



**Moyan v Kuku & another (Environment & Land Case 15 of 2020)
[2023] KEELC 16158 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16158 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 15 OF 2020**

LC KOMINGOI, J

MARCH 2, 2023

(FORMERLY MILIMANI ELC SUIT NO. 123 OF 2013(OS))

**IN THE MATTER OF; LIMITATION OF ACTIONS ACT CAP 21, LAWS OF KENYA
IN THE MATTER OF: CIVIL PROCEDURE ACT AND RULES ENACTED THERE UNDER
IN THE MATTER OF: AN APPLICATION FOR DECLARATION THAT THE APPLICANT
HAS**

**OBTAINED OWNERSHIP OF KAJIADO/KAPUTEI-NORTH/3910 MEASURING
20.23HA NOW SUBDIVIDED INTO KAJIADO/KAPUTIEI NORTH 68294, 68295,
68296, 68297, 68298, 68299, 68300, 68301, 68302, 68303 OF THE ABOVE SAID LAND**

BY WAY OF ADVERSE POSSESSION

BETWEEN

WILLIAM KOIPITATA MOYAN PLAINTIFF

AND

SAMREI OLEPAKI KUKU 1ST DEFENDANT

ANTHONY ATANGA KUTWA 2ND DEFENDANT

JUDGMENT

1. The originating summons dated 24/1/2013 is brought under order 37, rule 7(1) and sections 3 and 3A of the *Civil Procedure Act* (cap 21) Laws of Kenya and Sections 7, 37, and 38 of the *Limitations of Actions Act* (cap 22) Laws of Kenya and all other enabling provisions of the law.
2. Let Samrei Ole Oepaki Kuku and Anthony Atanga Kutwa within fifteen (15) days from the service of this summons on them enter appearance to this summons which is issued on the application of the Plaintiff/Applicant herein of Kajiado who claim to be the proprietor of 20.23 Hectares of land being



Kajiado/Kaputiei- North/3910 currently registered in the name of Anthony Ataga Kutwa by way of adverse possession of the determination of the following questions.

- i. Is the Plaintiff/Applicant entitled to be declared as the proprietor of 20.23 Hectares or thereabout of land being Plot Number Kajiado/Kaputiei-North/3910?
 - ii. Is the Plaintiff/Applicant entitled to be registered as the owner of Plot No. Kajiado/Kaputiei-North/3910?
 - iii. If the answer to 1 and 2 is yes, a declaration that Plot No Kajiado/Kaputiei-North/3910 belongs to the Applicant by reasons of adverse possession, and an order be issued to Land Registrar Kajiado to register the Applicant as the owner of Plot Number Kajiado/Kaputiei-North/3910.
 - iv. Is the Plaintiff/Applicant entitled to the costs of this suit?
3. The Plaintiff/Applicant filed an Amended Originating Summons dated April 9, 2019 seeking determination for the following questions.
- i. Is the Plaintiff/Applicant entitled to be declared as the proprietor Kajiado/Kaputiel-North/3910 measuring 20.23ha now subdivided into Kajiado/Kaputiel/North/68294, 682935, 68296, 68297,682989, 68300, 68301, 68302 and 68303?
 - ii. Is the Plaintiff/Applicant entitled to be registered as the owner Kajiado/Kaputiel-North/3910 measuring 20.23ha now subdivided into Kajiado/Kaputiel/North/68294, 682935, 68296, and 68297, 68298, 68299, 68300, 68301, 68302 and 68303?
 - iii. If the answers to 1 and 2 is yes, a declaration that Kajiado/Kaputiel - North/3910 measuring 20.23ha now subdivided into Kajiado/Kaputiel/North/68294, 682935, 68296, 68297,68298,68299,68300, 68301, 68302 and 68303 belongs to the Applicant by reasons of adversepossession, and an order be issued to Kajiado Land Register to register the Applicant as the owner of Kajiado/Kaputiel-North/3910 measuring 20.23ha now subdivided into Kajiado/Kaputiel/North/68294, 682935, 68296, 68297,68298, 68299,68300, 68301, 68302 and 68303.
 - iv. Is the Plaintiff/Applicant entitled to costs of the suit.
4. The Originating Summons is supported by affidavits of William Koipitat Mayon sworn on the January 30, 2013 and January 30, 2019. He depones as follows; That his late mother Nkiroine Ene Mayon Letuka was the initial owner of the suit land having acquired it from the group ranch in 1994. She then sold it to the 1st Defendant/Respondent in 1994. Upon her death in 2002, she was buried on the suit land. He claims that he has openly, continuously and uninterrupted resided, stayed and grazed on the suit land for over twenty five years without any hostility or claim from the registered owner. Further, his twenty cows and three hundred and fifty goats were even grazed there unhindered. This is where he has lived all his life.
5. He confirms that the suit land was subdivided by the 2nd Defendant/Respondent upon purchasing it from the 1st Defendant/Respondent into Kajiado/Kaputiei-North/68294, 68295, 68296, 68297, 68298, 68299, 68300, 68301, 68302 and 68303, respectively. According to him, the transfer and subdivision was undertaken when he was already residing on the suit land. He got surprised when he discovered that the 2nd Defendant/Respondent was the owner of the suit land because he had never met him. The 1st Defendant/Respondent has never occupied the suit land.



