



Wainaina v Njii; Mwaura (Interested Party) (Environment and Land Case Civil Suit E023 of 2022) [2023] KEELC 413 (KLR) (2 February 2023) (Judgment)

Neutral citation: [2023] KEELC 413 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E023 OF 2022**

**JO MBOYA, J
FEBRUARY 2, 2023**

BETWEEN

SAMUEL NGUGI WAINAINA PLAINTIFF

AND

SIMON MWANGI NJII DEFENDANT

AND

ESTATE OF MUIGAI MWAURA INTERESTED PARTY

JUDGMENT

Introduction and Background

1. Vide originating summons dated the June 8, 2022, the plaintiff herein has approached the court seeking for the following reliefs;
 - i. That consequently and upon the foregoing, the Plaintiff be registered as the sole, absolute and indefeasible proprietor of the aforesaid parcel of land known as LR No 209/11388/40 and declare the title held by Simon Mwangi Njii and his predecessors extinguished by virtue of adverse possession.
 - ii. That an Order do issue requiring and directing the Land Registrar Nairobi to register the Plaintiff, Samuel Ngugi Wainaina, as the sole, absolute and indefeasible proprietor of land parcel No LR No 209/11388/40 in place of Simon Mwangi Njii and in place of any other person succeeding the Defendant.
 - iii. That an Order do issue requiring and directing the Land Registrar Nairobi to cancel/nullify the title deed issued on July 6, 2021 in favour of the Defendant as the Plaintiff has adversely, openly, notoriously, exclusively, and peacefully



occupied the suit land hence the register should be amended to enter the name of the Plaintiff, Samuel Ngugi Wainaina as the proprietor of the said land parcel known as LR No 209/11388/40 in lieu of the Defendant's name or successors.

iv. That the Defendant do pay costs of this suit.

2. The Originating summons herein is premised and anchored on the various and numerous grounds that have been enumerated in the body thereof. Besides, the summons is supported vide assorted affidavits inter-alia, the supporting affidavit and supplementary affidavit sworn by the Plaintiff on the June 8, 2022 and October 26, 2022, respectively.
3. Furthermore, the originating summons is also supported by the affidavit of J S Gathumbi, sworn on June 8, 2022, Samuel Karanja Maina sworn on June 8, 2022 and Samuel Mwangi Wairagu, which is similarly, sworn on even date.
4. Upon being served with the originating summons, the Defendant herein duly entered appearance and thereafter filed an elaborate Replying affidavit sworn on the October 12, 2022 and to which same has attached various annexures.
5. On the other hand, the Interested Party has also filed a Replying affidavit sworn one Eric Muhindi Muigai. For clarity, the said Replying Affidavit has been sworn on the July 26, 2022.
6. Be that as it may, when the subject matter came up for directions, the advocates for the respective Parties agreed to canvass and dispose of the originating summons by way of affidavit evidence and written submissions.
7. Pursuant to the agreement by the advocates for the respective Parties, the court proceeded to and thereafter issued directions inter-alia, that the originating summons be disposed of on the basis of affidavit evidence.
8. In addition, the Honourable Court also directed the Parties to file and exchange written submissions.
9. Pursuant to and in line with the foregoing directions, the Plaintiff proceeded to and filed written submissions on the November 10, 2022, whilst the Defendant filed written submissions dated the December 9, 2022.
10. Nevertheless, despite filing a Replying affidavit, the Interested Party did not file her written submissions, either in the manner directed or at all.

Submissions By The Parties

a. Plaintiff's Submissions

11. The Plaintiff filed written submission dated the November 10, 2022 and in respect of which learned counsel isolated, identified and highlighted two issues for consideration and determination by the court.
12. Firstly, learned counsel for the Plaintiff submitted that the Plaintiff herein entered upon and took possession of the suit property on or about the year 1994 and thereafter same commenced and undertook the construction of a storey building, comprising of six floors on the suit property.
13. In addition, learned counsel has contended that even though the impugned construction was commenced in the year 1994, same was concluded and completed in the year 1996.



