



**Nzyoka v Munyalo (Environment & Land Case 102 of 2017)  
[2023] KEELC 607 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 607 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 102 OF 2017  
MC OUNDO, J  
FEBRUARY 2, 2023  
IN THE MATTER OF SECTION 38 OF THE LIMITATION  
OF ACTIONS ACT CAP 22 LAWS OF KENYA  
AND  
IN THE MATTER OF L.R.NO.KERICHO KIPCHICIM**

**BETWEEN**

**JOYCE MWIKALI NZYOKA ..... PLAINTIFF**

**AND**

**ABUBAKR MUSYOKI MUNYALO ..... DEFENDANT**

**JUDGMENT**

1. Vide an Originating Summons of 29<sup>th</sup> August 2017, filed pursuant to the provisions of Order 37 Rule 7 of the Civil Procedure Rules, the Plaintiff/Applicant herein seeks for the determination of the following questions;
  - i. Whether the Plaintiff is entitled to 0.2 of an acre of land comprised in L.R. No. Kericho/ Kipchimchim/6148 registered in the name of the Defendant by virtue of the Plaintiff's adverse possession of the same in open, quiet and peaceful occupation for a period of over 50 years.
  - ii. Whether the said Plaintiff should be declared as proprietor of the said 0.2 of an acre in the suit property, L.R. No. Kericho/Kipchimchim/ 6148, currently registered in the name of the Defendant.
  - iii. That the costs of this suit be provided by the Defendant.
2. The Originating Summons is premised on the Supporting Affidavit of Joyce Mwikali Nzioka the Plaintiff/Applicant herein, sworn on the 29<sup>th</sup> August 2017 to the effect that the parties herein were



- cousins by virtue of their fathers being brothers. That the Defendant's father brought her up as his daughter after the demise of her father in 1965.
3. That land parcel L.R. No. Kericho/Kipchimchim/2920 (herein referred to as the original land) was family land that had been subdivided into two portions by the Defendant's father wherein he had given one portion to the Defendant's mother and another portion to the Plaintiff's mother and wherein the Plaintiff resided and still resides.
  4. That in 1984 the Defendant's father passed on and was buried on the Defendant's mother's portion of land. That subsequently in 2002 the Plaintiff's mother also passed on and was buried on her portion of land as had been allocated to her by the Defendant's father.
  5. That later, on 31<sup>st</sup> May 1995 the Defendant's mother, Sophia Wangoi Munyalo obtained the title deed to the original property in her name wherein on 8<sup>th</sup> May, 2000 she transferred the said land to the Defendant. That the Plaintiff had been in open, quiet and peaceful occupation of 0.2 acres of part of L.R. No. Kericho/Kipchimchim/6148 for over 50 years wherein she had developed the same extensively and had no other property or home.
  6. That the Defendant had now closed the title, including the portion which had been allocated to the Plaintiff's mother, by sub-dividing it and using part of it to secure loans from the bank. That he had also disposed portions of the suit property to third parties wherein the Plaintiff was apprehensive that he would soon render her homeless should the orders herein sought not be granted.
  7. The Originating Summons was opposed by the Defendant's Replying Affidavit sworn on the 30<sup>th</sup> January 2018, to the effect that it was not true that L.R No. Kericho/Kipchimchim/2920 (the original land) was family land and was being held by him in trust for all other beneficiaries. That instead it belonged to his father Munyalo Mutunga (deceased) who was the sole proprietor thereof having acquired the same by his joint efforts as well as his deceased mother's around the 1940s after having migrated with his mother land in Eastern Province in the 1930s. That the Plaintiff's father had visited his father in or about 1965 where he had requested for temporary shelter and was granted a license in consideration of natural filial love and affection. Shortly the Plaintiff's father died and the Defendants' father allowed the family to bury the remains of his brother on the original property as was the norm at the time.
  8. That by allowing the Plaintiff's mother, who was now widowed, to put up a house on the original property, his father had no intention of passing on this property to them but it had been a humanitarian gesture to enable his widowed sister in law to bring up her young children as she had no means of travelling back to eastern province.
  9. That his father had not sub divided the property into two as alleged by the Plaintiff and neither was there a distinct boundary separating the two families. That a licensee could not acquire proprietary rights over a licensor's land. That the only reason his deceased father's family had tried to take away his estate from him was because he had been adopted and was not a biological son to the proprietor of the land. That the Plaintiff had land in Nakuru where she has been residing since 2008, while her brother Julius Musila a Nzyoka had a 20 acre land in Kibwezi.
  10. That neither the Plaintiff nor her family had any cause of action against him and therefore the suit herein was frivolous, vexatious and an abuse of due process of the court.
  11. Directions were taken on the 15<sup>th</sup> March 2018 where parties were directed to comply with the pre-trial directions. The matter took off for hearing on the 12<sup>th</sup> July 2018 when the Plaintiff Joyce Mwikali Nzioka, testified as PW1 to the effect that she as claiming 0.2 acres of land being part of L.R.



