitled him fit to be declared as the owner of the said portion of the suit property, which measures 0.125 Acres.
 9. In his Witness Statement dated 4th July, 2022, the Applicant reiterated the averments contained in his Supporting Affidavit dated 19th April, 2022.
 10. The Respondent opposed the suit through her Replying Affidavit filed on 7th July 2022, and averred that she inherited the suit property measuring 5 Acres from her husband. She admitted the Applicant’s



- claim that he was allowed to enter into and reside on the suit property in order to assist with chores within the suit land.
11. It was her further averment that following the death of her husband, the Applicant became recalcitrant and refused to work on the suit land, but continued to stay thereon.
 12. The Respondent controverted the Applicant's claim of having constructed an iron-sheet house on the suit property, and she stated that it was resolved between her husband and herself to establish a temporary dwelling house for the Applicant upon taking him in as a farmhand, given that the Applicant came from a poor background.
 13. It was her further contention that the Applicant upon undergoing the rite of circumcision returned to the suit land and begged the Respondent to take him in which request, the Respondent agreed to. However, she denied the Applicant's contention that he built a four- bedroom house on the suit property. She asserted that she constructed a larger house for the Applicant on the suit land using her own resources, so that the Applicant could accommodate his family. Further, that the Applicant used to receive his monthly salary being her farm-hand.
 14. It was the Respondent's further contention that she is the one who has been making payments in respect of the water and electricity consumed at the premises occupied by the Applicant, which demonstrates that the houses in question belong to the Respondent. Furthermore, that at some point, she did employ the Applicant as a rider of her motor-cycle ("bodaboda"), which motor-cycle went missing.
 15. The Respondent controverted the Applicant's assertion that his occupation of the suit land has been uninterrupted and she contended that she served an eviction notice upon the Applicant in February 2022, which notice was set to lapse in June 2022. Further, that the documents supplied in support of the instant case do not prove that the Applicant's alleged notorious and uninterrupted occupation of the suit property.
 16. Further, the Respondent accused the Applicant of being an ungrateful opportunist, who wishes to take advantage of the Respondent's advanced age and generosity, while knowing full well that the Respondent did not give birth to a son.
 17. The suit proceeded by way of viva voce evidence, wherein the Applicant gave evidence for himself and did not call any witnesses. The Respondent failed to attend court, and thus did not participate in the proceeding, nor give her evidence.

THE APPLICANT'S CASE

18. PW1 HARON MWANGI WAMBUI, who resides in IKUMBI area within KIGUMO locality, who is a motor-cycle rider and the father of three (3) children adopted his Witness Statement dated 7th July, 2022, as his evidence in chief. He also produced his List of Documents dated 4th July, 2022 as exhibits, which were marked as P. Exhibits 1-4.
19. He further testified that he was born in year 1981, and that the suit property was originally registered in the name of KIWIRI NJIHIA, and was subsequently transferred to LYDIA WANJIKU KIWIRI (the Respondent herein). Further, that he comes from MUTHERU village in KANDARA area, and that he was 7 years, old when his mother died. It was his further testimony that he attended school up to Class 7, and that the Respondent together with her husband took him as their son. and he underwent circumcision whilst a resident on the suit property.