14. Furthermore, learned counsel has added that upon the completion of the impugned building, same entered upon and commenced various activities therein. For clarity, counsel submitted that the impugned building contained various aspects, some of which are demised to tenants for residential purposes, whilst other segments are for commercial purposes.
15. On the other hand, learned counsel has submitted that other than the tenants who occupy and reside in various parts of the storey building, his wife runs and operates a clinic, namely, Wakibe Medical Clinic within the named premises.
16. Suffice it to point out that Learned Counsel has contended that the medical clinic, alluded to in the preceding paragraph, has been in operation and in existence, since the year 1996.
17. Additionally, learned counsel for the Plaintiff has submitted that the actions and activities by the Plaintiff and in particular entering upon and remaining in possession of the suit property, constitutes and comprises of acts, which were/are adverse to the rights and interests of the current Defendant as well as his predecessor in title.
18. In any event, counsel has added that despite entry upon and occupation of the suit property neither the Defendant herein nor his predecessor in title, took any precipitate steps or measures, to regain and recover possession of the suit property.
19. In the premises, it has been contended that the Plaintiff has remained in occupation and possession of the suit property since the year 1994, without any interruption and in this regard, the Plaintiff has therefore acquired adverse possessory rights to and in respect of the suit property.
20. Notwithstanding the foregoing, counsel has further added that the Plaintiff entered upon and took possession of the suit property peacefully and without force. Besides, it has also been contended that the occupation, possession and use of the suit property has been open, continuous and uninterrupted, for a duration of more than 12 years.
21. In view of the foregoing, learned counsel for the Plaintiff has therefore submitted that the Plaintiff has met and satisfied all the requisite conditions and ingredients that underpin a claim for adverse possession.
22. To buttress the foregoing submissions, learned counsel for the Plaintiff has cited and quoted various decisions, *inter-alia*, the *Estate of the Late Lucy Nyokabi Kiarie v Mary Nyakio Kanini & 3 others* [2020] eKLR, *Celina Muthoni Githinji v Safiya Binti Swalleh & 8 others* [2018] eKLR, and *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR, respectively.
23. Secondly, learned counsel has contended that where a property, which is the subject of a claim for adverse possession changes hand from one registered owner to another, such change of ownership does not impeach, impugn or affect the claim for adverse possession.
24. In this respect, learned counsel has submitted that insofar as the suit property was the subject of the Plaintiff's occupation during the time when same was registered in the name of the previous owner, the transfer to and in favor of the current Defendant, does not affect the claim of adverse possession,
25. In the premises, learned counsel has therefore contended that the impugned transfer and ultimate registration of the suit property in favor of the current Defendant was therefore a nullity and without any legal consequence.
26. Owing to the foregoing, learned counsel has therefore submitted that by the time the suit property was being transferred to and registered in the name of the Defendant, the previous registered owner and



by extension the person to whom the suit property was charged, had ceased to have any lawful or legal rights to and in respect of the suit property.

27. In regard to the foregoing submissions, learned counsel for the Plaintiff has cited the decision in the case of *The Late Lucy Nyokabi Kiarie v Mary Nyakio Kanini & 3 others* [2020] eKLR.
28. Finally, learned counsel has submitted that the Plaintiff herein has duly proved and established his claim on account of adverse possession. Consequently and in the premises, counsel has added that the Plaintiff is therefore entitled to the Reliefs sought, together with an award of costs.
29. In any event, learned counsel for the Plaintiff has invited the court to find and hold that costs follow the event and hence same should be awarded to and in favor of the Plaintiff.

