



**Mwilu v Muyanga & another (Environment & Land Case E003 of 2021)
[2023] KEELC 20726 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20726 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND CASE E003 OF 2021
LG KIMANI, J
OCTOBER 12, 2023**

BETWEEN

DANIEL KILATYA MWILU APPLICANT

AND

PAUL MULI MUYANGA 1ST RESPONDENT

PHILIP MULI KITHOME 2ND RESPONDENT

JUDGMENT

1. Before the court is the Originating Summons dated 29th December 2021 seeking the following orders:
 1. An order that the Plaintiff/Applicant is entitled by way of adverse possession of all that Land Parcel Number Nzambani/Kyanika/2230 having been in active possession, use and occupation of the suit property for a period exceeding 12 years.
 2. That an order that the Defendant's title to the Land Parcel Number Nzambani/Kyanika/2230 measuring 0.11 Ha has been extinguished in favour of the Plaintiff under Section 37 and 38 of the *Limitation of Actions Act*.
 3. An order that the Defendants (as the legal administrators of the estate of Muli Maketi-Deceased) do transfer to the Plaintiff the whole of the Land Parcel Number Nzambani/Kyanika/2230 filing with the Deputy Registrar of this Court be authorized to sign all necessary papers, documents and transfer forms, application for consent for the Land Control Board to ensure that the Plaintiff is registered as the owner of the Land free from all encumbrances.
 4. An order that the District Lands Registrar and the Surveyor to dispense with the production of the original title Deed and to forthwith register the property in the name of the Plaintiff/Applicant.
 5. That costs for this application be provided for.



6. That this Honourable Court be pleased to issue any other or further relief as it may deem fit.
2. Several grounds are relied on in support of the application herein. The Applicant states that he has been in continuous, un-interrupted, peaceful occupation use and possession of the suit land Nzambani/Kyanika/2230 for a period exceeding 12 years. He further claims that he purchased a parcel of land which after adjudication came to be known as land parcel number Nzambani/Kyanika/250 from Muli Maketi (Deceased) in the 1960s. He believes the suit land was fraudulently curved out of the said land despite the fact that he was in possession.
3. In response, the Respondents filed a Replying Affidavit denying the Applicant's claim and stating that the land in dispute Nzambani/Kyanika/2230 belonged to Muli Maketi (Deceased), who is their grandfather and great-grandfather respectively. They are the administrators of his estate through Kitui Chief Magistrates Succession cause No. 40 of 2009. They state that the Applicant filed a protest in the succession Cause but the same was dismissed. Upon confirmation of the grant, the suit land was awarded to them and they sold it to a company by the name of Anchor Mumoni Bar & Restaurant Ltd.
4. The Respondents claim that they have used the land to graze cattle until they were stopped temporarily in 2018 during construction of Kitui-Mutomo-Kibwezi Road. They also state that there have been boundary disputes between them and the Applicant who owns the adjacent land parcel Nzambani/Kyanika/2860 with beacons being put in place and removed.
5. It is the Respondents' contention that the orders sought are untenable, because time started running from the year 2017, if at all, and twelve years have not lapsed.
6. The Respondents vehemently denied the Applicant ever being in possession of the suit property but stated that in November 2021, he proceeded to till the suit land when the succession matter was pending its judgment. It is their contention that the Applicant has not exhibited anything permanent that he has ever planted in the suit property as proof that he was in possession for the last 12 years.

Evidence at the trial

7. The hearing of the suit proceeded on 7th February 2023 when PW 1 Daniel Kilatya Mwilu testified adopting his witness statement filed on 31st October, 2022 as evidence in chief. In his witness statement he reiterated that he was represented by his brother, Samuel Kithisya in purchasing the suit land from Muli Maketi(Deceased) in the 1960s who later died intestate on 6th April 1976. The area underwent adjudication in the 1980s and the land he purchased was registered as land parcel No. Nzambani/Kyanika/250 and he was later issued with a title deed.
8. The Applicant testified that he came to learn of the existence of Kitui Succession Cause Number 40 of 2009 estate of Muli Muketi after filing a citation number 30 of 2017 at Kitui Law Courts. He also found out that portion of his land had been parceled out and registered as land parcel number Nzambani/Kyanika/2230 in the names of the Muli Maketi (Deceased). That he filed a protest in the succession cause but the same was dismissed citing lack of jurisdiction. He stated that the Respondents having taken out letters of administration, have deliberately failed and/or refused to distribute the suit property to him, knowing that it has been his for over fifty (50) years.
9. He claims that he has been in continuous un-interrupted, peaceful use, occupation and possession of the suit land since the 1960s and all his children who were brought up on the suit land and are now adults the eldest being 45 years old. He stated that he has been farming on the property and as a result, the deceased's title has been extinguished in his favour and he is entitled to be registered as the proprietor of Land Parcel Number Nzambani/Kyanika/2230.



