



REPUBLIC OF KENYA



**Nyundo & 2 others v Kindia & 2 others (Environment & Land Case
204 of 2017) [2023] KEELC 20605 (KLR) (11 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20605 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 204 OF 2017**

**MAO ODENY, J
OCTOBER 11, 2023**

BETWEEN

**WILSON BAYA NYUNDO 1ST PLAINTIFF
PAUL THOYA BAYA 2ND PLAINTIFF
EMMANUEL SIFA NYUNDO (SUING IN THE CAPACITY AS
THE ADMINISTRATORS OF THE ESTATE OF WILSON BAYA
NYUNDO) 3RD PLAINTIFF**

AND

**MWANGOME RODGERS KINDIA 1ST DEFENDANT
CHIGUNDA RODGERS KINDA 2ND DEFENDANT
ANTONY KINDIA MWANGOME 3RD DEFENDANT**

JUDGMENT

1. By a Plaint dated 12th October, 2017 the Plaintiff herein sued the Defendants seeking the following orders;
 - a. Orders of permanent injunction restraining the 1st, 2nd and 3rd Defendants jointly or severally by themselves, servants and or agents or any person or persons acting under them from trespassing, alienating, interfering, disposing off and in any other way dealing with Plot Number Kilifi/ Roka/ 112 situate at Roka, Kilifi, the subject suit premises, or any part thereof and vacant possession of the same.
 - b. Costs of this suit.
 - c. Any other or further relief as the nature of this suit the court may deem fit to grant.
2. The Defendants in response filed a defence and counterclaim seeking the following orders:



- a. A declaration that the Plaintiffs are entitled to the parcel of land known as Plot Number Kilifi/ Roka/ 112 situate at Roka, Kilifi by virtue of adverse possession.
- b. An order that Plaintiffs be registered as the proprietors of the parcel of land known as Plot Number Kilifi/ Roka/ 112 situate at Roka, Kilifi.
- c. Costs of the counter-claim.

Plaintiff's Case.

3. PW1 Paul Thoya Baya adopted his Witness Statement dated 18th August 2020 as his evidence in chief, the list of documents dated 2nd October 2017 and the further list of documents as Pex No. 1 to 9.
4. It was PW1's case that he obtained a Limited Grant of Letters of Administration that gave him the authority to represent the Deceased Plaintiff's estate. He told the court that the Deceased Plaintiff, his late father, was the registered proprietor of Title Number Kilifi/ Roka/ 112.
5. PW1 also stated that the deceased instituted a suit at Kilifi vide SRMCC No. 56 of 2000 seeking orders of vacant possession and Judgment was entered in his favour on 11th January, 2001, which were yet to be executed at the time of his demise.
6. PW1 further stated that the Defendants are illegally occupying the suit premises after having been ordered to vacate which he now seeks orders of permanent injunction restraining the 1st, 2nd and 3rd Defendants jointly and severally from trespassing, alienating, interfering, disposing off and or in any other way dealing with Plot Number Kilifi/ Roka/ 112 situate at Roka.
7. On cross-examination by counsel for the Defendant, PW1 stated that Wilson Baya died in 2018 and had instituted Kilifi Case No. 56 of 2000, further that the present Defendants were not parties in that case. It was his evidence that his father bought the suit land in 1998, that the land was vacant, and that there were no squatters. He also informed the court that when they started clearing the forest, Kwekwe Kinda came and built structures.
8. PW1 also stated on cross-examination that the Judgment was not executed as the court lacked jurisdiction therefore the case was transferred to Malindi. He confirmed that the Defendants are the sons of Kwekwe Kinda and that the 3rd Defendant is her grandson.
9. Upon reexamination, PW1 stated that he has sued the Defendants, as they are the ones who are on the suit land and that the structures by the Defendants are on half to 1 acre near the road. He also stated that the land is approximately 12 acres and that they are on the land and currently developing it.
10. PW2 Stanslous Nyaleh Kiti adopted his Witness Statement dated 1st September 2020 as his evidence in chief and stated that he was an Assistant Chief of that area and that the Defendants were not residents of the area but they are known to him. He testified that in 1997 Wilson approached him, informed him that he wanted to develop the suit land, and gave him authority to engage people to clear the bushes but the Defendants threatened them. That it was at this point that the deceased opted to sue them in the Kilifi Court.
11. On cross-examination by Ms. Murage, PW2 told the court that he was an Assistant Chief from 1996 -2005 and that in 1997 Wilson baya showed him the title to the suit property. He confirmed that the title was issued on 7th September 1998 upon been referred to the title deed in the Plaintiff's list of documents. He told the court that before 1996 when he was employed as an Assistant Chief he had stayed in that area since 1962.