b. Defendant's Submissions

30. The Defendant filed written submissions dated the December 9, 2022 and same has itemized, raised and highlighted a total of five issues for due consideration. However, the issues that have been raised by the Defendant constitutes a breakdown of the ingredients that ought to be proved to be able to establish a claim for adverse possession.
31. In view of the foregoing paragraph, it is imperative to state and underscore that counsel for the Plaintiff has merely raised and canvassed one global issue to the effect that the Plaintiff has neither proved nor satisfied the requisite ingredients to warrant the grant of an order for adverse possession.
32. To start with, learned counsel for the Defendant has submitted that the Plaintiff averred and deposed in his supporting affidavit that same is the lawful and legitimate owner of LR No 209/11388/37, which the Plaintiff contends to have bought and purchased from one Fredrick Jenga.
33. In addition, learned counsel for the Defendant has pointed out that the Plaintiff also averred that upon purchasing his plot, namely LR No 209/11388/37, same entered upon and commenced construction and development thereon.
34. Furthermore, learned counsel for the Defendant has added that it is the Plaintiff's testimony that same commenced the impugned construction (sic) in the year 1994 whilst knowing and believing that the impugned construction was being undertaken on LR No 209/11388/37 and not otherwise.
35. Be that as it may, it has similarly been pointed out that the Plaintiff has also averred that same latter discovered that the impugned construction was mistakenly carried out and undertaken on LR No 209/11388/40 and not on the Plaintiff's parcel of land.
36. Nevertheless, learned counsel for the Defendant has submitted that despite the fact that the Plaintiff avers that same later on discovered that the impugned construction was erected on the suit property, the Plaintiff has however failed to disclosed when he (Plaintiff) discovered that the impugned building was mistakenly erected on the suit property and not otherwise.
37. In the premises, learned counsel for the Defendant has submitted that without disclosing and revealing when the Plaintiff discovered (sic) the mistake, it is not possible to ascertain whether or not the Plaintiff has accumulated and accrued the requisite statutory duration that underpins a claim for adverse possession.
38. Secondly, learned counsel for the Defendant has submitted that even though the Plaintiff contends that the impugned building was constructed on the suit property, the Plaintiff has however failed and neglected to avail to court any credible evidence to vindicate the contention that the impugned building stands on the suit property and not otherwise.



39. In addition, learned counsel for the Defendant has further submitted that there is no way that the Plaintiff would commence, carry out and complete the erection of a six storey building, in the manner alleged, in the absence of the requisite approval by the various authorities, inter-alia City Council of Nairobi, now defunct.
40. In this regard, learned counsel has contended that if indeed there was any permanent and storey building constructed by the Plaintiff, either in the manner alleged or at all, then the Plaintiff ought to have availed and tendered before the court a copy of the duly approved Building Plans. For clarity, counsel added that the fact that none has been adduced is testament to the fact that there is no such building.
41. On the other hand, learned counsel has also added that the only document which has been availed and furnished to the court are photographic images in respect of a building but which photographic images do not show or state the details of the property on which the purported building stands.
42. Furthermore, learned counsel for the Defendant has submitted that other than the photographic images that were tendered and exhibited to the court, the Plaintiff also availed to court copies of water connection bills, receipts confirming deposits for water connection and land rent demand note as well as a copy of registration of a medical clinic.
43. However, it has been pointed out that the named documents (details in terms of the preceding paragraph), show and reflect that same relates to LR No 209/11388/37 and not the suit property.
44. In view of the foregoing, learned counsel for the Defendant has therefore submitted that the impugned documents/annexures were merely brought to mislead the court and by extension to defraud the Cause of Justice.
45. The third issue that has been ventilated by counsel for the Defendant relates to the fact that the Plaintiff herein only entered upon the suit property on or about the year 2017, when same became aware of the fact that the suit property was in the process of being transferred to and registered in favor of the Defendant.
46. Furthermore, counsel has added that it is then that the Plaintiff herein commenced to and erected temporary structures on the suit property, with a view to laying a claim for adverse possession.
47. Nevertheless, counsel has submitted that the impugned temporary structures which were erected by the Plaintiff on the suit property, (sic) in the year 2017, have since been earmarked for demolition by the County Government of Nairobi.
48. The fourth issue that has also been canvassed relates to the fact that upon the Defendant being registered as the owner and proprietor of the suit property, same approached the Plaintiff with a view to removing the offensive temporary structures and that indeed the Plaintiff agreed to remove the impugned structures.
49. In this regard, it has therefore been submitted that the admission/agreement by the Plaintiff to remove the offensive structures was tantamount to an acknowledgment of the Defendant's title.
50. Additionally, learned counsel for the Defendant has also submitted that despite conceding to the removal of the impugned temporary structures, the Plaintiff herein reneged and thereafter filed and commenced a suit vide originating summons against the previous registered owner of the suit property.