10. In his written statement he stated that the Respondents threatened to evict him from the suit property in the year 2009 and upon conducting a search, he found that the land was still registered in his name. Upon purchasing the ground map at the survey office, he found out that land parcel Nzambani/Kyanika/2230 which is fenced inside his property on the ground was adjudicated and registered as a separate property then issued with number Nzambani/Kyanika/2230 in the name of Muli Maketi(Deceased). This resulted in his property being smaller on paper but bigger on the ground because Nzambani/Kyanika/2230.
11. According to the Applicant, the respondents sold the land to a third party Anchor Mumoni Bar and Restaurant Limited on 7th January 2022. The Respondents invited the District Surveyor Kitui on 1st January 2022 to establish the boundary between Nzambani/Kyanika/2230 and 250 and concrete pillars were erected which cut across his property.
12. Upon cross-examination, the Applicant stated that his advocate did not explain to him the contents of his supporting affidavit and that the signature on it did not belong to him. He however reiterated the claim in his Originating Summons and stated that the entire land was sold to him by Muli Maketi who gave him permission to live on it including land parcel 2230. He however confirmed that his house is on land parcel 250.
13. The Applicant confirmed that he had planted foodstuff on parcel 2230 and that the Respondents cut down the maize. He stated that the title deed for 2230 was not obtained legally.
14. PW 2 Edward Maingi Kilatya adopted his witness statement as evidence in chief stating that he is the first-born son of the Applicant herein born on the suit property in 1970. He recalled planting mango trees on the land which stand to date. He testified that in the year 2009, the Respondents threatened to have them evicted from the suit property. He confirmed the Applicant's statement on how they found out about existence of land parcel Nzambani/Kyanika/2230 and Kitui Succession Cause No. 40 of 2009.
15. The witness stated that the land was fenced off when his father bought it but that he did not have photographs of the crops stated to be planted on the land. He realized that land parcel 2230 was carved out of 250 when he saw the map. He stated upon cross-examination that the Applicant's occupation was peaceful until 2009. He was not aware of the process that gave rise to the title deed.
16. PW 3 Mwanza Kiema Kieti, testified and adopted his witness statement filed on 31 October 2022 where he stated that he has been the Applicant's neighbour for more than sixty years and that he also knew Muli Muketi (deceased) the person who sold him the land.
17. The witness stated that the boundary marked by a fence still stands to date and that the Applicant has been using the property peacefully, openly and uninterrupted and that adverse rights have accrued in the Applicant's favour and that the purchasers of parcel 2230 hold the property in trust for the Applicant.
18. The Defence case proceeded on 19th April 2023, when DW 1, Bernard Mwema Kilonzi, the area chief of Kyanika location testified, adopting his witness statement filed in Court on 6th February 2023. In the statement he stated that he is aware of the ownership dispute between the parties and on 29th March 2016 in the presence of the parties they established the boundaries between the parties' parcels of land.
19. On cross-examination, the witness stated that no one has built on land parcel Nzambani/Kyanika/2230. He confirmed writing the letter dated 6th February 2023 to confirm that surveyors and all parties visited the land in 2016 for a boundary verification exercise done at the request of the