Defendants' case

12. DW1 Mwangome Rodgers Kinda adopted an affidavit dated 8th January 2018 as his evidence together with a statement dated 2nd July 2021. He also produced documents annexed to the affidavit De No. 1 to 4.
13. It was DW1's evidence that they have been in occupation of the parcel of land known as Plot Number Kilifi/ Roka/ 112 situated in Roka since 1978 which they have constructed permanent houses, planted trees and carried out subsistence farming. He also testified that since the year 1978 no one has ever come to the suit land to claim its ownership or challenged their occupation by asking them to vacate the suit land. That his nuclear family has always been in open, continuous and uninterrupted occupation of the suit land for over 12 years.
14. DW1 told that court that he has buried his mother and brother on the suit land and has never been served with any objection from the Plaintiff or any other person claiming ownership over the suit land. He stated that the Plaintiff is claiming ownership of the suit land that he allegedly purchased via sale but has failed to provide the name of the vendor, a sale agreement or transfer documents to that effect.
15. On cross-examination, he stated that he had photos to show that he stays on the suit land and upon being shown the photos, they did not show when they were taken. He further stated that he was not aware that there was a case between Wilson Baya and Kwekwe Kinda, further that the court ruled that Kwekwe was to vacate the suit land and Wilson take possession of the land. He confirmed that it was Wilson's right to get the suit land after the court had decreed.
16. DW1 stated on cross-examination that the suit land measures 12.6 acres that they occupy but he had not produced any evidence to show that they occupy the whole 12.6 acres. He confirmed that the title to the suit land is in Wilson Baya's name.
17. DW2 Antony Kinda Mwangome adopted his Witness Statement dated 2nd July 2021 as his evidence in chief and relied on DW1's evidence.
18. On cross-examination, he told the court that his grandmother was buried on the suit land but they had not followed up to be given the suit land. That he was not aware that Kwekwe had a case with Wilson Baya that ordered that she vacate the suit land. He confirmed that the title belongs to Wilson Baya and that they did not have any document to the suit land.
19. On reexamination, he told the court that they had filed a counter claim to be granted the land by way of adverse possession and that they had not been sued in the Kilifi case that was against Kwekwe Kinda.

Plaintiff's Submissions

20. Counsel identified two issues for determination, whether or not the Defendants entitled to be declared to have acquired the suit land Title No. Kilifi/ Roka/ 112 through adverse possession and whether or not the Defendants were required to take out title documents in the year 1978.
21. On the first issue, counsel submitted that the law concerning the doctrine of adverse possession is founded under Section 7, 37 and 38 of the *Limitation of Actions Act* and stated that the Defendants had not satisfied the ingredients required in a claim of adverse possession.
22. On exclusive use and possession of the property, counsel submitted that no evidence was led by the Defendants to show that they have occupied the entire suit portion. That during re- examination, PW1 informed the court that the Defendants occupy about one (1) acre as the rest is in possession of the Plaintiff.