51. For clarity, counsel has invited the attention of the court to take cognizance of Milimani ELC OS No 495 of 2018, Between Samuel Ngugi Wainaina v Mwigai Mwaura, which suit was ultimately withdrawn on the March 14, 2022.
52. To the extent that the Plaintiff herein had hitherto filed and lodge a claim for adverse possession, but which was thereafter withdrawn, it has been pointed out that the filing of the current suit was undertaken before the lapse of the statutory duration, taking into account than the running of time had been interrupted vide the filing of the previous suit.
53. In a nutshell, learned counsel for the Defendant has contended that the Plaintiff herein has therefore failed to satisfy the requisite ingredients that underpin a claim for adverse possession.
54. In particular, learned counsel submitted that the Plaintiff has neither established nor demonstrated that same has been in actual and physical occupation or possession of the suit property or at all.
55. Furthermore, counsel has submitted that adverse possession is premised on proof of actual and physical occupation or possession of the suit property for the requisite number of years and in default of such proof, no order for adverse possession can issue or be granted.
56. To vindicate the foregoing submissions, learned counsel for the Defendant has cited and relied on various decisions inter-alia Wambugu v Njuguna [1983] KLR 173, Paulina Wanjiru Kiarie v Benson Irungu Mbaria [2014] eKLR, Jandu v Kirplal & another (1975) EA and Haro Yonda Juaje v Sadaka Dzengo Mbauro & another [2014] eKLR, respectively.

c. Interested Party's Submissions

57. Though the Interested Party was present at the time when directions were taken for the filing of the written submissions, same has however not filed any written submissions. For clarity, none had been filed on the Judiciary filing portal up to and including the time of crafting the Judgment herein.

Issues For Determination

58. Having reviewed the Originating summons together with the various supporting affidavits, as well as the Supplementary affidavit filed by and on behalf of the Plaintiff and having taken into account the contents of the Replying affidavit filed by the Defendant and the Interested Party; and having duly considered the written submissions filed by the Parties, the following issues do arise and are thus worthy of determination;
 - i. Whether the Plaintiff has established and demonstrated the requisite Ingredients that underpin a claim for Adverse possession or otherwise.
 - ii. Whether the claim for Adverse Possession by and at the Instance of the Plaintiff was/is premature, misconceived and bad in law.
 - iii. What Reliefs ought to be granted.



Analysis And Determination

Issue Number 1 - Whether the Plaintiff has established and demonstrated the requisite Ingredients that underpin a claim for Adverse Possession or otherwise.

59. The Plaintiff has approached the honourable court vide the originating summons dated the June 8, 2022 and in respect of which, same seeks to be declared as the lawful owner of the suit property by and on account of adverse possession.
60. To the extent that the Plaintiff is laying a claim based and premised on adverse possession, it was incumbent upon the Plaintiff to place before the honourable court *inter-alia*, cogent and credible evidence to establish and authenticate actual, physical and visible possession of the suit property, in the manner envisaged under the law.
61. For the avoidance of doubt, there is no gainsaying that any claimant who seeks to acquire title to a landed property by way of adverse possession, must establish and prove that same has been in actual and physical position of the named property for the requisite/statutory numbers of years.
62. To this end, it is imperative to restate and reiterate the holding of the Court of Appeal in the case of *Wambugu v Njuguna* [1983] eKLR, where the honourable court stated and observed as hereunder;
- “In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his rights to the land either by being disposed 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.”
- The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”
63. In addition, the significance and importance of actual, physical and visible occupation of the property, which is the subject of adverse possession was also underscored in the case of *Jandu v Kirplal & another* (1975) EA 225.
64. For coherence, the honourable court stated and held as hereunder;
- “....to prove title by Adverse Possession, it is not sufficient to show that some acts of Adverse Possession must be adequate in continuity, in publicity and in extent to show that it is Adverse to the owner. It must be actual, visible, exclusive, open and notorious.”
65. In view of the foregoing excerpts, there is no gainsaying that proof of actual and physical possession of the named property, which is the subject of adverse possession is central and paramount.
66. Furthermore, it is also imperative to state and underscore that possession is a question of fact or evidence to be tendered by the claimant. In this regard, it behoves the claimant (read the Plaintiff) to place before the court credible evidence to show that indeed he has been in possession of the suit property for the requisite number of years provided and circumscribed under the law.