- No. Kericho/Kipchimchim/6148 which she had inherited from her parents. That the land initially belonged to the deceased Hamisi Munyalo Mutunga who was her father's brother and who had brought her up. That she had lived on the suit land since she was born.
12. She produced the search certificate as Pf exh 1 and the green card as Pf exh 2 wherein she proceeded to testify that the Defendant was her cousin and that the suit land had now been registered to his mother one Sofia Abubakhar.
  13. In cross examination, she confirmed that the suit land had been registered to her uncle's name and that she did not know when he had bought it. That her father lived in Subukia as he worked for the white settlers, and that she was also born there (subukia) in 1957. That upon the death of her father, she and her mother had moved to Kipchicim where her mother died in 2002 and her uncle brought her up.
  14. She confirmed that an uncle James Ole Kipketer had tried to lay claim on the suit land but via a meeting held by the Elders in Land Dispute No. 31 of 1994, it had been decided that he had no share in the suit land.
  15. That sometime in 2016 their houses were burnt and when she tried to rebuild hers, the Defendant had repulsed her and asked her to leave the suit land and that was when trouble started unlike before when they had lived peacefully. Her evidence was that it had not been true that her parents had not contributed to the purchase of the suit land which had now undergone several transfers. That although her parents were both buried on the suit land she had no documents to confirm the same. She also stated that in 2008, owing to the post-election violence, she had left her sister Monica Mbithi on the suit land with her children, while she travelled to Nairobi.
  16. She also confirmed that she had one brother called Julius Musau Nzyoka and that her parents had been born in Machakos. That it had been his uncle who had invited his father to Kericho wherein he had died soon after.
  17. The second Plaintiff witness Julius Musau Nzyoka testified to the effect that he lived in Kibwezi and that whereas the Plaintiff was his younger sister, the Defendant was his cousin. That parcel of land L.R. No. Kericho/Kipchimchim/6148 was originally registered to Hamisi Munyalo Mutunga who was the Defendant's father after which it had been transferred to the Defendant.
  18. He also confirmed that one by the name Kipketer have tried to lay claim on the land, which matter was resolved in Land Dispute No 31/1984. His evidence was that the Plaintiff had been born in Subukia in 1959. That his father had moved to Kericho in 1962 pursuant to an invite by his brother who had bought some land there.
  19. He confirmed that he and his sister had been brought up by his uncle. That the Plaintiff had been living peacefully on the suit land until such a time that the Defendant sought to sale a share of his land. That after he had sold his share, he was to construct some structures for the Plaintiff but did not live up to his promise and in 2016 after the Plaintiff's house had caught fire, the Defendant had become hostile wherein he had stopped her from rebuilding the same.
  20. In cross examination, the witness confirmed that the suit land had been solely acquired by Munyalo Mutunga at a cost of Ksh 810/= in 1947. That his father had not contributed to the purchase of the suit land but had been invited thereon in 1962 by the said Munyalo Mutunga who died in 1984. He confirmed that the suit land had been sub divided into two equal portions in 1962 but his mother did not get title. That the land was registered to the Defendant.
  21. PW3 Moses Keter Korir tendered his evidence to the effect that he knew both parties herein as they were his neighbors since 1974. That they were cousins as their deceased parents were brothers and they