6. He states that it is in the interest of justice that he be granted the orders sought because this is his only home where he has lived with his three brothers, their wives and one sister. To support his claim, he filed a register of Kajiado/Kaputiei-North/3910 opened on 16/11/1994, death certificate for Nkiroine Ene Mayon Letuka, map for the suit land and photographs of the suit land showing animals and persons.

The Defendants'/respondents' Case

7. The Defendants'/ Respondent' oppose the Originating Summons through the affidavits of Anthony Atanga Kutwa sworn on April 8, 2019 and February 2, 2021 together with the Statement of Defence dated May 9, 2018. He depones that the Originating Summons ought to be dismissed with costs for being highly misconceived, prejudicial and an abuse of court process. He averred that he purchased the suit property from the 1st Defendant/Respondent on July 9, 2007 upon conducting an official search. The suit was duly transferred to him upon payment of full purchase price. In December, 2013, he obtained the land control board consent to allow its subdivision into Kajiado/Kaputiei-North/68294, 68295, 68296, 68297, 68298, 68299, 68300, 68301, 68302 and 68303. According to him, the plaintiff/Applicant has not proprietary rights over the suit land through the doctrine of adverse possession because the Department of Criminal Investigation report and area chief confirmed he (Plaintiff) never resided on the suit land. Therefore if the orders sought are granted, the suit property will be destroyed since the Plaintiff/Applicant has removed the beacons erected in 2014. Despite the fact that expenses were incurred during the subdivision. In addition, the doctrine does not apply against an innocent purchaser for value. To support their claim, the 2nd Defendant/Respondent produced a duly executed sale agreement of July 9, 2007, application and certificate for official search and application and consent from land control board, a duly executed transfer and mutation form for suit land, photographs of land, Department Of Criminal Investigations report dated October 27, 2014 on status of occupation of the suit land and the chief's letter dated October 27, 2014.

Evidence Of The Plaintiff

8. PW1 William Koipitat Mayon testified on October 27, 2022. He told the court that his mother, Nkiroine Ene Mayon Letuka sold the suit land to Samrei Olepaki Kuku (1st defendant) in 1994. That the 1st Defendant was issued with a title deed on the same December 17, 1994. He stated that he was 22 years old at the time. He further stated that from the time the land was sold, he continued staying on the land.
9. He also stated that his mother passed on, on 1/7/2002 but he and his siblings continued occupying the land. He told the court that they graze animals on the said land. It is his case that the 1st Defendant never asked them to vacate the land. He further stated that he has given his neighbours permission to graze their animals on the said land. He stated that he saw the 2nd defendant for the first time in the year 2013 when he came to subdivide the land. He told the court that the land has been subdivided into ten (10) portions.
10. When he was cross-examined by Miss Chepkoech for the Defendants, he told the court that he resides on Kajiado/Kaputiei - North/3911. He told the court that the only reason the family moved from Kajiado/Kaputiei-North/3910 was because of the floods. He told the court that he was claiming the land by way of adverse possession.