20. PW1 further testified that the suit property became his home and he contracted a marriage to one JANE WAIRIMU, while living on the suit land. Further, that he established his homestead on the suit property without any objection being raised by the Respondent. That he planted tea bushes on the portion of the suit property allocated to him by the Respondent for purposes of farming. Further, that the Respondent disposed the suit land and the purchasers thereof cut down some trees which belonged to him, hence the reasons for filing the instant suit.
21. It was PW1's further testimony that he has acquired ownership rights over 0.125 Acres out of the suit land through Adverse Possession. That the Respondent wished to dispose of the suit property, but he stopped the same by filing the instant suit and also by lodging a caution over of the said property. That he used to cultivate the said portion of the suit land even prior to contracting his marriage, either year 2011 or 2012.
22. The Applicant further testified that his homestead is a semi-permanent house with a concrete floor, wherein he has already installed water and electricity with the Respondent's permission. He urged the Court to allow his claim.
23. On cross-examination by Ms. Nyaga for the Respondent, PW1 testified that he is not related to the Respondent, and admitted that the Respondent allowed him to use the suit property and he lives therein on a portion measuring 0.125 Acres, while the Respondent occupies a small portion of the suit land. Further, that the Respondent's husband died in year 1998, and that he was not aware when the Respondent commenced a Succession Cause in relation to the estate of her late husband.
24. He testified that the Respondent became the registered owner of the suit property on 6th February 2012, and that is the time when the Respondent entered the suit property. PW1 denied interfering with the deceased's property, and stated that the Respondent acquired a title deed over the property in year 2012, while he filed the instant suit in year 2022.
25. He also testified that the portion which he is occupying measures 0.5 Acres, and the tea bushes which he is laying claim to are located on a separate section of the suit land. It was his further testimony that the Respondent has never demanded that he vacates the suit property, and that he pays his electricity bills to the KPLC through MPESA transfer. He admitted to not having filed any documents in support of the above assertion.
26. Further, that he is the one who constructed the semi-permanent house which serves as his homestead, and not the Respondent. He reiterated that the larger part of suit property has already been sold off by the Respondent, and the remaining part is where PW1 has constructed his homestead, and planted tea bushes. That he has been utilizing the suit property which is the property of the Respondent, and that the suit land is not sub-divided. Further, that he picks the tea planted on his portion of the suit property, and that the purchasers of the suit land lack the title deeds to enable them to harvest tea from the said property.
27. On re-examination, PW1 affirmed that the suit land is registered in the Respondent's name, and that she has disposed the same, save for the portion occupied by PW1. Further, that he has lived on the suit property for more than 10 years, and that more than 20 years have elapsed since his entry into the suit land. He reiterated that he lives on the suit property and pays for the water and electricity consumed in his homestead. That a valuer carried out valuation of the portion of the suit property occupied by himself and his family.



28. The Applicant urged the Court to allow his claim, as he has no other place to call home and if the said portion will be sold out, he will become a destitute together with his family.

THE RESPONDENT'S CASE

29. The Law Firm of CHEGE KIBATHI & CO. ADVOCATES, who were on record for the Respondent vide the Notice of Appointment dated 27th April 2022, filed before this Court, brought an Application dated 15th January 2024, seeking leave to cease representing the Respondent in the matter on grounds that she could not be traced, hence lack of instructions to proceed with the suit.
30. The said Application dated 15th January 2024, was allowed by the Court with further directions that the Respondent be served personally to accord her an opportunity to appear in court personally, and defend the claim.
31. On account of the Return of Service dated 5th April 2024, filed in the Court to demonstrate that the Respondent was served personally with a Mention Notice in the matter and failed to appear, the Court marked the Defence case as closed, whereupon the Applicant was directed to file written submissions.

THE APPLICANT'S WRITTEN SUBMISSIONS

32. The Applicant filed his written submissions dated 8th May 2024, through the Law Firm of KIRUBI MWANGI Ben & CO ADVOCATES, and submitted that the Applicant has been in occupation of a portion of the suit property measuring 0.125 Acres, wherein he has settled his family for the requisite period to become entitled to be declared the owner of the same pursuant to the doctrine of Adverse Possession.
33. It was further submitted that Applicant was orphaned at a tender age, whereupon he was informally adopted by the original registered owner of the suit land GEORGE KIWIRI NJIHIA, and his wife (the Respondent) in or about 1997. That he became of age while still living on the suit property, and he subsequently contracted a marriage and built on the said portion of the property measuring 0.125 Acres.
34. It was his further submission that following the death of the original registered owner of the suit land, GEORGE KIWIRI NJIHIA in 1998, the Respondent demanded that he vacates the suit property. However, he continued living on the said property, and cultivated the same against the Respondent's wishes.
35. Further that Respondent filed a Succession Cause in respect of the estate of her late husband and by 6th February 2012, the land had been confirmed to her whereby, ownership over the suit property passed to the Respondent on 6th February 2012. It was submitted that the computation of time for purposes of Adverse Possession should start from year 1998, during which time the Respondent communicated to the Applicant that she wanted him out of the suit property. The Applicant argued that his occupation of the suit land after year 1998, was not in the capacity of a licensee. Furthermore, the death of the original registered owner in year 1998, did not disrupt the running of time for purposes of Adverse Possession.
36. It was further submitted that the Respondent failed to present her case despite being afforded opportunity to do so by this Court. Reliance was placed in the Valuation report filed in Court attesting to the Applicant's occupation of a section of the suit property measuring 0.125 Acres, wherein he has built a house and the copy of the certificate of Official Search wherein the Respondent is indicated as the registered owner thereof. He further relied in the cases of: Ibrahim Wachira Kiraguri V Mary