67. Premised on the foregoing, it is now appropriate to interrogate whether or not the Plaintiff has placed before the court any cogent and credible evidence showing and establishing actual and physical possession of the suit property (and not otherwise), for the statutory duration.
68. To this end, it is worthy to recall that the Plaintiff has attached or annexed photographic images of a building to his supporting affidavit and has therefore impressed upon the court to take cognizance thereof and to hold that the impugned building, whose photographs (read Pictures) has been annexed constitutes sufficient evidence to show and prove possession.
69. I beg to state that indeed a construction or development carried out or erected on a named property, which is the subject of adverse possession, would certainly provide a fulcrum for ascertaining possession.
70. However, before using the construction or building as a basis for ascertainment of actual and physical possession by the claimant, it is incumbent upon the claimant to indeed prove and establish that the impugned building stands on the named property and not otherwise.
71. In this regard, it must be recalled that the evidential burden of proof lies squarely on the shoulders of the claimant/Plaintiff. Consequently, it is the Plaintiff who is tasked with the obligation to prove that the Impugned Building, is situate or located on the suit Property.
72. Consequently, the question that arises is; has the Plaintiff satisfied or met the requisite threshold using and relying on the impugned photographic images that have been annexed and attached to the supporting affidavit.
73. In my humble view, the Plaintiff has failed to meet or muster the requisite threshold, insofar as the impugned photographic images, have not been accompanied with Electronic Certificate as envisaged vide the Provisions of section 106B of the Evidence Act Chapter 80 Laws of Kenya.
74. To and underscore and vindicate the importance of the requisite Electronic Certificate, it is appropriate and imperative to borrow from the holding of the Court of Appeal in the case of Speaker, County Assembly of Kisumu & 2 others v Clerk, Kisumu County Assembly Service Board & 6 others [2015] eKLR, where the court observed as hereunder;

65. Section 106B of the Evidence Act states that electronic evidence of a computer recording or output is admissible in evidence as an original document “if the conditions mentioned in this section are satisfied in relation to the information and computer.”

66. In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B(2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced. For ease of reference, we wish to reproduce Section 106B of the Evidence Act in its entirety:

“106B

- (1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output)



shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

- (2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—
 - (a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;
 - (b) during the said period, information of the kind contained in electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
 - (c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and
 - (d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.
- (3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of sub section (2) was regularly performed by computers, whether—
 - (a) by combination of computers operating in succession over that period; or



- (b) by different computers operating in succession over that period; or
 - (c) in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.
- (4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—
- (a) identifying the electronic record containing the statement and describing the manner in which it was produced;
 - (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
 - (c) dealing with any matters to which conditions mentioned in sub-section (2) relate; and
 - (d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.
- (5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed



for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.”

67. In relation to this case, the relevant conditions in that section are (a) if the computer output was recorded by a person having lawful control over the computer used; (b) if the output was recorded in the ordinary course of that person’s activities using a computer or some other electronic device and fed into a computer that was properly operating throughout the material period; and (c) if that person gives a certificate that to the best of his knowledge, the output is an electronic record of the information it contains and describes the manner in which it was produced.
68. The *Evidence Act* does not provide the format the certificate required under sub-section 106B(2) thereof should take. The certificate can therefore take any form including averments in the affidavit of the recorder.
75. Furthermore, the importance of the Electronic Certificate was also underscored by the court in the case of *Samwel Kazungu Kambi v Nelly Ilongo the Returning Officer, Kilifi County & 2 others* [2017] eKLR, where the Honourable Court observed as hereunder;
21. Sub-section (4) of Section 106B requires a certificate confirming the authenticity of the electronic record. Such a certificate should describe the manner of the production of the record or the particulars of the device. The certificate could also have the signature of the person in charge of the relevant device or the management of the relevant activities.
22. The source of the photocopies of the photographs annexed to the affidavit sworn by the Petitioner in support of the Petition was not disclosed. The device used to capture the images was unknown. The person who took the photographs was not named. The person who processed the images was not named. The Petitioner was not an eyewitness to the incident and he could not therefore tell the court that the photographs were a true reflection of the incident he witnessed.
76. My reading of the foregoing decisions and in particular, the holdings therein, drives me to the conclusion that any photographic images, which are part of electronically produced evidence, must be accompanied by electronic certificate.
77. In addition, where such photographic images are not accompanied by the requisite electronic certificate then same are devoid and bereft of any legal or probative value. For clarity, such kind photographic images therefore attract no legal weight or value, which is essential in determining the issues in controversy before the court.
78. In view of the foregoing consideration, it is my humble view that even though the Plaintiff has attached or annexed the impugned photographic images of (sic) some purported building, the impugned photographic images are unhelpful.
79. Furthermore, it is worthy to add that the photographic images have also neither shown nor reflected the details of (sic) Plot or parcel of land from which same were taken or otherwise.