- had lived peacefully on the suit land which was jointly owned by their fathers. That after the dispute arose, the Plaintiff moved away but it was within his knowledge that they were both beneficiaries to the suit land.
22. In cross examination, the witness confirmed that the parties have stayed peacefully on the suit land from 1974 to 2016. That he did not know who the registered proprietor was but that the parents of both parties lived together on the suit premises which he did not know how it had been acquired or how it was to be shared.
  23. He also confirmed that he had heard about one James Ole Kipketer whom he did not know and neither did he know that the said James Ole Kipketer had had a land dispute with the Defendant's father.
  24. His evidence was that the suit land consisted of several houses and each of the parties had over 20 (twenty) single roomed houses some which were temporal when others were permanent. That it had been after these houses got burnt, that the dispute arose. That the Plaintiff had constructed houses around the year 2012 and before that each of their parents had their separate houses on the same plot.
  25. On 17<sup>th</sup> May 2019 the court visited the locus in quo where it noted that the disputed portion was about 50ft by 100ft with 10 single roomed "mabati" houses. There was a small section which had been designated as a graveyard, and the slab which had contained the Plaintiff's mother's house was visible. The disputed area was in one corner of the suit property.
  26. PW4, Babu Kipkoech testified that he was 72 years old, that he knew both the Plaintiff and the Defendant who were his neighbors. He adopted his statement as his evidence in chief.
  27. On cross examination, he confirmed that he knew the Defendant's parents as Hamisi Mkamba and Sophia Mkamba, from mid-1960. That the Defendant's father owned a piece of land in Nyagacho although he did not know how he had acquired it. That Hamisi initially lived on the land before his brother joined him in the 1960s after which he divided the land into two where Hamisi occupied one part and his brother the other side. That there had been a fence separating the two portions which fence was no longer there having been removed in the 1970s. That Hamisi did not support his brother as each of them had their share. He confirmed that whereas the Defendant had his houses the Plaintiff too had her portion of land and there was a wall separating the two.
  28. In re-examination, he reiterated that Hamisi's brother had moved to the suit land with his family and that the plaintiff was one of his children who had been staying on the land and even after she left, her grandson had continued staying there. That there had been no dispute between Hamisi and his brother but the dispute arose in 2016 after the houses got burnt.
- The Plaintiff then closed its case.
29. The defense case was prosecuted by the Defendant who testified as DW1 to the effect that the Plaintiff was his cousin as their fathers were brothers. That the suit land the Plaintiff lay claim to was his father's plot which was now registered to himself as per the search certificate herein produced as Pf exh 1. That he had charged the property to Family Bank where he had taken a loan. He confirmed that the Plaintiff had lived on the suit land since 1965 after she and her siblings had come with her ailing father for treatment. When the treatment failed, the Plaintiff's father was returned to Ukambani where he died. The Plaintiff's siblings and their mother remained in Kericho where his father took up the responsibility of bringing them up. That upon their arrival they had been given a semi-permanent house and a small land to plant their vegetables all which measured about 0.2 acres.
  30. That in 1978 during his father's lifetime, they had sold 1 acre of land including 1<sup>1</sup>/<sub>2</sub> points from the portion the Plaintiffs had been given wherein after they had been issued with title No. 1527.