- Respondents. He was present at the exercise, accompanying the chief at the time but acknowledged that he did not produce the chief's letter confirming attendance.
20. The witness also stated that he did not know how the Respondents obtained the land nor how the title was registered and had never heard of a dispute over ownership of the land. He stated that the Respondents are the only surviving grandson and great grandson of Muli Maketi. He further stated that the provincial administration was interested in buying Nzambani/Kyanika/2230 but later lost interest when they found out there was a dispute involving the land. He further stated that he knew that there was a case in Court when he wrote the letter exhibited dated 6/2/2023.
 21. Upon re-examination, DW 1 stated that the Applicant has been chasing away the Respondents when they come onto the land which gave rise to disputes and disagreements.
 22. DW 2 Dan Kinza Mulei, testified by adopting his witness statement filed in court on 6th February 2022, where he stated that he is a director of The Anchor Mumoni Limited. The Respondents approached him on 23rd December 2021, with a proposal to sell land parcel Nzambani/Kyanika/2230 and upon conducting a search, they found that it was duly registered in the Respondents' names. The Company Anchor Mumoni and the Respondents entered into an agreement on 26th December 2021 and went to erect fencing poles on the suit property but an elderly man with three or four boys came to the land and alleged it was their land and they ran away as they had clubs with them. They reported the matter to the police station together with the Respondents.
 23. Upon cross-examination, the witness stated that he did not have any document to show that he was a director of the Anchor Mumoni and did not have a title deed in the name of the Anchor Mumoni Ltd. It was also noted that they entered into the Agreement for Sale on 23rd December 2022 while the Title deed was issued on 19th January 2023, within a period of less than one month. He however denied knowing that the land had an ongoing court case. He stated that when they were buying the land they did find maize growing there.
 24. DW 3 Paul Muli, the 1st Respondent herein also testified and relied on his replying affidavit sworn on 28th February 2022 and filed in court on 2nd March 2022 as his evidence in chief. It was his statement that the suit land belonged to his grandfather, Muli Maketi while his father died in 1982. The title was issued in the Respondents' names after a succession cause.
 25. The 2nd Respondent stated that the Applicant and his sons live on Land Parcel Nzambani/Kyanika/250 and not land parcel Nzambani/Kyanika/2230 and that land parcel 2230 did not form a part of the Applicant's land. He however stated that he did not know where 2230 evolved from. According to him, the Applicant has been arrested 3 times as a result of his complaints for trespassing onto the suit property. The Applicant knew of the succession case when they did the boundary verification in 2016. He denied any wrongdoing in the sale of the suit property or in living and grazing on the land.
 26. DW 4 Philip Muli Kithome, the 2nd Respondent herein was the last witness to the Defence case. He stated that he has never seen the Applicant cultivate the suit land until he did so in December 2021. He adopted the joint replying affidavit as his evidence in chief.
 27. Upon cross-examination, he said that he got the land through succession from his great grand-father Muli Maketi, and that they used the land to graze. He stated to the Court that he found the Applicant living elsewhere, not on the suit land but that his land borders the suit land which is land parcel 250.
 28. When they did the survey exercise in 2016, the Applicant had destroyed the boundary and crossed over. The title to the land was transferred immediately after they finished with the succession.



29. On re-examination, the 2nd Applicant said that there was nothing to prevent them from selling the land once they inherited it through succession.

The Applicant's written submissions

30. Counsel for the Applicant summarized the Applicant's claim and stated that he had proved his case through oral and documentary evidence submitted that a claim for adverse possession is attached to land and not title and it does not matter who owns the land as they relied on the case of Maweu vs Liu Ranching & Farming Co-operative Society (1985) KLR.
31. His submission was that a right to adverse possession started running immediately the last instalment was made from the purchase of the initial Land Parcel number Nzambani/Kyanika/250 in 1961 to 2009, which is over 48 years.
32. Further, it was submitted that once payment of the last instalment of the purchase price had been effected, the purchaser's possession became adverse to the vendor. Counsel relied on the cases of Public trustee v Wanduru Ndegwa (1984) eKLR and Hosea v Njiru & others (1974) EA 526.
33. Counsel cited several authorities on the element of the occupation being adverse, non-permissive and non-consensual namely: Gabriel Mbui vs Mukindia Maranya [1993] eKLR , Wambugu vs Njuguna(1983)KLR 172 Mtana Lewa v Kahindi Ngala Mwagandi(2015)eKLR and Mbira v Gachuhi(2002)1 EALR 137
34. The Applicant contends that the occupation has been open, continuous and exclusive a fact that was not controverted or objected and quoted from the case of Samuel Kihamba v Mary Mbaisi (2015) eKLR.
35. It was denied that time ever stopped running for the reason that a succession cause is not a suit to assert the rights over land and is only for distributing the properties of the deceased person and cited the authority of Isaac Cypriano Shingore v Kipketer Togom (2016) eKLR and Benson Mukuwa Wachira vs Assumption Sisters of Nairobi Registered Trustees (2016) eKLR on the issue.
36. The Applicant also submitted that the land was clearly identified as required by Order 37 rule 7 of the Civil Procedure Rules as he had produced a copy of the title deed extract, citing the case of Wilson Kazungu Katana & 101 others vs Salim Abdalla Bakshwein & another (2015) eKLR.

The Respondents' submissions

37. Counsel for the Respondents made their written submissions and summarized the case for the Applicant and Respondent. He highlighted that PW 1, the Applicant herein testified that the signature on the supporting affidavit was not his and therefore the Originating Summons are unsupported by an affidavit as envisaged by Order 37 rule 7 and is fatally defective. It was further submitted that the annexures in the said affidavit and the ones on the list of documents filed in court were therefore not produced as exhibits in Court and that the Applicant only adopted his witness statement. On this matter, Counsel relied on the holding by the Court of Appeal in the case of Kenneth Nyaga Mwige vs Austin Kiguta & 2 others (2015) eKLR where the Court held that a document has to be produced as an evidence by a witness and admitted by the court to become part of the judicial record.
38. Counsel further claimed that the Respondents had been sued as the proprietors of the suit land while the estate of Muli Maketi (Deceased) has not been sued. They submitted that the law requires that the Respondents be sued as administrators since they became the land owners in 2021 and 12 years have



not lapsed since then they relied on the case of Titus Mutuku Kasuve -vs- Mwaani Investments Limited & 4 others (2004) eKLR on this point.

