



REPUBLIC OF KENYA



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**Kahi v Manasseh (Environment & Land Case 23 of 2021)  
[2023] KEELC 20593 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20593 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA  
ENVIRONMENT & LAND CASE 23 OF 2021**

**E ASATI, J**

**OCTOBER 12, 2023**

**BETWEEN**

**JOHN LUNDU KAHI ..... PLAINTIFF**

**AND**

**WILFRED KAMADI MANASSEH ..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. This suit was first filed in the Environment & Land Court at Kisumu as Kisumu ELC Case NO. 340 of 2016 on 14<sup>th</sup> December, 2016 vide the Originating Summons dated 13<sup>th</sup> December, 2016. The Plaintiff John Lundu Kahi sought the court to determine;
  - a. whether the Plaintiff has had sufficient prescriptive rights through adverse possession over property known as South Maragoli/Kegoye/508 as against the Defendant.
  - b. whether the Plaintiff should be registered as the proprietor of property known as South Maragoli/Kegoye/508 on the grounds that since 1991, the Plaintiff has been openly and peacefully enjoying the uninterrupted possession for over twelve (12) years preceding the presentation of this Summons.
  - c. whether the Defendant should execute a transfer and do all acts necessary to convey the said title to the Plaintiff as the rightful proprietor and enable it to be registered as such and in default, the Deputy Registrar be authorized to sign the relevant documents on behalf of the Defendant.
  - d. who is to bear the costs of this summons.
2. The Originating Summons was premised on the grounds that the Defendant is the Administrator of the Estate of Manasseh Mudegu Chalunga. That the Plaintiff has been in possession of the property known as South Maragoli/Kegoye/508 for a period which is adequate in continuity, in publicity



and in extent to show that the possession is adverse to the Defendant. That the Defendant became dispossessed of the property since 1991 and the Plaintiff has enjoyed quiet possession thereof ever since and that the Plaintiff resides on the said property.

3. The Originating Summons was supported by the averments contained in the Affidavit in Support of Originating Summons sworn by the Plaintiff on 13<sup>th</sup> December, 2016 and the annexures thereto.
4. The Defendant responded to the Originating Summons by filing an appearance, Notice of Preliminary Objection and a Replying Affidavit sworn by the Defendant all dated 28<sup>th</sup> December, 2016. The Defendant's contention was that the Originating Summons was incompetent, incurably defective and an abuse of the court process and that the court lacked jurisdiction as the same matter was the subject of succession cause No.614 of 2015 pending before the High Court at Kakamega. That the Plaintiff has never been in possession of the suit land.
5. On 31<sup>st</sup> January, 2018, the court made an order transferring the suit to the Environment & Land Court Kakamega within whose jurisdiction the suit property was situate. Later upon the opening of the Environment & Land Court at Vihiga, the matter was transferred to the Environment and Land Court Vihiga for hearing and disposal.
6. Direction on the Originating Summons were taken on 18<sup>th</sup> July 2022, inter alia, that the originating Summons be disposed of by way of *viva voce* evidence.

### **The Evidence**

7. In addition to the pleadings filed earlier, the Plaintiff filed a Further Affidavit sworn by himself on 18<sup>th</sup> July, 2022, and other Affidavits Sworn by James Kanyangi Kalu and Teresa Wambui on the same date. His evidence comprised of his own testimony, the exhibits he produced and the testimonies of the two witnesses that he called.
8. The Plaintiff testified as PW1. He relied on the contents of the Affidavit in Support of Originating Summons and the Further Affidavit as his evidence in chief. He produced Certificate of Official Search dated 25<sup>th</sup> August, 2015 in respect of the suit land as exhibit P1. Grant of Letter of Administration in Kakamega High Court Succession Cause No.614 OF 2015 in respect of the estate of Manasseh Mudegu Chaluga as exhibit P2, certificate of Official Search dated 12/7/2022 as exhibit P3.
9. On cross-examination, he stated that he bought land from one Catherine Jandeka Mudegu in 1991 and the sale was concluded in 1992. That the land sale agreement was misplaced. That at the time of purchase, the land was registered in the name of Masasseh Mudegu. That Catherine Jandeka assured him that she was the successor of the deceased registered owner. That Catherine was the wife of the deceased registered owner. That he took possession of the land between the years 1991 and 1992. That on the parcel of land, he has fish ponds, trees and a house. That he had tried to settle the matter amicably but when the Defendant became difficult, hence he filed the suit.
10. On re-examination, he stated that the land is under fish farming. That he has planted trees, tills part of the land and grows crops. That the issue of ownership was never determined in the succession cause. That he has always occupied the suit land since the year 1991. That a caretaker and his brother reside on the land taking care of the land while he is away in the USA. That the Defendant has never displaced or evicted him from the suit land. That an old house which was on the land was pulled down by the seller in the year 1991.
11. PW2 was one James Kanyangi Kalu. He adopted the contents of his Affidavit sworn on 18<sup>th</sup> July, 2022 as his evidence-in-chief. He had stated in his Affidavit that he is a brother to the Plaintiff. That in