Evidence Of The Defendants

11. DW1 Anthony Atanga Kutwa (the 2nd Defendant) testified on October 27, 2022. He stated that he was also testifying on behalf of the 1st Defendant. He told the court that he bought the suit land from



- the 1st Defendant in the year 2007, after conducting due diligence. He relied on a Sale Agreement dated July 9, 2007. He told the court the land was vacant and undeveloped. There were no structures or animals on the land.
12. He was issued with a Title Deed and in 2013 he decided to subdivide the land into ten portions and got the title deeds. It is his evidence that this is when the Plaintiff turned hostile and demanded money from him. The Plaintiff later applied for cautions to be registered against the said parcels.
 13. He further stated that he made a report to the Directorate of Criminal Investigations and the area chief. The Directorate of Criminal Investigations visited the land and found it was vacant. He also stated that the chief turned hostile despite his knowledge that the land had been sold to the 1st Defendant who in turn sold to him (2nd Defendant).
 14. When he was cross examined by the Plaintiff's Counsel he stated that there is no house on the suit land. He also confirmed that the Plaintiff resides on the adjacent land No Kajiado/Kaputiei-North/3911. He prays that he be allowed to take possession of the land as he bought it.
 15. At the close of the oral testimonies, parties tendered final written submissions.

The Plaintiff's Submissions

16. They are dated November 17, 2022. Counsel submitted that the Defendants have never issued the Plaintiff any notice to vacate. That after the subdivision by the 2nd Defendant, the Plaintiff protested. He has put forward the case of *Abmed Abdulkarim and another v Minister for Lands and Mines and another* (1958) EA 436 which was cited by Ojwang, J (as he then was) in the case of *Kenya Tea Development Authority v Jackson Githui Karanja and another* (2006) eKLR. Where it was held

“To establish a claim for adverse possession, the identity of the claimant must be clear, the identity of the suit property must be clear and it must be demonstrated that the Plaintiff has been in open, exclusive continuous and uninterrupted possession or occupation. The Plaintiff must show he has been in occupation on the portion claimed for a period of 12 years or more”.
17. Counsel further submitted that the Plaintiff's occupation extinguishes the right of the Defendants and more so Anthony Atanga Kutwa who holds Title to this land. It is also submitted that the fact that the land was transferred to the 2nd Defendant on August 10, 2007 does not in any way interrupt the Plaintiffs right to adverse possession. He has relied on the cases of *Githu v Ndeete* (1984) eKLR; *James Ajwang Odiyo v Thomas Gat Omondi* (2012) eKLR. *Chatherine Waruguru Maina v Maginda Ranchard Chouhan* (2006) eKLR.

The Defendants' Submissions.

18. They are dated December 1, 2022. They raise one issue for determination. Whether or not the Plaintiff has acquired title by way of adverse possession.
19. Reliance is placed on Sections 7, 13, 38 of the *Limitations of Actions Act* and the case of *Mtana Lewa v Kabindi Ngala Muwagandi* (2015) eKLR. Counsel has also put out the excerpts *Halbury's Laws of England* 4th Edition Volume 28 paragraph 768; *Wilson Kazungu Katana and 10 others v Salim Abdalla Bakshwein and another* (2015) (eKLR), *Kasuve v Mwaani Investments Limited & 4 others* (2004) KLR 184, *Wanje & others v AK Saikwa & others, Sisto Wambugu v Kamau Njuguna* (1983) eKLR, *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* (2020) eKLR.



20. It is submitted that the Plaintiff admitted during the hearing that he grazes his cattle in the suit land. That his neighbors also graze there with his permission.
21. It is also submitted that the Plaintiff failed to substantiate that he is in occupation of the suit land. Further that the ingredients of adverse possession have not been proved by the Plaintiff.
22. I have considered the Amended Originating Summons, the affidavits in support, and the annexures. I have also considered the response thereto; the annexures; the written submissions and the authorities cited.