39. Regarding the basic conditions for an order of adverse possession to be granted, counsel for the Respondent was guided by the decision in Tabitha Waitherero Kimani v Joshua Ng'ang'a (2017) eKLR. It is their submission that time only starts running once the Applicant comes to know of its registration or existence and therefore in this case started to run in 2017 when the Applicant came to know of the registration of Land Parcel Nzambani/Kyanika/2230, also noting that the Applicant testified that he lives on Nzambani/Kyanika/250. They relied on the holding in the case of Richard Wefwafwa Songoi vs Ben Minyifwa Songoi (2020) eKLR.
40. It is the Respondents' submission that the Applicant failed to prove the time he started tilling the suit land for time to start running and that it is not clear when he entered into the land for a claim for adverse possession to accrue.
41. On the requirement that adverse possession must be open, notorious and exclusive, counsel submitted that this requirement has not been met because the Respondents had asserted their rights over the land time and time again and there have been disputes to the extent of reporting to the police. There was also a boundary dispute which was determined in the year 2016 the common boundary was erected again by the district surveyor on 13th January 2022. It is therefore their submission that there was no continuous, peaceful and uninterrupted stay by the Applicant in the suit property was held in the case of Wilson Kazungu Katana & 101 others vs Salim Abdalla Bakshwein & another and Kim Pavey & 2 Others vs Loise Wambua Njoroge & another (2011) eKLR.
42. The Respondents' final submission is that the Applicant's pleadings have not met certain conditions required in filing a suit for adverse possession namely, that there is no affidavit in support of the Originating Summons since the signature on it was disowned by the Applicant, that they had not produced a certified extract of the title deed in accordance with Order 37 Rule 7 of the Civil Procedure Rules(2010), that the Applicant has not shown by evidence that he is in possession of the suit property thereof. They also stated that the originating summons does not have a penal notice on it to enforce the orders and that the Applicant has not sued the right party which is the estate of the deceased in the pleadings. They relied on the authorities Maina Njuguna vs Paul Njuguna Mwangi and Wilson Kazungu Ktana & 101 others vs Salim Abdalla Bakshwein & another (2015) eKLR and urged the court to dismiss the suit with costs.

Analysis and Determination.

43. Based on the pleadings filed in court, the evidence adduced in court and submissions by Counsel, the court is of the opinion that the following issues arise for determination;
 - A. Whether originating summons as drawn and filed is properly before the court.
 - B. Whether the Applicant's claim meets the threshold for a claim for adverse possession of land parcel Kyangwithya/Ndumoni/428."
 - C. Whether the orders sought should be granted.

A. Whether originating summons as drawn and filed is properly before the court.

44. On this issue counsel for the respondent raised several preliminary issues of procedure and substance that will be dealt with under the 1st issue arising for determination. Some of the issues counsel raised were the subject of the preliminary objection dated 21st January 2022. The said preliminary objection



was the subject of the court's ruling dated 30th September 2022 and the court finds that the issues dealt with in the said ruling cannot be subject to reconsideration in this judgement.

45. However, some of the issues considered in the said ruling will be reconsidered due to changes arising during hearing of the suit and the same will be evident during consideration of the issues as raised.
46. Counsel for the Respondents stated that during cross-examination the Applicant stated that the signature on the affidavit supporting the originating summons did not belong to him. Counsel drew the courts attention to the fact that the documents attached to the said affidavit and the ones filed under the Plaintiffs list of documents dated 5th December 2022 and filed on 8th December 2022 were never produced in court and to date the same do not form part of the court record.
47. Filing of originating summons and supporting affidavit is provided for under Order 37 rule 7 of the Civil Procedure Rules (2010) provides that:

“ An application under section 38 of the *Limitation of Actions Act* shall be made by originating summons.

(2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.”