the year 1991 while he worked as a clerk for his brother at Mbale Supermarket, he wrote a cheque to Catherine Jendeka Manasseh who had sold the suit land to the Plaintiff.

That at one time, he was given a land sale agreement regarding the suit parcel of land to take to the area Assistant Chief William Kamengere to stamp. That sometimes thereafter the Plaintiff allowed him to utilize the piece of land and have been conducting various farming activities thereon and is currently running several fish ponds on the land.

That the house of the deceased which was on the land was demolished by Catherine Jendeka in the year 1998. That he has never received any notice asking him or his brother to vacate the suit property. That he has never received any complaint concerning his occupation of the land.

12. On cross-examination he stated that the land was bought from the lady called Esther Jendeka. That he did not sign the agreement. That they do fish farming on the land and that there are trees and a house on the land. That the fish ponds on the land are his and they don't belong to John Lundu. And on re-examination, he stated that all the property on the land belongs to John Lundu and that he is only a caretaker. That they occupy the land peacefully and Manasseh family has never come to claim it.
13. PW3 was Teresa Wambui who adopted the contents of her Affidavit sworn on 18/2/2022 as her evidence in chief. She stated in the Affidavit that she is the wife of the Plaintiff. That in the year 1991 Catherine Jendeka Manasseh and Jane Jandeka approached her husband to buy land from her. That the agreed purchase price of Kshs.140,000/= was paid between the year 1991 and 1992. That after purchase, her husband permitted his brother to utilize the land and take care of it to date. That Catherine Jendeka resides in Soy where her husband had another land. That Jane Jendeka was married to the Plaintiff's uncle.
14. On cross-examination, PW3 stated that they lost documents including the land sale agreement. That they took possession of the land in the year 1991. That they authorized PW2 to take care of the land.
15. On re-examination, she stated that the purchase price was Kshs.140,000/=. That the house on the suit land is not vacant as the same is occupied by the Plaintiff's workers. That nobody has ever demanded that they vacate the land.
16. In addition to the Notice of Preliminary Objection and the Replying Affidavit filed, the Defendant filed Replying Affidavit to the Plaintiff's Further Affidavit sworn by the Defendant on 19<sup>th</sup> August, 2022 witness statement and documents. The evidence on behalf of the Defendant comprised of the Defendant's testimony, the exhibits he produced and the testimony of DW2.
17. The Defendant testified as DW1. He adopted the contents of the Replying Affidavit to Originating Summons sworn on 28<sup>th</sup> December, 2016 and the Replying Affidavit to Plaintiff's further Affidavit sworn on 19<sup>th</sup> August, 2022 as his evidence in chief. He produced the certificate of death for Manasseh Madegu Chaluga as exhibit D1, copy of title deed for the suit land as exhibit D2, copy of petition and gazette notice in respect of succession to the estate of Manasseh Madegu as exhibit D3 and Grant of Letters of Administration to the Estate of Manasseh Mudegu as exhibit D4. He stated that he has never seen any land sale agreement in regard to suit land. That the Plaintiff has never occupied the land and does not use it. That the land is being used by one Jackson Ndayala who is the Defendant's cousin. That the Plaintiff has never constructed any house on the land. That Jackson Ndayala uses the land to plant maize and currently grazes his animals thereon.
18. On cross-examination, the Defendant stated that he has never been in actual occupation of the suit land. That he is the Administrator of the estate of his late father. That nobody objected to the succession proceedings and the Plaintiff could not object as he is not a blood relative of the deceased. That it is Jackson Ndayale Cheluge who stays in the house which is on the suit land. That Jackson