The issues for determination are;

- i. Whether the Plaintiff has acquired title to the suit land by way of adverse possession.
 - ii. Is the Plaintiff entitled to the orders sought?
 - iii. Who should bear the costs to this suit?
23. It is not in dispute that the suit land was originally owned by the Plaintiff's late Mother Nkiroine Ene Mayon Letuka and that she sold it to the 1st Defendant in 1994. It is also not in dispute that the suit land is no longer in existence because it was subdivided by 2nd Defendant into ten portions upon purchasing it from the 1st Defendant. What is in dispute is whether the Plaintiff/Applicant has proved he has acquired propriety interest over the suit land under the doctrine of adverse possession due to continuous uninterrupted occupation and possession of the land for a period of over twelve years.
 24. The doctrine of adverse possession is founded in Section 7, 13, 37 and 38 of the *Limitation of Actions Act*. They provisions rightfully states that in order to succeed in the claim for adverse possession, a party must prove he had uninterruptedly possessed and occupied the suit land continuously and the Defendant was aware of such. Although the Plaintiff/Applicant pleads he has lived and grazed on the suit land, these assertions are negated by his testimony during cross-examination. He testified that he occupied the suit land from 1990 to 1994 when he moved out due to floods. Further, his was mother was buried on Kajiado/Kaputiei-North/3911 where they reside. From his testimony, it is clear, the Plaintiff/ Applicant does not reside on the suit land. A perusal of the Defendants/Respondents documents indicate that the 2nd Defendant bought the suit land from the 1st Defendant on July 9, 2007. In December, 2013, it was subdivided into ten portions. According to the Kajiado Central, Directorate of Criminal Investigations report dated May 5, 2015, it was established that there was no person residing on the suit land. The Plaintiff/Applicant did not challenge the contents of the said report.
 25. The Court of Appeal in *Ruth Wangari Kanyagia v Josephine Muthoni Kinyanjui* [2017] eKLR while relying on the holding in *Mtana Lewa vs Kabindi Ngala Mwangandi* [2015] eKLR stated as follows with the regard to the doctrine of adverse possession

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is “*nec vi, nec clam, nec precario*”, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual,



visible, exclusive, hostile and continued over the statutory period.” (Emphasis added). See the Supreme Court decision in *Karnataka Board of Wakf v Government of India & others* (2004) 10 SCC 779”.

26. Similarity in the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* (2020) eKLR the Court of Appeal in Kisumu stated that,

“a person claiming adverse possession must establish the following;

- i. On what date he came into possession.
- ii. What was the nature of his possession.
- iii. Whether the fact of his possession was known to the other party.
- iv. For how long his possession has continued and
- v. That the possession was open and undisturbed for the requisite 12 years.”

I have gone through the oral evidence of the Plaintiff and found that he was unable to prove that he is in possession of the suit land

27. The Plaintiff told the court that he and his siblings reside on the Kajiado/Kaputiei-North/3911. This is where his mother was buried.

28. His claim that he resided on the suit land until they moved as a result of the floods could not be further from the truth. His claim that he grazed his livestock in the suit land neither here nor there.

29. The 2nd Defendant’s testimony is more credible. He confirms that the suit land is vacant with no structures. He also stated that the Plaintiff resided in the adjacent suit land. This confirms that the Plaintiff is not in possession of the suit land.

30. In conclusion I find that the Plaintiff has failed to prove his claim for adverse possession. He has failed to prove his case against the Defendants on a balance of probabilities.

31. Consequently, this suit is dismissed with costs to the 2nd defendant.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 2ND DAY OF MARCH, 2023.

L. KOMINGOI

JUDGE

IN THE PRESENCE OF:

Mr. Njonjo for the Plaintiff –present

No appearance for the Defendants

Court Assistant -Mutisya