48. In the case of *Malewa Ranching Company Limited v Joseph Nyutu Ng'ang'a & 146 others* [2022] eKLR where the Advocate did not properly commission an affidavit as required, the Court held that:

“ The provisions of Article 159 of *the Constitution* is not a cleanser of all short falls of the so called technicalities including fraud and forgeries on record. It comes in handy for innocent and genuine mistakes not deliberate forgery and fraud. The 3 affidavits on Respondents' side are the realm of fraud and forgery thus Article 159 cannot sanitize and cleanse them unlike the blood of Jesus which cleanses all sins but and except the abuse of the Holy Spirit of God. Thus the 3 affidavits cannot stand and will thus be struck out with costs assessed at Kshs. 5,000/- to be paid by the Advocate Maina personally.”

49. Similarly, in the present case, the signature to the supporting affidavit having been disowned by the deponent renders the said affidavit invalid and/or incompetent. Order 19 Rule 4 of the Civil Procedure Rules provides that “Every affidavit shall state the description, true place of abode and postal address of the deponent, and if the deponent is a minor shall state his age.” In the present suit without the signature of the deponent the court finds that the supporting affidavit cannot stand and is incompetent and the same is for striking out.
50. What then is the fate of the Originating Summons that is unsupported by an affidavit? The court issued directions under Order 37 Rule 16 of the Civil Procedure Rules on 11th November 2022 and allowed all parties to file witness statements and list of documents. Further, the applicant testified under oath and adopted the witness statement on which he was cross-examined. Order 37 Rule 18 provides for the directions on how to adduce evidence and conduct the hearing of summons and states;

“ If the parties do not agree to the correctness and sufficiency of the facts set forth in the summons and affidavit, the judge may order the summons to be supported by such further evidence as he may deem necessary, and may give such directions as he may think just for the trial of any issues arising thereupon, and may make any amendments necessary to make the summons accord with existing facts, and to raise the matters in issue between the parties.”



51. From the foregoing, it is clear that the witness statements cannot take the place of the supporting affidavit since the statement ought to be further to the evidence adduced in the affidavits. The court thus finds that the originating summons was not properly supported as required under Order 37 Rule 7 of the Civil Procedure Rules.
52. On the question of failure to produce in evidence the documents attached to the Plaintiffs list of documents dated 5th December 2022 and filed on 8th December 2022, the court has confirmed that indeed the Applicant did not produce the said documents or any other documents as exhibits. On the authority of the Court of Appeal case of Kenneth Nyaga Mwigie v Austin Kiguta & 2 others [2015] eKLR the documents filed in court under the Applicants list of documents dated 5th November 2022 and filed on 8th December 2022 even though mentioned by the Applicant in support of his case and he was cross-examined on the same, they are not part of the court record and are of very little, if any, evidential value since they were not evidenced as exhibits. The Court of Appeal stated as follows;
- “ 22. Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.”
53. The Respondent’s Counsel further submitted on the Applicant’s failure to attach a certified extract of title and stated that the law under Order 37 Rule 7 of the Civil Procedure Rules requires the Applicant to support the Originating Summons with a supporting affidavit and attach a certified extract of title to the land in question. The Applicant did not in the 1st instance attach the certified extract of title to the supporting affidavit. The affidavit in support of the Summons filed by the Applicant has been found to be invalid and/or incompetent and thus the documents annexed thereto are also not properly before the court.
54. The court has also found that the documents filed in court by the Applicant were not produced in evidence as exhibits and the same cannot be considered as evidence properly before this court.
55. The issue of production or failure to produce a certified extract of title was found to be fatal to a suit brought by way of originating summons claiming adverse possession by the Court of Appeal in the case of Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another [2015] eKLR; where the court held as follows;

“The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of Githu v Ndele [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them. It is exactly for this reason, perhaps that there was a mandatory requirement under the old *Civil Procedure Act* and the rules made thereunder that when taking out and O. S. anchored on adverse possession that an extract of the title to the subject land be annexed to the application. Indeed, the then Order XXXVI Rule 3D(2) specifically provided:



“...The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed...”

That requirement no doubt was couched in mandatory terms failing which it would render the O. S. incompetent. We have perused the entire O. S. and nowhere have we come across a certified extract of the title of the suit premises. Thus, the O.S. was incompetent and liable to be struck out. We are surprised that the trial court and counsel involved did not notice this fatal omission.”

56. From the foregoing authority the Originating Summons herein is found to be fatally defective since the same is not supported by a competent affidavit and a certified copy of the extract of title to the suit land is not attached. The originating summon is thus for striking out.
57. The Respondents further objected to the suit on the ground that they are wrongly sued as beneficiaries and/or administrators of the estate of Muli Maketi, the deceased owner of the suit land. However, contrary to the Respondents submissions and in reliance on the Authority of the Court of Appeal in Titus Mutuku Kasuve vs. Mwaani Investments Ltd (2004) eKLR the Respondents herein are not sued as beneficiaries or administrators of the estate of Muli Maketi but as the registered owners of the suit land. The copy of title deed attached to the Respondents replying affidavit shows that the Respondents were registered as owners of the suit land on 21st December 2021 which was before filing of this suit.