31. That after his father had passed on, one of his uncles, James Ole Kipketer, had tried to lay claim to the suit land wherein parties went to court and his mother had been given the land measuring 0.41 hectares. That although there had been an objection raised which was dated 8<sup>th</sup> October 1984, herein produced as Df exh 1, and his mother had been issued with the Letters of Administration in Kericho Magistrate's court in Succession Cause No 31 of 1984 herein produced as Df exh 2.
32. That in 2002 after the Plaintiff's mother passed on, he had given permission for her to be buried on the suit land. That the Plaintiff's siblings had left the suit land leaving her behind since she was the last born. That at no time had his father subdivided the land for them.
33. That the Plaintiff continued living on the suit land while carrying on with her business and she would sometimes live in Makuyu, where she now lived, and at other times in Nakuru. That she had built her rooms for rental in 2017 when she filed suit, before which she had a small house which got burnt during the post-election skirmishes.
34. That the suit land measured ½ acre and there was no boundary. That the same was not family land as it had been purchased by his parents and the Plaintiff had no right over it. That the family land was in Ukambani. He sought for the suit to be dismissed.
35. In cross-examination, the Defendant responded that the party's fathers were brothers. That whereas he was born in 1954 the Plaintiff was born in 1959 and that they had all lived on the land since 1965 when his father took care of the Plaintiff's family. That the Plaintiff's mother and her older sister Ngina were buried on the suit land with his permission and that it was this site that resembled a boundary. In essence there was no boundary, the Plaintiff occupied space and was not measured and he would like them to move from the suit land now that they were adults.
36. DW2 Simon Gitonga also confirmed that he was acquainted to the parties herein who were his neighbors and had been since 1980's and that they lived in the same compound. That initially he had thought that they were siblings. That he did not know how they came to occupy the land but that the Defendant's father Mzee Hamisi used to take care of both parties. That he could not remember seeing any boundary in the compound which had many houses some which were semi-permanent and which the Plaintiff had built. He confirmed that some houses had been burned during the post-election violence in 2007, wherein new houses had been put up.
37. It was his evidence in cross-examination that the Plaintiff no longer lived on the suit land although her houses were still there. He also confirmed that the Defendant's father did not have two wives but the two parties herein lived as a family and the Plaintiff's mother had been buried on the suit land.

The Defendant closed its case and parties filed their submissions.

#### **Plaintiff's submissions;**

38. Upon summarizing the brief background of the matter, the Plaintiff framed her issues for determination as follows :
  - i. Whether the Plaintiff herein is entitled to the portion of the suit property by virtue of adverse possession.
  - ii. Whether the court should grant the orders sought.
  - iii. Who should pay the cost of the suit?
39. On the first issue for determination, it was the Plaintiff's submission that the answer was in the affirmative. That the law on adverse possession was well settled and founded on Sections 7, 13, 17 and



- 38 of *Limitation of Actions Act*. That the Court of Appeal discussed the circumstances under which the cause of action accrues in *Wines & Spirits Kenya Limited & Another vs. George Mwachiru Mwango* [2018] eKLR to the effect that a right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run. That the provisions of Section 17(sic) stipulated that should the registered proprietor fail to recover the land within 12 years of uninterrupted adverse occupation, the proprietor's title to the land stood extinguished.
40. That the legal implication of the doctrine was well summarized by the Court in the case of *Benjamin Kamau Murima & Others vs. Gladys Njeri C A No, 213 of 1996* where it had held that the combined effect of the relevant provisions of Sections 7, 13 and 17 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya was to extinguish the title of the Proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.
41. That the ingredients of adverse possession had also been set out in the case of *Tabitha Waitherero Kimani vs. Joshua Ng'ang'a* [2017] eKLR, as follows:
- i. Open and notorious use of the property:
  - ii. Continuous use of the property
  - iii. Exclusive use of the property
  - iv. Actual possession of the property
42. That the Plaintiff had lived on the suit property since her childhood and had grown up knowing that it was their property where she had done massive development and had no other place to call home. That the Plaintiff's deceased parents were buried on the suit land without a complaint from the Defendant or his relatives. That had the Plaintiff's parents had a home in eastern province as claimed by the Defendant, their bodies would have been interred there.
43. On the issue of permission having been granted to the Plaintiff's deceased father, it was the Plaintiff's submission, that upon the visit by the Plaintiff's deceased father in 1965, they had been given a temporal shelter wherein he died in the same year, wherein the Plaintiff's mother had continued living on the suit land without permission until her death in 2002. They had thus become adverse possessors to the title of the registered proprietor.
44. That the Plaintiff had lived on the suit land peacefully and without interruption for a period in excess of 12 years and it was only in 2016 when the Defendant continued disposing off the portions of land, that it had come to her realization that she was almost left homeless that he had also wanted to put her in the same situation.
45. Reliance was also placed in the decided case of *Kasuve vs Mwaani Investments limited & 4 Others* [2004] eKLR where the court had held that the claimant must prove that he had been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuance of possession by the owner on his own violation. That the Plaintiff's occupation of a portion of the suit land had been lawful, peaceful and uninterrupted for a period in excess of 12 years and therefore she was entitled to the portion measuring 0.2 acres of the suit property by virtue of adverse possession.
46. On the second issue as to whether the court should grant the orders sought, the Plaintiff's submission was that the answer was in the affirmative. That the answer had been informed by the foregoing argument, that the court should grant the Plaintiff a declaratory order of the ownership of land measuring 0.2 acres comprised in LR. No. Kericho/Kipchimchim/6148 by adverse possession.