- Ndalaye has land that is adjacent to the suit land where he has built and resides. That the trees on the land were planted by his (Defendant's) parents. That he does not know whether there are fish ponds on land. That he stays in a place called Naingiri near Eldoret.
19. On re-examination, he stated that after the death of his mother in the year 2015, the Plaintiff visited his house and said that he had bought the land. That John did not give him any agreement and that John has never come back to him since then.
  20. DW2 was Jackson Ndayala Chaluga. He relied on his witness statements dated 19<sup>th</sup> August, 2022 as his evidence in chief. He had stated in witness statement that he is an immediate cousin to the Defendant. That after the death of the Defendant's father, the Defendant's mother one Catherine Jandeka Manasseh permitted him to use the suit property. That he used it to plant foodstuffs and he has been using the suit property until the demise of the Defendant's mother, after which the beneficiaries allowed him to continue using the land. That nobody has ever approached him claiming ownership of the land. That he has enjoyed the use of the suit property peacefully. He stated that it is only recently that PW3 came to the land and demanded to use it.
  21. On cross-examination, he stated that he owns land which is adjacent to the suit land on which he built his house in the year 1992 where he stays. That the trees on the suit land were planted by his uncle by the name of Essau Chunguli. That he could not remember the year when the trees were planted. That there are 2 fish ponds on the land from which James has been harvesting the fish. There is no caretaker of the Plaintiff on the land. And on re-examination, he stated that nobody lives in the house which is on the suit land.

### **Submissions**

22. At the close of the evidence, the parties agreed to file and exchange written submissions on the case. Written submissions dated 30<sup>th</sup> May, 2023 were filed on behalf of the Plaintiff by the firm of Osango & Company Advocates. Similarly, written submissions dated 5<sup>th</sup> July, 2023 were filed on behalf of the Defendant by the firm of Ben Aduol Nyanga & Company Advocates.

### **Issues for Determination**

23. The issues for determination in this suit are the questions set out in the Originating Summons.

### **Analysis and determination**

24. The law in Order 21 Rule 4 of the [Civil Procedure Rules, 2010](#) requires this court to ensure that its judgements in defended suits contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision. Rule 5 requires the court, in suits in which issues have been framed to state its findings or decision with the reasons therefor upon each separate issue. Guided accordingly, I proceed to determine the issues herein.
25. The first question that the Originating Summons invites the court to determine is whether the Plaintiff has had sufficient prescriptive rights through adverse possession over the suit land as against the Defendant.
26. It was the Plaintiff's case that sometime in 1991, one Catherine Mudegu (who was the mother of the Defendant) approached him and requested that the Plaintiff buys the suit land from her to facilitate payment of fees for her children including the Defendant herein. That the Plaintiff subsequently bought the land at Kshs 140, 000/= which was the agreed purchase price and which the Plaintiff paid to her in full by way of instalments. That he then took possession of the suit land upon purchase in



- the year 1991 and has been in continuous, open, public and hostile occupation and use of the land to date. That he built a house, made a home thereon and does fish farming which is managed by PW2 and had planted trees on the lower side of the land which are now mature. That the occupation has been uninterrupted. The evidence of PW2 and PW3 supported the testimony of the Plaintiff. The plaintiff did not produce the land sale agreement and the explanation was that the same is lost.
27. The plaintiff averred in paragraph 8 of the Affidavit in Support of Originating Summons that at the time when he entered onto the suit land the same was registered in the name of the deceased. Further that he knew about it and that the seller, Catherine Mudegu, represented to him that she was the apparent heir to the estate of the deceased and that she had authority to transact as such. Did the limitation period start to run in favour of the Plaintiff from the time he took up possession in the year 1991?
28. Adverse possession is a doctrine of law through which a person obtains legal title to land by reason of actual, open, hostile and continuous occupation of the land to the exclusion of the registered owner for a prescribed period, in Kenya twelve years. Adverse possession is an extinctive process whereby a possessor of land acquires a right by extinguishing the legal right of another, the registered owner. The doctrine is anchored on the provisions of Sections 7, 13 and 38 of the *Limitation of Actions Act*. Section 7 prohibits filing of actions for recovery of land after the expiry of 12 years from the date the right of action accrued. This means that at the end of twelve years of occupation of land by an adverse possessor, the right of the registered owner of the land to recover the land is extinguished and the right of the adverse possessor to claim title to the land matured.
29. In the case of *Mtana Lewa –vs- Kabindi Ngala Mwangandi* [2015] e KLR the court of Appeal defined adverse possession as:
- “Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or in action of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”
30. For adverse possession to crystalize the presence of two actors namely an indolent and inactive title holder who fails to assert his rights over the land within the time stipulated by law and an adverse possessor who dispossesses the registered owner of occupation and remains in continuous, open and uninterrupted occupation for the stipulated period. In this case, at the time of entry onto the suit land the title holder was deceased. Certificate of death in respect of the deceased produced as exhibit shows that the deceased Mannasseh Mudegu Chaluga died on 27<sup>th</sup> July 1983 long before the Plaintiff entered the suit land. Time could not run against the title of the deceased.
31. The plaintiff has sued the Respondent herein who is the son of the deceased and administrator of his estate. The Respondent became Administrator of the estate vide Grant of Letters of administration Intestate issued on 18<sup>th</sup> November 2016. The court of Appeal in *Francis Gitonga Macharia Vs Muiruri Waitbaka* [1998]eKLR held that
- “the limitation period for purposes of adverse possession only starts running after registration of the land in the name of the Respondent. It follows that in the instant case; time for adverse possession could not run against the respondent prior to the year 1978 as he had