B. Whether the Applicant’s claim meets the threshold for a claim for adverse possession of land parcel Kyangwithya/Ndumoni/428.”

58. In the event that the court may be wrong in finding the Originating Summons herein incompetent, the court has proceeded to consider the Applicants claim on merit.
59. The Applicant claims a right to the suit land by way of Adverse possession. Section 7 of the [Limitation of Actions Act](#) Cap 22 Laws of Kenya provides that:

“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.”

60. Section 38 of the [Limitation of Actions Act](#) provides that:

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act (registered land), or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

61. In the case of Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others [2018]) eKLR, the Court enumerated the elements required to prove adverse possession as follows:

“Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non-permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, nec vi nec clam nec precario.”



62. Possession by the adverse possessor and dispossession on the part of the land owner is a key requirement as was held in the case of *Sisto Wambugu v Kamau Njuguna* [1983] eKLR which the Applicant relied upon: -

“The general principle appears to be that until the contrary is proved, possession in law follows the right to possess: *Kynoch Ltd v Rowlands* [1912] 1 Ch 527, 534. Lindley MR in *Littledale v Liverpool College* [1900] 1 Ch 19, 21 put it in these words:

“In order to acquire by the 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 ...”

63. Similarly, it was held by the Court of Appeal in *Kisumu Civil Appeal No. 27 of 2013 Samuel Kihamba v Mary Mbaisi* [2015] eKLR, where the court held:

“Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land”

64. The burden of proof lies on the Applicant to prove that they have a valid claim of adverse possession on the suit land. Section 107(1) of the [Evidence Act](#) Cap 80 Laws of Kenya, provides:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

65. The 1st question for consideration is when, if at all, the Applicant took possession of the suit land. The Applicant stated that he purchased what came to be known as land parcel number Nzambani/Kyanika/2230 from the deceased Muli Maketi on or about 1960's and that time for purposes of adverse possession started to run. He states that all his children have been brought up on this land and that his first born is now 45 years old. The Applicant stated that what he purchased as land parcel Nzambani/Kyanika/250 included land parcel Nzambani/Kyanika/2230. In his evidence in court the Applicant stated that he has constructed his home on land parcel number Nzambani/Kyanika/2860 a subdivision of parcel 250.

66. The Applicant stated in evidence that he entered into the transaction of purchase of the land through his brother who showed him the land he had purchased. Later on the land went through land adjudication and the Applicant was awarded land parcel number 250 measuring 1.1 hectares and a title deed was issued on 13th December 1985. The suit land parcel 2230 measuring 0.11 hectares was awarded to the deceased Muli Maketi and a title deed was issued on the same date 13th December 1985. The said title deeds were issued long after Muli Maketi had died since he is said to have died in April 1976.

67. The court's interpretation of the law is that between the period when the Applicant stated he purchased the suit land and came into possession in 1961 to the time title deeds were issued in 1985, time for purposes of adverse possession could not run for the reason that ascertainment and recording of rights and interests in the land had not been carried out as provided for under the [Land Adjudication](#)



Act Cap 284. Land adjudication is an elaborate process that requires identification, recording and pointing out of boundaries of the land by various owners and surveying of the same prior to registration

68. It has been held in various cases that before ascertainment of rights and interests in unregistered land under adjudication, land cannot be the subject of a claim for adverse possession since rights and interests in the land are not ascertained until the process is completed. In *Haro Yonda Juaje v Sadaka Dzengo Mbauro & another* [2014] eKLR the court held that;

“The ascertainment of rights of individuals under the Land Adjudication Act was meant to deal with the claims that may arise later under the doctrine of adverse possession. Indeed, the elaborate procedures set out in the said Act on how the rights of people over customary land were to be ascertained to the settlement of the disputes by various bodies during the adjudication process was meant to avoid future claims under the doctrine of adverse possession, specifically where one claims that the land he is occupying is his ancestral land.”

69. From the foregoing it is clear that between the period 1961 when the applicant states he purchased the land and 1985 when a title deed was issued to the deceased, a claim for adverse possession could not be made and time does not run since deceased had not been declared owner of the land.