47. On the last issue as to who should bear the costs of the suit, the Plaintiff submitted that cost normally followed an event as provided for under Section 27 of the *Civil Procedure Act*, unless there are exceptional circumstances to depart from this established legal principle. That they believed there were no exceptional circumstance in the present case, that the Defendant (sic) should be granted the costs. That since the Plaintiff had met the threshold of the conditions to be satisfied before granting ownership of land through adverse possession, that the court do allow Plaintiff's prayers as sought.

### **Defendant's submission**

48. In opposition to the Plaintiff's submissions, the Defendant framed his issues for determination as follows;

- i. Whether the Plaintiff has been in actual, peaceful, uninterrupted, hostile and exclusive possession of 0.2 acres comprised in L.R.No. Kericho/Kipchimchim/6148 for a period of at least 12 years;
- ii. What remedies are available to the parties herein?

49. On the first issue, it was the Defendant's submission that the Plaintiff was not entitled to the 0.2 acres comprised in LR No. Kericho/Kipchimchim/6148 as she had not been in actual, peaceful, hostile and exclusive possession of the same. That her occupation of the said property was as a result of his father's humanitarian act of allowing his younger brother to live on the said land portion several years back. That the Defendant's father had only intended for the Plaintiff herein and her family to live on the suit land until they were old enough to cater for themselves. That in the circumstances, the Plaintiff's possession was neither hostile not exclusive. Reliance was placed in the case of *Celina Muthoni Kithinji vs. Safiya Binti Swaleh & 8 others* [2018] eKLR.

50. That it was worthy to note that the Plaintiff in the instant case claimed that she had been living on the said suit property since childhood and that she has overtime developed the same extensively without permission of the owner, yet in the same breath, she admitted to having been raised by the Defendant's father and having lived on the suit land out of the Defendant's father's act of kindness.

51. That assuming that the Plaintiff's claim was justiciable, she had not submitted any evidence as to when her possession became hostile. Her claim that she and her family had lived on the subject land was not supported by any Letters of Administration vesting authority on her to pursue this claim on behalf of her father's/mother's estate, being the original inhabitants of the same. That it had been the Defendant's case that he had followed his father's instructions to allow the Plaintiff and her family members live on the suit property until they could cater for themselves. The Defendant relied on the holding by the Court of Appeal in *Ruth Wangari Kanyagia vs. Josephine Muthoni Kinyanjui* [2017] eKLR where it was reiterated that for a claim of adverse Possession to succeed, it must have been without the consent/license of the registered owner. The Plaintiff being the Defendant's first cousin, the claim herein, premised on adverse possession could not lie. The Defendant relied on the decided cases in *Mbui vs Maranya* (1993) KLR 726, *Rodgers Mwambonje v Douglas Mwambonje* [2014] eKLR and *Gilbert Kimutai Koech vs Wilson Kipngeno Koech* [2018]eKLR to submit that the African way of living back in the countryside has always been to depend on one another for mutual survival and progress. That allowing a family member who had been allowed to live on land belonging to a family member to thereafter claim for adverse possession would amount to bastardizing the doctrine of adverse possession.