23. Counsel relied on the case of *Robinson Kiplagat Tuwei v Felix Kipchoge Limo Langat* (2020) eKLR where the Court of Appeal quoted with approval the case of *Kasuve v Mwaani Investments Ltd & others* (2004) 1 EA and submitted that a person claiming to be entitled to be registered as an owner of a parcel of land by adverse possession must adduce cogent evidence and that not only of possession, but also of the specific area that the adverse possessor claims to be in possession of.
24. On the second limb of use without force, without secrecy and without license or permission of the land owner, with the intention to have the land, counsel submitted that the Applicant claiming under adverse possession must prove that his occupation on the suit land is without force, not in secret and without the permission of the owner.
25. Counsel relied on the testimony of PW2 who testified that the deceased Plaintiff Wilson Baya Nyundo who hired people to clear his suit portion after purchasing were unable to do so due to the threats and use of force by the Defendants.
26. It was counsel's submission that the Defendants herein have been in occupation of the suit portion and that it is their resistance and use of force that has made them be in occupation of the suit portion contrary to the elements of adverse possession and relied on the case of *Mohamed Sadeeqe Khan v Ali Didi Aboud & 18 others* Petition No. 7 of 2013 where the Court failed to declare the Defendants as adverse possessors on account of use of violence and threats.
27. On continuous occupation, by the Defendants, counsel submitted that a party relying on the doctrine of adverse possession must show that they have occupied the suit portion for a continuous period of twelve years. He also submitted that the late Plaintiff bought the suit portion and become the registered owner as exhibited under Plaintiff Exhibit 1 which meant that the time begun to run against the Plaintiff in the year 1998 when the suit portion was registered in the name of Wilson Baya Nyundo (deceased) and not the year 1978 as claimed by the Defendants.
28. Counsel relied on the case of *Manason Ogendo Afwanda v Alice Awiti Orende & Another* (2020) eKLR which was cited with approval in the case of *Titus Kiguru Munyi v Peter Mburu Kimani* where the court was of the opinion that the limitation period for purposes of adverse possession only starts to run after registration of land in the name of the Respondent.
29. On the second issue, counsel submitted that no explanation was given by the Defendants as to why they failed to acquire title documents of the suit property since they have been in occupation since the year 1978. He further submitted that the Defendants are professional squatters who have admitted to use of unlawful means to deprive the Plaintiff from the suit portion.
30. Counsel cited the case of *Abdilrazak Khalifa Salim V Harun Rashid Khator & 2others* (2015) eKLR and urged the court to dismiss the counterclaim with costs to the Plaintiff.

Defendants' Submissions

31. Counsel identified three issues for determination; whether the Plaintiffs claim against the Defendants is time barred by dint of Section 7 of the *Limitation of Actions Act*, whether the Plaintiff's suit has merit and whether the Defendants have met the threshold for grant of orders for adverse possession as sought in the counterclaim.
32. On the first issue, counsel submitted that the Plaintiff filed the action herein against the Defendants to recover the suit property in the year 2017 and that under the provisions of Section 7 of the *Limitation of Actions Act*, a registered owner of land may not bring an action to recover land after the end of twelve years from the date on which the right of action accrued to him. It was his submission that the



Defendants were occupying the suit property in the year 2000 when the Plaintiff filed a suit against the said Kwekwe Kinda.

33. Counsel further submitted that the Plaintiff having elected to file the action herein 17 years after the cause of action arose, the Plaintiff's claim offends the express provisions of Section 7 of the Limitation of Actions Act hence the this court lacks jurisdiction to entertain a claim that is statute barred.
34. On whether the Plaintiff's suit has merit, counsel submitted that it was the Plaintiff's duty to prove its case on a balance of probability as was held in Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another (2014) eKLR. Further that the Plaintiff has not proved the tort of trespass to the required standard since the Plaintiff was registered as an owner of the suit property on 7th September 1998 by which time the Defendants were already in occupation of the suit property.
35. On whether the Defendants have the met the threshold for grant of orders for adverse possessions, counsel submitted that the essential requirements that one has to meet in order to succeed in a claim for adverse possession were discussed in Kilimo Shutu & 6 others v Godfrey Karume (2017) eKLR and the circumstances under which the title of a registered owner can be defeated by a claim of adverse possession were set out in Peter Kamau Njau vs Emmanuel Charo Tinga (2016) eKLR.
36. Counsel submitted that the Defendants have proven the essential requirements that one has to meet in order to succeed in a claim for adverse possession as they have been in actual, continuous possession of the suit property for 12 years.

Analysis and Determination.