no proprietary interest in the suit property. Time for adversity cannot run against a person who has no interest in the property....”

32. Firstly, the Respondent had no proprietary rights over the suit land prior to the year 2016. Secondly, he did not inherit any overriding interests to which the suit land could be subject in terms of section 28 (h) of the *Land Registration Act* as there were none.
33. Further, time would not run against the widow of the deceased or the Defendant herein as the child of the deceased as they were not the personal representatives or the administrators of the estate of the deceased. In *Re Estate of Barasa Kanenje Manywa (Deceased)* (Succession Cause 263 of 2002) [2020] KEHC 1 (KLR) it was held that the mere fact that a person was a surviving spouse or child of the deceased did not make him or her a personal representative of the deceased. One only became a personal representative or administrator upon being appointed by the court as such. The property of the intestate would not vest in any person until such person was appointed administrator by the court. Any transaction, entered into with a person who was yet to be appointed administrator, over estate assets, would be null and void, since such assets would not have vested in such a person, and such person would have no standing in law to transact over such property.” Also In *Re Estate of David Livingstone Loka Injene (Deceased)* [2019] eKLR which held that:

“I should state that the mere fact that a person is a child or a spouse of the dead owner of the property does not give them any right or power to deal with the property as if the same belonged to them. The only person who can handle the property of a dead person as if that property belonged to them is the person who holds a grant of representation, for that is a personal representative of the deceased, whether as an administrator or an executor.”
34. The period between when the deceased died on 27<sup>th</sup> July 1983 and the date when the grant was issued on 18<sup>th</sup> November 2016, there was no person with capacity to transact in the suit land, and against whose title and interest time for adverse possession could run. Hence the land sale transaction, Plaintiff’s entry onto and his stay on the suit land in the manner described by the Plaintiff and his witnesses was an act of intermeddling with the estate of the deceased, an act prohibited by section 45 of the *Law of Succession Act*. For these reasons I find that the first question on the Originating Summons is answered in the negative. The Plaintiff has not had sufficient prescriptive rights through adverse possession over the suit land as against the Defendant.
35. The second and third questions on the Originating Summons are anchored on the determination of the first question. The second question seeks the court to determine whether the Plaintiff should be registered as the proprietor of property known as SOuth Maragoli/Kegoye/508 on the ground that since 1991, the Plaintiff has been openly and peacefully enjoying the uninterrupted possession for over twelve (12) years. Having found that the Plaintiff has not acquired rights of adverse possession, there will be no basis for this court to find that the plaintiff should be registered as proprietor of the suit land. Similarly, as regards the third question, there will be no basis to order the Defendant to execute a transfer and do all acts necessary to convey the title to the Plaintiff.
36. As concerns costs of the suit in the circumstances of this case I find it just that each party bear own costs.
37. I find that the plaintiff has not proved his case on a balance of probabilities and make the following orders:
  - a. The suit is dismissed
  - b. Each party to bear own costs.



Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED THIS 12<sup>TH</sup> DAY OF OCTOBER, 2023 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

In the presence of:

No appearance for the Plaintiff.

Willie for the Defendant.