80. Other than the foregoing, it is also imperative to recall that the Plaintiff himself averred and stated that same purchased a property known as LR No 209/11388/37 from one Fredrick Njenga and thereafter same entered upon and commenced to erect (sic) the six-floor building thereon.
81. It is the same Plaintiff who proceeded and averred that the entry upon and the erection of the impugned building were carried out under the impression that same were being undertaken on LR No 209/11388/37, only to later on discover that the impugned building had been constructed on the suit property.
82. Despite the fact that the Plaintiff averred that he later on discovered that the impugned building was erected on the suit property, albeit by mistake, same has however, neither disclosed nor divulged when he (sic) discovered that the building was erected on the suit property.
83. It is important to underscore that a claim for adverse possession only accrues or arises the moment that the intruder knows, acknowledges and confirms that the named property on which the impugned activities are being carried out on belongs to a third party and not otherwise.
84. In regard to the instant matter, what becomes apparent and evident is that; the Plaintiff, if at all, believed and imagined that he was constructing on his own property and not otherwise. Consequently, the duration during which the Plaintiff imagined that he was on his own property cannot be reckoned and computed in determining the 12-year duration.
85. Clearly, one cannot commence or propagate a claim for adverse possession over a property that same believes, imagines and assumes to be his or better still, one cannot lay a claim for adverse possession and take into account the duration when he (claimant) believed he owned the Impugned property.
86. To this end, it is appropriate to borrow and adopt the statement of the law as enunciated vide the holding of the Court of Appeal in the case of *Catherine Koriko & 3 others v Evaline Rosa* [2020] eKLR, where the honourable court stated and observed as hereunder;

In *Haro Yonda Juaje v Sadaka Dzenge Mbauro & Kenya Commercial Bank* [2014] eKLR it was stated:

- (29) One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession. If the Plaintiff's averment is that the title which was issued to the Defendant was fraudulently acquired, then his cause of action would be for the rectification of title by cancellation pursuant to the provisions of Section 143 of the Registered Land Act and not adverse possession. He cannot use the doctrine of adverse possession to go around the decision of the Minister.

In the application, the appellants sought to lay claim to the suit property on the basis of adverse possession. A claim for adverse possession is inconsistent with the claim for being a beneficiary of the estate of a deceased person. In the original suit, the appellants did not concede that indeed the respondent was the true owner of the suit property. (Emphasis supplied).

87. In my humble view, it was incumbent upon the Plaintiff, if at all, to disclose when in his view he discovered that he has (sic) entered onto and constructed on the suit property, belonging to (sic) the



Defendant or his predecessor in title. However, the Plaintiff has inadvertently or deliberately withheld such disclosure, albeit for reasons only known to him.

88. Be that as it may, on the part on the court, the only construction or inference that the court can draw from such none disclosure, or concealment of a material fact, is that the disclosure, if any, would have been adverse to the Plaintiff's case. In a nutshell, this is a clear case that warrants invocation and application of the doctrine of adverse inference as against the Plaintiff.
89. Additionally, the Plaintiff herein also annexed and exhibited various documents (other than the photographic images) which same sought to rely on as evidence of possession of the suit property. For clarity, the documents included inter-alia, receipts confirming deposits for water connection, copies of demand for land rates, receipts confirming payments for land rates and a copy of certificate of registration of a medical clinic.
90. However, an examination of the named documents, details in terms of the preceding paragraphs, shows and reflects that same bears a reference to LR No 209/11388/37, which is the property belonging to and registered in the name of the Plaintiff.
91. Consequently and without belaboring the point, what comes out is that the Plaintiff herein would stop at nothing to mislead and dupe the honourable court to grant favorable orders in his favor.
92. To the Plaintiff herein, it is immaterial how he procures and obtains the beneficial/ favourable orders. In short, what matters to the Plaintiff, is the end result and it is immaterial how same is achieved or realized.
93. Unfortunately, he who approaches a court of law and of equity , must come to court with clean hands. However, in this regard, the Plaintiff has approached the court with soiled hands and thus same is not deserving of Equity.
94. In view of the foregoing considerations, I come to the conclusion that the Plaintiff herein has neither proved nor established the requisite ingredients that underpin a claim for adverse possession or at all.