70. The 2nd question for determination was the nature of the Applicant’s possession. Is there evidence of possession of the suit land by the Applicant? The applicant claims that he purchased land that included the suit land and took possession in the early 1960s by fencing and planting mangoes, oranges among other pomocultural activities. He stated that the said trees are still on the land and fully grown. However, there is not much evidence of the stated activities on record. The evidence that was proffered by the applicant as proof of the activities was one photograph attached to the impugned supporting affidavit. The said photograph shows an uncultivated piece of land with a fence of concrete poles, a house that is shown from a distance and trees which even though the applicant stated were mango trees the court is not in a position to properly identify them. There are no orange trees on the photograph or any other activities. The Applicant confirmed that he did not present in evidence photographs of the fence he stated he had put up on the suit property at the time he took possession in the 1960s. The fence that is visible from this photograph was said to have been put in place by the respondents and the purchaser Anchor Mumoni Bar & Restaurant Ltd in December 2021 and the house seen on the photograph was confirmed to belong to the applicant and is on land parcel number 250.

71. The Respondent on the other hand pointed to photographs that were filed in succession cause number 40 of 2009 during the hearing of the objection to confirmation of grant and the said photographs do indeed show that there was no farming activities going on the suit land. The Respondents while claiming that applicant did not have continuous possession and use of the land stated that the maize crops seen on the photograph adduced by the applicant were only planted in the year 2021 only for purposes of this suit.

72. The Applicant said in his recorded witness statement that he got to know that the suit land was registered in the name of the deceased in 2009 when the Respondents threatened him with eviction from the suit property. This prompted him to visit Kitui Lands office to confirm the status of the property and found that indeed land parcel Nzambani/Kyanika/250 was registered in his name. He was however shocked when he visited the survey office and purchased the ground map only to find that the land parcel number Nzambani/Kyanika/2230 which was fenced inside his land parcel number 250 was adjudicated and registered as an independent and separate property and issued a different number 2230. On cross examination the applicant stated that he came to know that the land did not belong to him when he was following up on his title deed in 2017 and this was the time he filed his documents in court. This was confirmed by the citation he filed as number 30 of 2017.



73. In the court's view the citation would have been filed immediately after discovering the existence of a separate title. This is also confirmed by the Applicant's statement in his statement that he was shocked to find out that a portion of his property had been parceled out and registered as Nzambani/Kyanika/2230. At another point, the Applicant stated that when the Respondents came to the land in 2016 with surveyors with the aim of establishing the boundary to the land and he refused because he did not know them and so the boundaries were not fixed.
74. The 2nd witness called by the applicant Edward Maingi Kilatya, a son to the applicant claimed that in 2009 the respondent threatened to evict them from the suit property and that was when they went to check at lands office only to discover that part of the land they had considered to be the Applicants land was registered in the deceased's name.
75. In the court's view there is contradicting evidence on the year when the applicant discovered the suit land was registered in the deceased's name. He stated that at lands registry title number 250 was still in his name. The court notes that the applicant did not file any documents he obtained from the lands office to show the position of the two land parcel numbers 250 and 2230 save for the sketch map attached to the supporting affidavit. The said map is not dated, signed and has no name and the court finds its authenticity questionable. The applicant further gave evidence that contradicted the documents filed especially the extract of title number Nzambani/Kyanika/250 shows that the title deed was closed on 17th December 2004 on subdivision and new numbers 2860 and 2861. Thus by the year 2009 title number 250 no longer existed and the two resultant title deeds were in existence.
76. From the foregoing it is the courts assessment that if the Applicant's assertion were true that he did not know that land parcel number Nzambani/Kyanika/2230 was registered in the name of the deceased, he could only have made this discovery sometime in the year 2016 or 2017 and not in 2009. This is around the time the applicant filed citation number 30 of 2017.
77. The significance of the time when the applicant is said to have become aware of the registration of the deceased as owner of the suit land is that it would mean that all along the Applicant was in possession of the suit land believing that the same was registered in his name under title deed number Nzambani/Kyanika/250 and subsequently Nzambani/Kyanika/2860. In the court's view, such possession could not be interpreted as being adverse to the rights of the deceased or his estate. It is the courts conclusion from the applicants did not have the requisite animus possidendi of intention to have the land from the deceased or his estate since he believed the land to belong to him as a result of purchase.
78. Courts have many times determined the prerequisites on adverse possession as stated by Counsel for the Applicant the same set out in the case of Mate Gitabi Vs Jane Kabubu Muga & Others (Nyeri Civil Appeal No. 43 of 2015 (unreported)); where it was stated that;
- “For one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin maxim nec vi, nec clam, nec precario.”
79. This was also held by the Court of Appeal in the case cited by the Applicant's Counsel Kisumu Civil Appeal No. 27 of 2013 Samuel Kihamba v Mary Mbaisi [2015] eKLR, where the court held:
- “Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be



an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land.”

