



**Katana v Ng'anga (Environment & Land Case 69 of 2019)
[2023] KEELC 17216 (KLR) (8 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17216 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 69 OF 2019**

MAO ODENY, J

MAY 8, 2023

BETWEEN

NICHOLUS KOPO KATANA APPLICANT

AND

MARY WAIRIMU NG'ANGA RESPONDENT

JUDGMENT

1. By an Originating Summons dated August 21, 2019 the Applicant sought the following orders;
 - a. That the Respondent's interest in Kilifi/ Mtwapa/439 measuring 4.9 Ha or thereabout has been extinguished.
 - b. That the Applicant be registered as the proprietor of all that parcel of land Kilifi/ Mtwapa/439 measuring 4.9 Ha or thereabout which said piece of land is comprised in a Title Deed in the District Land Registry at Kilifi in place if Mary Wairimu Ng'ang'a reason of the fact that the Applicant has become entitled to the said land by adverse possession.
 - c. That the orders referred to in paragraphs 1 and 2 above be registered against the title Kilifi/ Mtwapa/439 measuring 4.9 Ha or thereabout which said piece of land is comprised in a Title Deed in the District Land Registry at Kilifi in terms of Section 38 (2) of the *Limitation of Actions Act*, Cap 22 Laws of Kenya.
 - d. That the costs of this Originating Summons be provided for.
2. The application was supported by the affidavit of Nicholus Kopo Katana sworn on the same day where he deposed that the Respondent is the registered owner of all parcel of land known as Kilifi/ Mtwapa/439 measuring 4.9 Ha and that at all material time to the suit, he together with his entire family have lived on the said parcel of land for a period that amounts to more than 50 years. That he



has lived, cultivated, built permanent houses, reared livestock, conducted business and raised children there without any interruption for the mentioned period of time.

3. The Respondent did not enter appearance therefore the matter proceeded undefended.

Applicant's Case

4. PW1 Nicholas Kopo Katana adopted his witness statement dated August 2, 2019 as his evidence in chief and also produced the documents in the list of as Pex 1 to 3. He further told the court that he was born and raised on the parcel of land known as Kilifi/ Mtwapa/439 which his parents originally occupied. That during and throughout their stay there, they have farmed the land, built permanent houses, reared livestock, carried on business and started families on the said land without interference from any third party.
5. It was his testimony that they have lived and developed the said land for an uninterrupted period of over 50 years and as such, that is the only home they have known and owned ever since.
6. PW1 stated that during the entire period of their occupation of the land, they have never met the Respondent and have never received a notice to vacate the suit land. He stated that they have stayed on the same land for a continuous period of over 50 years which is more than the 12 years required by the law and as such, they have a right over it and ought to be declared the legal owner of the land.

Applicant's Submissions.

7. Counsel submitted that the law relating to adverse possession and limitation of action seeks to regularize the phenomenon in a manner that balances the rights and expectations of the parties.
8. Mr Birrir submitted that a squatter or a trespasser who has occupied land to claim an interest in land, in cases where the owner of the land has failed to secure the eviction of squatter or a trespasser within a certain period of time. He stated that this is an overriding interest provided for in Sections 7, 13, 17, 37 and 38 of the Limitation of Actions Act and Sections 1A,1B, 3, 3A of the Civil Procedure Act and Orders 1 and 37 of the Civil Procedure Rules.
9. Counsel relied on the case of Kweyu vs Omutu (1990) KLR where the court held that in deciding cases of adverse possession, the primary function of a court is to draw legal inferences from facts and such inferences are clearly matters of law. That the question whether that possession is adverse is a matter of legal conclusion to be drawn from the finding on facts. He also relied on the case of Sisto Wambugu vs Kamau Njuguna (1983) KLR.
10. Mr Birrir also submitted that the legal requirement in adverse possession is that the claimant must prove that he has actual possession of the land and that he has the requisite intention to poses and that for adverse possession to be established, it is not necessary that the owner of the land is actually aware of the fact that the land is in another's occupation and that the entry of the adverse possession was not secretive.



Analysis And Determination.

11. The issue for determination is whether the Applicant has acquired the suit parcel of land by way of adverse possession. The doctrine of adverse possession in Kenya is embodied in Section 7 of the Limitation of Actions Act, Cap 22 which provides as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person

Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action, to recover land (including a redemption action) the title of that person to the land is extinguished.”

12. I In the case of Tabitha Waitberero Kimani v Joshua Ng'ang'a (2017) eKLR, Ombwayo J held on the ingredients of adverse possession as follows:

“(A) Open and notorious use of The Property, for this condition to be met the adverse party’s use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim. The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If a legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about.

(B) Continuous use of the property The adverse party must, for Statute of Limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor’s time on the land, not how long true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned.

(C) Exclusive use of the property the adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a barn on the owner’s property, and the owner then uses the barn, the adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (ie., owners) in common, so long as the other elements are met.

(D) Actual possession of the property the adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession.”

13. The Applicant has produced a copy of the land certificate and official search to prove that the suit land belongs to the Respondent which is a requirement in claims for adverse possession. The Applicant has also given evidence of how he has been in possession of the suit land openly without interruption by anyone for a period of more than 12 years. This evidence has been uncontroverted by the respondent whose tile the Applicant seeks to be registered in his name.



14. Even if evidence is uncontroverted it is still incumbent upon the Applicant to prove his case on the required standards. The fact that the respondent has not filed any response to the case does not shift this burden and does not meant that the it is a walk over for the Applicant.
15. In the case of *Gichinga Kibutha v Caroline Nduku* [2018] eKLR the court held that:
- “It is not automatic that in instances where the evidence is not controverted, the claimant’s claim shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”
16. In the case of *Haro Yonda Juaie v Sadaka Dzengo Mbauro & another* [2014] eKLR, the court held:
- “The position, as was held in the above case, is therefore not whether or not the claimant has proved that he has been in possession for the requisite number of years but whether he had the animus possidendi to acquire the land by way of adverse possession. The Claimant can only prove that he had the requisite animus possidendi by showing the circumstances under which he dispossessed the true owner of the land or the circumstances under which the true owner discontinued his possession”
17. In the case of *Wanie v Saikwa (No 2)* (1984) KLR 2841 the court held that in order to acquire by statute of limitations a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it and that what constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use. The court went further and held that a person who occupies another’s person’s land with that person’s consent, cannot be said to be in adverse possession as in reality he has not dispossessed the owner of the land and the possession is not illegal.
18. The Applicant in effect has proved that he has dispossessed the registered owners of the suit land by doing acts that are inconsistent with the owner’s rights, has occupied the suit land built permanent and temporary structures, cultivated and kept livestock on the suit land without the owners permission as was held in the case of *Kamataka Board of Wakf v Government of India & Others* (2004)10 SCC 779 where a court in India stated thus:-
- “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 by clearly asserting 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 continues. 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 dispossession of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”
19. I find that the Applicant has proved his case against the respondent hence he has acquired the suit land by way of adverse possession. The prayers in the Originating Summons dated August 21, 2019 are hereby allowed as prayed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 8TH DAY OF MAY, 2023.

M.A. ODENY

JUDGE