52. That guided by the above captioned authorities, it was clear that the Plaintiff could not be heard to claim entitlement of a portion of that property known as L.R. No. Kericho /Kipchimchim/6148 by



way of adverse possession as it would tantamount to biting the hand that fed her. The Defendant urged the court to find and hold that the Plaintiff had failed to prove on a balance of probability, that she is entitled to the 0.2 acres comprised in L.R No. Kericho/Kipchimchim/6148 by operation of the doctrine of adverse possession.

53. On the last issue as to whether the Defendant was entitled to the reliefs sought, it was their submission that the Plaintiff's Originating Summons be dismissed with costs.

### **Determination**

54. This is a matter where the Plaintiff seeks for orders that she be registered as proprietor of 0.2 of an acre of land comprised in L.R. No. Kericho/Kipchimchim/6148, currently registered in the name of the Defendant, by virtue of her adverse possession of the same on allegation that she had been in open, quiet and peaceful occupation for a period of over 50 years.

55. The Plaintiff's evidence was that she had inherited the portion of the suit land from her parents. That the land initially belonged to the deceased Hamisi Munyalo Mutunga who was her father's brother and who had brought her up after her father's death. That she had lived on the suit land since she was born and that the suit land was registered to her uncle's name. That upon the death of her father, she and her mother had moved to Kipchicim, the suit land herein where her mother died in 2002 and was buried thereon. That she had remained on the land up to 2016 when there arose a disagreement between her and the Defendant. That in the interim, she had done massive developments on the land and had no other place to call home.

56. The Plaintiff's suit was opposed by the Defendant, who was categorical that the Plaintiff and her family came into the suit land through permission by his father, who had sheltered them on humanitarian grounds and as a family and therefore the Plaintiff could not now claim adverse possession keeping in mind on how they had entered onto the land. That the suit land was not family land as it had been purchased by his parents and the Plaintiff had no right over it. That the family land was in Ukambani. He sought for the suit to be dismissed.

57. The court is mindful of the legal attribution to the doctrine of Adverse Possession in Kenya which is embodied in Section 7 of the *Limitation of Actions Act*, (Cap 22) in these terms:

58. Section 7 of the *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...”

59. Section 13 of the *Limitation of Actions Act* aforesaid further provides that:

A right of action to recover land does not accrue unless the land is in the possession of some person in whose favor 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 the 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.

60. Sections 37 and 38 of the *Limitation of Actions Act* stipulate that if the land is registered under one of the registration Acts, then the title is not extinguished but held in trust for the person in Adverse Possession until he shall have obtained and registered a High Court (Real Environment and Land) Order vesting the land in him/her