Issue Number 2 - Whether the claim for Adverse possession by and at the instance of the Plaintiff was/is premature, misconceived and bad in law.

95. The Defendant herein averred in the Replying affidavit that prior to and before the filing of the instant suit, the Plaintiff had hitherto filed and mounted a previous suit vide Milimani ELC OS No 495 of 2018, which suit was thereafter withdrawn on the March 14, 2022.
96. It has similarly been contended that upon the withdrawal of the named suit, the Plaintiff returned before this honourable court vide the current originating summons and which was filed on the June 8, 2022. For clarity, it has been pointed out that the current suit was filed barely three months after the withdrawal of the previous suit.
97. What comes out from the foregoing contention is that upon the filing of the previous suit, the time for computing the requisite duration for claiming adverse possession stopped running. In this regard, it was incumbent upon the Plaintiff to prosecute the previous suit to conclusion.
98. Nevertheless, insofar as time stopped running, it was not open for the Plaintiff to return to court vide the current suit, albeit within a duration of three months from the date of withdrawal of the suit and purport to lay a claim for adverse possession.



99. In my humble view, the duration from the time when the previous suit was withdrawn to when the current suit was filed does not measure up to the requisite duration envisaged under the law for a claim for adverse possession.
100. To my mind, having withdrawn the previous suit seeking for positive orders of adverse possession, it was incumbent upon the Plaintiff to await a further duration of 12 years prior to and or before returning to court with a similar claim for adverse possession.
101. Furthermore, it is my humble opinion that the filing of the previous suit (which was ultimately withdrawn), cause the running of time to stop. In this regard, the possession, if any, was interrupted and hence negating one of the critical ingredients that underpin a claim for adverse possession.
102. To underscore and vindicate the statement that the filing of a suit interrupts the running of time for purposes of laying a claim for adverse possession, it is imperative to recall, restate and reiterate the holding of the Court of Appeal in the case of *Ndatbo v Itumo* [1983] eKLR, where the honourable court stated and observed as hereunder;

“The position in Kenya as regards when the time would stop running against an adverse possessor has been amply set out. In the case of *William Gatuhi Murathe v Gakuru Gathimbi* (Civil Appeal No 49 of 1996) (unreported) this Court followed the decision in the case of *Joseph Gahumi Kiritu vs. Lawrence Munyambu Kabura* (Civil Appeal No 20 of 1993) (unreported) which reviewed previous judgments of this Court on the issue of time and it was held that the filing of a suit for recovery of land would stop time from running for the purposes of Section 38 of the *Limitation of Actions Act* under which a person may claim to have become entitled to land by adverse possession. We would set out the following excerpt from the judgment of Kwach, JA in *Kiritu v Kabura* (*supra*).

“The passage from Cheshire's Modern Law of Real property to which Potter JA made reference in *Githua v Ndeete* is important and deserves to be read in full. It is at page 894 Section VI under the rubric the methods by which time may be prevented from running and the learned author says -

“Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a merely formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. Such a nominal entry, even though it was secret, entitles him to bring an action within a year afterwards, and as it was possible to make such an entry every year, in this case called continual claim, the title to land might be in doubt for longer than the period of limitation. It was therefore provided by the Real Property Limitation Act 1833, in a section which has been repeated in the Limitation Act 1939, that a person shall not be deemed to have been in possession merely because he has made an entry on the land. He must either make a peaceable and effective entry, or sue for recovery of the land.’

I agree that the mere filing of a suit for recovery of possession may not disrupt the possession of the adverse possessor, it being a physical thing, but as regards the stopping of time for the purposes of the Act, I would fully subscribe to the position expounded by Potter JA



in *Githu v Ndeete*, and which has solid backing in the passage I have read from Cheshire . It is the sensible step to take instead of going into the disputed land armed to dislodge the adverse possessor, an act which can only result in a serious breach of the peace or even loss of life. It may well be true that in India the position as set out by Kneller, JA in *Muthoni v Wanduru* does work, but I do not regard it as a practical approach to take in land disputes in Kenya. As there are authorities of this Court going both ways I am free to decide which way to go. An on this particular point I will go with the Potter, JA. The only reason I can think of for the apparent contradiction in the decisions I have discussed is the total absence of law reports during the period under review, a calamity which has yet to be redressed."