80. In the present case the Applicant’s claim is that he took possession of the suit land upon purchase of the same from the deceased Muli Maketi and with his permission and/or consent and that at no time was that permission terminated.
81. However, from the court record the applicant claims that permission to occupy the land was at some point withdrawn by the respondents as administrators of the estate of the deceased Muli Maketi. As stated earlier, this could not have happened in the year 2009 as alleged by the applicant and PW 2 but the same may be taken to have been withdrawn some time in 2016 or 2017. This would also be the time that the applicant discovered that the suit land was registered in the name of the deceased. This is thus the time when time could have started to run for purposes of adverse possession. To the time of filing suit, the statutory period of 12 years had in the courts view not lapsed.
82. With regard to the Applicants claim that the land parcel number Nzambani/Kyanika/2230 was illegally and wrongly excised from his land parcel number Nzambani/Kyanika/250 and a title deed issued in the name of the deceased, the court is of the view that a one cannot lay a claim for adverse possession when he is contending that the title of the adverse party was procured and/or obtained illegally, wrongly and by fraud. A claim for adverse possession can only arise where the claimant concedes that the title belongs to the adverse party and that the title of the adverse party is not being challenged on whatever ground save for and on the basis of adverse possession.
83. The Applicant herein all along states that the suit land belongs to him. It is the position of this court that he is precluded from turning around and claiming the land on account of adverse possession. This position was taken by the court in case of Haro Yonda Juaje –v- Sadaka Dzenzo Mbauro & Another (2014) eKLR (supra) where 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.”

84. This position was confirmed by the Court of Appeal in the case of Richard Wefwafwa Songoi v Ben Munyifwa Songoi [2020] eKLR where the court found that a claim of title by way of a gift and a claim for adverse possession are mutually inconsistent and exclusive;

“The appellant testified he started using the suit property when he was given by his father. In the same vein, the appellant claims title to the parcel by way of adverse possession. The appellant’s claim is founded on title by way of gift from his father. He prevaricates and lays claim to the land parcel by way of adverse possession against the respondent. The pleas of title and a claim for adverse possession are mutually inconsistent and exclusive.



43. Comparatively, the Supreme Court of India in Mohan Lal –v- irza Abdul Gaffar, 1996, 1 SCC 639 faced with an inconsistent claim of title by agreement and adverse possession stated that since the appellant admitted he came into possession of land lawfully under an agreement and continued to remain in possession till date of the suit, the plea of adverse possession was not available to the appellant. That having come into possession by agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor and that the latter had acquiesced to his illegal possession during the entire period of 12 years.
44. Persuaded by the merits of the legal principle enunciated by the India Supreme Court and which we hereby adopt, in the instant matter, the appellant cannot found his claim to possession of the suit property on a gift from his father then also assert a claim over the parcel founded on adverse possession. He either proves he had a gift or proves independently his claim for adverse possession. The appellant’s claim founded on a gift fails as his father had no proprietary interest in the suit property that he could gift to the appellant in 1970.”
87. The Indian case relied upon by the Court of Appeal was faced with a claim that was similar to the claim before this court where there is an inconsistent claim of title by way of an agreement and adverse possession. The said court stated that since the appellant admitted he came into possession of land lawfully under an agreement and continued to remain in possession till date of the suit, the plea of adverse possession was not available to him.
88. The Court of Appeal went on to state that;
- “In our considered view, there is no evidence on record to prove that the appellant entered the suit property with intention to dispossess the respondent as the registered proprietor of the suit property. The appellant had no knowledge that the respondent was the registered proprietor.”
90. The court has not seen evidence to show that the applicant entered into the suit land with intention to dispossess the deceased as the registered proprietor of the suit land or the administrators of his estate since he had no knowledge that the Respondent was the registered owner. The claim for adverse possession is thus not available to him. It is a further finding of the court that when the Applicant became aware of the ownership of the suit land the statutory period has not run to the date of filing this suit.
91. For the foregoing reasons the court is satisfied that the Applicant’s suit has no merit and finds as follows;
- A) The Originating Summons dated 29th December 2021 is incompetent and improperly before the court and the same is hereby struck out.
- B) On the merits of the case the court finds that the Applicant has not proved the claim that he is entitled by way of adverse possession to land parcel number Nzambani/Kyanika/2230 registered in the joint names of the Respondents.
- C) The costs of this suit are awarded to the Respondents.

DELIVERED, DATED AND SIGNED AT KITUI THIS 12TH DAY OF OCTOBER, 2023.

HON. L. G. KIMANI



ENVIRONMENT AND LAND COURT JUDGE

Judgement read in open court and virtually in the presence of;

Musyoki - Court Assistant

Mutisya holding brief for Atonga for Applicant

N/A for the Respondents