37. The issues for determination are whether the Plaintiff is entitled to the orders of permanent injunction against the Defendants and whether the Defendants have proved that they have acquired the suit land by way of adverse possession.
38. It is not disputed that the suit land Kilifi/ Roka/ 112 is registered in the name of Wilson Baya Nyundo. In claims for adverse possession, the claimant must acknowledge the title holder as the registered owner otherwise; the claim would fail especially when they allege fraud in the acquisition of the title.
39. It is further the Plaintiff's case that the Defendants are illegally occupying the subject suit premises after having been ordered to vacate the premises and therefore, he now seeks orders of permanent injunction restraining the 1st, 2nd and 3rd Defendants jointly and severally from interfering with the suit land Plot Number Kilifi/ Roka/ 112 situate at Roka.
40. The Plaintiff had sued Kwekwe Kinda who is the mother of Mwangome Rodgers the 1st Defendant and grandmother to Antony Kinda Mwangome the 3rd Defendant. The court ordered that Kwekwe Kinda vacates the suit land. The Defendants who were living with Kwekwe Kinda did not vacate and continued occupying the suit land illegally.
41. The Plaintiff produced evidence to show that he is the registered owner of the suit land which title has not been disputed.
42. The Defendants have not adduced any evidence to justify why they should continue occupying the Plaintiff's suit land. They have claimed adverse possession, which is the next issue that the court will deal with.
43. Section 24 of the Land Registrations Act 2012 that provides as follows: -



- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
- (b) -the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

Section 25 provides for the rights of a proprietor thus the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
 - (b) declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

44. Section 26 of the Act that provides that a Certificate of title to be held as conclusive evidence of proprietorship has an exception thus;

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

45. On whether the Defendants have proved that they entitled to orders of adverse possession, an Applicant seeking to rely on the doctrine of adverse possession must meet the following ingredients as was held in the case of *Kasuve Vs Mwaani Investments Limited & 4 others* 1 KLR 184, where the Court of Appeal restated what a party in a claim for Adverse Possession has to prove;

“In order to be entitled to land by Adverse Possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

46. Similarly in the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, where the Court held:

“The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve



or more years. In addition there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown”

47. The Defendants have met none of the above ingredients. The Defendants were under a duty to establish that they have been in exclusive possession for over twelve years and adduce evidence of a clear intention to hold adversely under a claim of right.
48. The Plaintiff became the registered owner in 1998 and not 1978 as claimed by the Defendants , which meant that the time begun to run against the Plaintiff in the year 1998 when the suit portion was registered in the name of Wilson Baya Nyundo. This necessitated the filing of the case against Kwekwe Kinda in the year 2000 at Kilifi law Courts.
49. In the case of Manason Ogendo Afwanda v Alice Awiti Orende & Another (2020) eKLR (supra) the court held that the limitation period for purposes of adverse possession only starts to run after registration of land in the name of the Respondent.
50. The occupation must be quiet, continuous, uninterrupted, without force for a period of 12 years. In the Defendants’ case, the occupation was neither quiet, uninterrupted nor continuous for the statutory period. The interruption took place when a case was filed immediately after the Plaintiff was registered as an owner. The Defendants also involved themselves in violence when the Plaintiff started clearing and fencing the suit plot as was stated by PW2 the Assistant Chief of the Area.
51. I have considered the pleadings, the evidence and submissions by the parties and find that the Plaintiff has proved his case and is therefore entitled to the orders sought. I further find that the Defendants have failed to prove their claim for adverse possession and is therefore dismissed with costs.
52. I therefore make the following specific orders:
 - a. An order of permanent injunction is hereby issued restraining the 1st, 2nd and 3rd Defendants jointly or severally by themselves, servants and or agents or any person or persons acting under them from trespassing, alienating, interfering, disposing off and in any other way dealing with Plot Number Kilifi/ Roka/ 112 situate at Roka, Kilifi, the subject suit premises, or any part thereof.
 - b. The defendants to give vacant possession within 45 days failure to which eviction to issue.
 - c. Costs of the suit to the plaintiff.
 - d. Defendants counterclaim is hereby dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF OCTOBER 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