61. It is not contested, that the original suit land No. Kericho/Kipchimchim/2920 was acquired by the Defendant's father the late Hamisi Munyalo Mutunga sometime in 1947. A fact which was confirmed by a panel of elders, in Kericho PMCC Civil Application No. 31 of 1984, after one James Ole Kipketer had tried to claim it unsuccessfully.
62. That the said Hamisi then invited his ailing brother, the Plaintiff's father in 1962 to live with him wherein he had arrived with his wife and family, the Plaintiff being one of them, wherein both families continued to live in harmony on different parts of the suit land. Later the Plaintiff's father died in 1984 wherein the Defendant's father took care of his brother's family and even let them continue living on the suit land.
63. It is also not disputed that on 31<sup>st</sup> May 1995, the land was subsequently registered to the Defendant's mother one Sofia Abubakhar after the death of her husband Hamisi Munyalo Mutunga. That on 8<sup>th</sup> May 2000 Sofia transferred the land to the Defendant who was then issued with a title and later sub-divided and sold part of it thus resulting into parcel No. L.R. No. Kericho/Kipchimchim/6148, currently registered in his name.
64. From the facts as given, it can be deduced that at no time had the Plaintiff and/or her family been on the suit land against the Defendant's father's wish for the said period that exceeded 12 years.
65. The issue that I need to determine therein is:
  - i. Whether the original land being L.R. No. Kericho/Kipchimchim/2920 was family land.
  - ii. Whether the Plaintiff herein is entitled to 0.2 of an acre of land comprised in L.R. No. Kericho/Kipchimchim/6148 registered in the name of the Defendant by virtue of the Plaintiff's adverse possession of the same.
66. On the first issue for Determination, the answer is clearly in the negative having herein above elaborated from the witness's evidence on how the land was acquired. Family land is land vested in a group of persons closely related by blood or persons consisting of parents and their children. It can also be referred to as land which had vested upon individuals who had descended from a common ancestry or pedigree. In the present scenario, it is very clear that the Defendant's father having migrated for his ancestral home in Easter province, came to Kericho, bought the suit land and settled therein. Thereafter, he had invited the Plaintiff's father to live with him. No evidence was tendered that he had bought this land as a family land or that the land had been acquired for family or clan uses, such as burials, and other traditional rites or reserved for various future uses, such as construction of houses and other amenities. The fact that the Defendant's father took in his brother's family, which consisted of the Plaintiff, and allowed them to build a temporary/permanent house on his land did not mean that they had now been integrated into his family formally by way of adoption, so as to automatically become entitled to a part of his estate as beneficiaries.
67. Indeed the Plaintiff's brother Julius Musau Nzyoka had also confirmed that the parcel of land L.R. No. Kericho/Kipchimchim/6148 had been solely acquired by Hamisi Munyalo Mutunga at a cost of Ksh 810/= in 1947 before adjudication. That his father had not contributed to the purchase of the suit land but had been invited thereon in 1962 by the said Munyalo Mutunga who died in 1984. That the Plaintiff had been born in Subukia in 1959 and their father had moved to Kericho in 1962 pursuant to an invite by his brother who had already bought the suit land. That his sister had been brought up by his uncle.
68. By registration of Sofia brother Abubakhar and subsequently the Defendant as its proprietor, their proprietorship was thus governed by the repealed Registered *Land Act*, Cap 300 which then



constituted them as absolute proprietors and conferred on them all rights, privileges and appurtenances thereto, free from all other interests and claims, which rights, privileges and appurtenances were not liable to be defeated except as provided in the Act. Nothing in evidence had been adduced proving that the registration of the suit land to both Sofia and then to the Defendant had been in trust of any family. The provisions of Section 26 of the [Land Registration Act](#), on the rights of a proprietor kicked in, in the circumstance.

69. On the second issue for determination as to whether the Plaintiff herein was entitled to 0.2 of an acre of land comprised in L.R. No. Kericho/Kipchimchim/6148 registered in the name of the Defendant by virtue of adverse possession, I find that the mere assertion that the Plaintiff was granted the consent of the then owner to live thereon, she had denied herself the claim under adverse possession, for adverse possession cannot arise where possession was commenced by consent of the proprietor, for it would of necessity amount to a possession without the requisite *animus possidendi*.
70. In *Mwinyi Hamisi Ali vs Attorney General and Philemon Mwaisaka Wanaka*, Civil Appeal No. 125 of 1997 it was held that:

“...adverse possession does not apply where possession is by consent and in a court of law, sympathy takes a second stand as the Court is governed by statutes.”

However, it is trite that one cannot acquire land by pleading the period of limitation if he has been on the land under a licence or permission from the owner.

The elements to prove for a claim of adverse possession are: the intruder resisting the suit or claiming the right by adverse possession must make physical entry and be in actual possession of the land for the statutory period; the entry must be with some claim or colour of right or title; the occupation of the land by the intruder must be non-permissive, the non-permissive actual possession must be unequivocally exclusive and with the clear intention of excluding the real owner (*animus possidendi*) and the acts of the owner must be inconsistent with the owner’s enjoyment of the soil.

The burden of proving acquisition of title by adverse possession rests upon the person asserting it. It was therefore for the Defendant, not the Plaintiff, to prove on a balance of probabilities that he has acquired title to the suit property by way of adverse possession.”