Mwihaki Simon & Another (2020); and, Jeremiah Otemo Okonyo V Registered Trusteed of African Divine Church & Another (2022) eKLR.

37. The court has considered the pleadings herein, the evidence adduced in court and the exhibits produced thereon, further the court has considered the written submissions, cited authorities and the relevant provisions of law, and finds the issues for determination are:-
- I. Whether the Applicant is entitled to the Order sought.
 - II. Who shall bear the costs of the suit?

i).Whether the Applicant is entitled to the Order sought.

38. During the trial, the Court adjourned the matter to allow the Respondent to comply with the provisions of Order 11, as she failed to file a signed Witness Statement in the suit. Subsequently, the Respondent's Advocates on record sought leave to cease from acting for her, which leave was granted. The matter, therefore, proceeded as a "formal proof".
39. In the case of Samson S. Maitai & Anor v African Safari Club Ltd & Anor [2010] eKLR, the Court observed thus;

"...I have not seen 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."

40. Notwithstanding that the instant suit proceeds as a formal proof, the onus of adducing sufficient evidence in support of any claim advanced to support the instant suit fell on the Applicant, pursuant to the provisions of Sections 107, 109 and 112 of the Evidence Act. In the case of Hellen Wangari Wangechi Vs Carumera Muthini Gathua [2005] eKLR, the Court held as follows:

"It is a well-established fact that whoever asserts a fact is under an obligation to prove it in order to succeed."

41. The gist of the Applicant's claim is that he has acquired prescriptive rights over a portion of the suit property measuring 0.125 Acres, having occupied, utilized and established his homestead thereon, since year 1998, notwithstanding the Respondent's attempts to have him vacate the said suit property.
42. The Applicant brought his Originating Summons under Section 38 of the Limitation of Actions Act, Cap 22 which stipulates as follows:

"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,... 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".



43. 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.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land”.

44. For a claimant to be entitled to land by adverse possession, he/she must prove that he has been in exclusive possession of the land, openly and as of right, without interruption for a period of 12 years, either after dispossessing the owner, or by discontinuation of possession by the owner on his own volition. In the case of *Kasuve Vs Mwaani Investments Ltd & 4 Others* (2004) eKLR 184, the Court 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.”

45. Further, in the case of [Mtana Lewa vs Kabindi Ngala Mwagandi \[2015\] eKLR \(Malindi App No. 56 of 2014\)](#), 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.”

46. Again in the case of *Munyaka Kuna Company Limited -Vs- Bernado Vicezo De Masi (The Administrator of the Estate of Domenico De Masi (Deceased)* (2018) eKLR, the Court reasoned as follows:

“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.”