103. In addition, the Defendant herein averred that upon being registered as the owner of the suit property, same engaged and spoke to the Plaintiff herein who thereafter readily acknowledged and admitted the Defendant's ownership rights.
104. Furthermore, the Defendant further avers that the Plaintiff agreed to vacate and move out and also to remove the temporary structures that same had erected on the suit property.
105. In my humble view, the acknowledgment of the Defendant's title and readiness to vacate the suit property, at the request of the Defendant, negated the Plaintiffs claim for adverse possession.
106. Suffice it to point out that an admission or acknowledgment of the registered Owners' title or rights to the named property, is yet another established mechanism for averting/ negating a claim for adverse possession.
107. Other than the foregoing, it was also pointed out that the Defendant duly issued and served the Plaintiff with an eviction notice and that the instant suit was thereafter filed with a view to circumventing or defeating the eviction notice.
108. I beg to add that the issuance of an effective notice would also connote an assertion of right by the registered owner.
109. The bottom line, is that the Plaintiff's claim herein, which seeks declaration of ownership on the basis of adverse possession, was certainly mounted prematurely and prior to meeting the established statutory duration.

Issue Number 3 - What Reliefs ought to be granted.

110. It is the Plaintiff who had approached the honourable court with a view to procuring and obtaining the requisite declaration of ownership by way of adverse possession.
111. Having approach the court, it was incumbent upon the Plaintiff to place before the honourable court the necessary and relevant material to prove and vindicate his entitlement to the reliefs sought.
112. Put differently, the burden of proving the averments and allegations contained in the body of the Originating summons, was cast upon the Plaintiff and not otherwise. See sections 107, 108 and 109 of the *Evidence Act* Chapter 80 Laws of Kenya.



113. Additionally, the fact that the burden of proof rests and lies on the Plaintiff was well articulated and espoused by the Supreme Court of Kenya in the case of *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR, where the Court stated as hereunder;

(49) Section 108 of the *Evidence Act* provides that,

“the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;”

and Section 109 of the Act declares that,

“the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

[50] This Court in *Raila Odinga & others v Independent Electoral & Boundaries Commission & Others*, Petition No 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden....”

(51) In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.

114. Furthermore, the importance of discharging the burden of proof was also examined and underscored by the court of appeal in the case of *Agnes Nyambura Munga (suing as the Executrix of the Estate of the late William Earl Nelson) v Lita Violet Shepard (sued in her capacity as the Executrix of the Estate of the Late Bryan Walter Shepard)* [2018] eKLR, the Court expounded on section 107 and 109 of the *Evidence Act* as;

“The standard of proof is on a balance of probabilities which Lord Denning in the case of *Miller v Minister of Pensions* (1947) explained as follows:-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: „We think it more probable than not?, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties? explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”



115. To the extent that the burden of proof was cast upon the Plaintiff herein, there is no gainsaying that the Plaintiff was under duty to discharge same. For clarity, a failure to meet the requisite threshold would leave the court with no alternative, but to dismiss the claim.
116. Be that as it may and as pertains to the subject matter, I beg to underscore that the Plaintiff was unable to prove or establish that same has been in active, physical and visible possession of the suit property for the requisite number of years as envisaged under the law.

Final Disposition

117. Having deliberated upon and analyzed the various perspective to and concerning the claim for Adverse possession, it is now appropriate to bring the Judgment herein to closure.
118. However, it is evident and apparent that the Plaintiff, upon whom the burden of proof laid, (both Evidential Legal) has not been able to discharge same to the requisite standard. In this regard, the standard of proof was on a balance of probabilities.
119. Consequently and in the premises, the Originating Summons dated the June 8, 2022, is devoid and bereft of merits.
120. In a nutshell, Same be and is hereby dismissed with costs to the defendant.
121. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF FEBRUARY, 2023.

OGUTTU MBOYA

JUDGE

In the Presence of;

Benson Court Assistant

Mr. Kimani h/b for Ms Kamau for the Plaintiff

Ms. Wayua for the Defendant

N/A for the Interested Party