71. Further in the case in *Rodgers Mwambonje v Douglas Mwambonje* [2014] eKLR, it was held that

“Under the law of [Limitation of Actions Act](#), an action may not be brought by anyone to recover land after the end of the right of action accrues to him or, if it first accrued to some persons through whom he claims, to that person. The period of limitation to bring such an action is 12 years.

However, it is trite that one cannot acquire land by pleading the period of limitation if he has been on the land under a licence or permission from the owner.

The elements to prove for a claim of adverse possession are: the intruder resisting the suit or claiming the right by adverse possession must make physical entry and be in actual possession of the land for the statutory period; the entry must be with some claim or colour of right or title; the occupation of the land by the intruder must be non-permissive, the non-permissive actual possession must be unequivocally exclusive and with the clear intention of excluding the real owner (*animus possidendi*) and the acts of the owner must be inconsistent with the owner’s enjoyment of the soil.



The burden of proving acquisition of title by adverse possession rests upon the person asserting it. It was therefore for the Defendant, not the Plaintiff, to prove on a balance of probabilities that he has acquired title to the suit property by way of adverse possession.”

72. The court further held that;

“I entirely agree with the sentiments of the Judge in the above case. Indeed, if I was to feign ignorance of the African customs of people accommodating their kin on their land for long periods, I will be visiting calamity on the innocent.

Taking a cue from the sentiments of the court in the Mbui case (supra), which I am in agreement with, this court cannot overlook the fact that in the African cultural set up, a brother will more often than not allow his brother or sister to stay on his land whenever necessary.

In my view, where a relative, like a brother, a sister, a father, a mother, or even an uncle lives on one’s land, unlike in a case of a stranger, there is a rebuttable presumption that consent was given. The burden of proving that the consent or permission was not given will be on the person claiming the relative’s land by virtue of the doctrine of adverse possession.

The Defendant did not convince me that he has been staying on the land for more than 12 years without the consent of his brother, the Plaintiff. The Defendant did not call any relative of his a neighbour to dispute the fact that it is the Plaintiff who allowed him on the suit property after he sold his land.”

73. And similarly in the case of Gilbert Kimutai Koech vs Wilson Kipngeno Koech [2018]eKLR, the court had also stated:

“He is a family member whom the Defendant says he allowed to live on the land he was given by their late father. How then does a claim for adverse possession arise in such circumstances. Allowing the claim for adverse possession in this case would amount to bastardizing the doctrine of adverse possession. I therefore find and hold that the Plaintiff’s occupation of the Defendant’s parcel of land does not amount adverse possession. Consequently, the Plaintiff has failed to prove his case on a balance of probabilities and I dismiss it with costs.”

74. In Mbui vs Maranya (1993) KLR 726 it was held as follows:

“Now, in this country, go to the countryside, where our largest population resides, and see for yourself how people are so caring and mindful of one another’s welfare. In the countryside, a lot of people are living on other people’s land, thanks to the African milk of generosity and kindness. Our way of living has always been to depend on one another for mutual survival and progress. This is at every level.

To us, if you want any help, if you want a cow, if you want a piece of land for as long as the owner does not immediately require it, you are given these things, because the owner knows that it does not matter for how long you borrow these things ; he can always recover whatever he has lent to you and whatever he has let you use. There are many people who, by a gentleman’s agreement, all over the country, are actually living on the land of their friends, their clansmen, neighbours or even void land sale agreements. They do not ever think of claiming or losing title, by adverse possession... I would be surprised if anyone pretended to be ignorant of these things...



The keeping of our land of landless relatives, clansmen... for long periods of time until they are able to buy their own land is a custom we all know... 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."

75. These decision was also echoed with approbation in *Njenga Kimani & 2 Others vs Kimani Nganga K. Wainaina* [2017] eKLR and *Elvis Kosgey & another vs Gilbert Kosgey & 2 Others* [2016] eKLR.
76. I agree with their Lordships and have nothing useful to add. This court therefore finds that the Plaintiff has not established her claim of adverse possession on a balance of probabilities and her suit is herein dismissed with costs.

**DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 2<sup>ND</sup> DAY OF FEBRUARY 2023.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