47. The Court of Appeal in Kisumu Civ App. No. 110 of 2016 *Richard Wefwafwa Songoi v Ben Muniyifwa Songoi* [2020] eKLR ruled that a person claiming adverse possession must establish the following;
- (a) 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.”
48. In the instant suit, the Applicant contended, testified and submitted that he ceased being a licensee on the portion of the suit land which he claims as from year 1998, when the Respondent made it clear to him that she no longer wanted him on the suit property. He argued that his continued occupation of the said section of the property from 1998 to the time of the filing of the Succession Cause in respect of the estate of GEORGE KIWIRI NJIHIA, the original registered owner of the suit land suffices for purposes of Adverse Possession. Further, that the demise of the said GEORGE KIWIRI NJIHIA, did not interrupt the running of time for purposes of Adverse Possession.
49. The Court has carefully considered the pleadings, evidence, oral testimony and submissions filed herein and finds that; - According to the copy of the Certificate of Official Search dated 27th January 2022, in respect of the suit property, the Respondent is indicated as the registered proprietor of the suit property measuring 5.0 Acres, out of which the Applicant has laid claim to a section measuring approximately 0.125 Acres. The said Certificate of Official Search indicates that the Respondent was registered as the owner of the suit land on 31st December 2011, and a title deed was issued to her on 6th February 2012.
50. The Valuation Report prepared by Upcountry Valuers dated 31st January 2022, at the instructions of the Applicant reflects that a site visit was conducted on 27th January 2022, in respect of the suit land whereupon it was observed that the Applicant is in occupation of a portion thereof measuring 0.1 Hectares, which is equivalent to 0.25 of an Acre.
51. The above mentioned valuation report further shows that the section claimed by the Applicant is marked by the following boundaries: a hedge, access roads; and, trees. Further, there is homestead with a main-house, a kitchen, a poultry/goat house, a cow shed, a pig shed and a toilet block on the on the portion in question.
52. Further, the said Report shows that the section of the suit property claimed by the Applicant is also planted with Napier grass and subsistence crops. This Court has perused the photographs of the portion of the suit land forming part of the Valuation report, and has noted the contents of the said Report and the Photographs in question.



53. In the case of *Peter Kamau Njau Vs Emmanuel Charo Tinga [2016] eKLR (Malindi CoA Civil Appeal No. 29 of 2016)*, the Court held:

“in order to stop time which has started running, it must be demonstrated that the owner of land took positive steps to assert his right by, for instance taking out legal proceedings against the person on the land or by making an effective entry into the land.”

54. The Court is satisfied that notwithstanding the Applicant’s entry onto the suit land was as a licensee, that license was revoked upon the death of the original registered owner in 1998.

55. It is trite that Adverse Possession runs with the land, and is not to be observed on the title deed to the land in question. See the case of *Maweu VS Liu Ranching & Farming Cooperative Society [1985] eKLR*, as quoted in *Civil Appeal No 164 of 2011: - Gachuma Gacheru VS Maina Kabuchwa [2016] eKLR*, where the Court held that:

“ Adverse possession is a fact to be observed upon the land. It is not to be seen in a title”

56. The Applicant’s occupation became adverse to the successors-in-title to the registered owner at the point of the registered owner’s demise. Further, the Applicant continued to occupy and develop the suit property despite the protestations of the Respondent from the year 1998.

57. Having now carefully considered and evaluated the totality of the evidence availed before this Court, it is the finding and holding of the Court that the Applicant has established his occupation of the portion of the suit land claimed for the requisite period of 12 years; and thus, he is entitled to be declared as the owner of the said portion of land, pursuant to the doctrine of Adverse Possession.

58. Consequently, the Court finds and holds that the Applicant has proved his claim as contained in Originating Summons dated 19th April 2022, on the required standard of balance of probabilities. For the above reasons, the court finds the claim herein is merited and the same is allowed in terms of the prayers No. (a), (b), (c) and (d) of the said Originating Summons.

59. On the issue of costs, the Court acknowledges the act of generosity by the Respondent herein and her departed husband, who took the Applicant in as their own son in year 1997, and allowed him to remain on the suit property to constitute a special factor within the meaning of Section 27 of the *Civil Procedure Act*. Accordingly, the court directs each party to bear his/ her own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5TH DAY OF DECEMBER 2024.

L. GACHERU

JUDGE

5/12/2024

Delivered online in the presence of:*

Joel Njonjo – Court Assistant

Mr Kirubi for The Plaintiff/ Applicant

N/A for the Defendant/ Respondent.

