



**Waswa v Wanjala (Enviromental and Land Originating Summons
E007 of 2022) [2023] KEELC 21560 (KLR) (9 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21560 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E007 OF 2022
EC CHERONO, J
NOVEMBER 9, 2023
IN THE MATTER OF SECTION 7,17 &38 OF THE LIMITATION
OF ACTIONS ACT
IN THE MATTER OF LAND PARCEL NO. E. BUKUSU /N.
NALONDO/5714
IN THE MATTER OF ADVERSE POSSESSION**

BETWEEN

ELECTRINA NANJALA WASWA APPLICANT

AND

FEDNAND NYONGESA WANJALA RESPONDENT

JUDGMENT

1. By way of Originating Summons dated 29th September 2022, the Applicant sought against the Respondent the following orders;
 - a. That the applicant has become entitled to 0.04Ha parcel of the land number E.Bukusu/N.Nalondo/5714 by way of adverse possession and/or by acquiring prescriptive rights thereon.
 - b. That the respondent do forthwith transfer 0.4Ha comprised in the land parcel number E.Bukusu/N.Nalondo/5714 to the applicant and in default thereof the Deputy registrar and/ or any lawfully authorized officer of the court do execute all relevant documents for the said land on behalf of the respondent.
 - c. That costs of this application be borne by the respondents.



2. The Originating Summons was supported by the grounds on its face together with the Affidavit sworn on the 29th September, 2022 by Electrina Nanjala Waswa, the Applicant in this case.
3. In response to the Applicants claim the Respondent filed a replying affidavit sworn on the 17th October ,2022 by Fednand Nyongesa Wanjala.

Applicant's case and evidence

4. It was the applicant's case that she purchased land parcel number E.Bukusu/N.Nalondo/5714 ("suit land") in the year 2009 from one Isaac Kimawachi Nandhoka whose father bought it from the 1st registered owner who is the father of Wellington Chemwanda ChePukwesi who is said to have sold the suit land to the Respondent. She stated that since 2009, she has been in peaceful occupation of approximately 0.4 Ha of the suit land and that the Respondent has never lived nor used/possessed and/or occupied it.
5. The applicant averred that she resides in the suit land with her family and has extensively developed the said parcel of land having erected both permanent and semi-permanent structures. The Applicant argued that she had met the threshold of the orders sought as she has been in occupation of the suit land peacefully, openly, exclusively and uninterruptedly and thus the title held by the Respondent has been extinguished by operation of the law in her favour.
6. The Applicant called three witnesses in support of her case.
7. PW1: Electrina Nanjala Waswa adopted her statement dated 16th March,2023 and produced into evidence her List of Documents dated 21st March 2023 being Exhibit 1(a) &(b), 2 (a) (b)(c) & (d) & 3(a) & (b). In cross-examination and re-examination, she reiterated her case as above
8. PW2 Isaac Kimawache Nandhoka adopted his witness statement dated 16th March 2023 as his evidence in chief. In cross examination he stated that the signature in the statement was not his. He testified that he was the son of Philip Nandhoka Ngaanya and brother to Daniel Nandhoka. It was his testimony that his father bought a portion of land parcel No. E.Bukusu/ N.Nalondo 168 measuring 3 ½ Acres from one Joash Chepkwesi in 1994 and that he sold his share i.e. ¾ Acres (0.3 Ha) to the Applicant at a consideration of Kshs. 1,500,000/= which was paid in instalments. He stated that he was not aware that his brother had sued one wellington. It was his evidence that the Applicant is in occupation of the suit land and has developed thereon and is also ploughing the land. In re-examination, he confirmed that the consideration for the suit land was Kshs. 175,000/= and that he knew his brother had sued Wellington claiming for 3 ½ Acres bought by their father from Joash Chepkwesi. On cross-examination by the court, he stated that his father died in 2007 and that at the time of selling the property, they had not carried out succession proceedings over his estate.
9. PW3 Raphael Chari Mayonge adopted his witness statement dated 16th March, 2023. In cross examination, he confirmed that the signature in the statement was not his. It was his testimony that he has been a village elder since 1978 and that he first saw the applicant in 1982 when she bought land in the village from one Ndiwa and constructed a dwelling house therein. He testified that he knew Wellington Chepkwesi and his father Joash Chepkwesi. It was his testimony that Philip Nandhoka who is now deceased bought land from Joash Chepkwesi but had not acquired title deed at the time of his death. The witness stated that when the Applicant bought land from PW2, he was a witness to the agreement. He stated that as a neighbor of the plaintiff, he knows that the plaintiff has been utilizing the land from 2009 until 2002 by ploughing thereon. In re-examination he testified that Philip Nandhoka bought 3 ½ Acres from Joash Chepkwesi and subdivided the land amongst his children prior to his



death and that Isaac sold his share to the Applicant in 2009 and the Applicant started planting crops therein.

Respondents Case And Evidence

10. It was the Respondents case that he was the absolute owner of the suit land having purchased the same from one Wellington Chemwada Chepkwesi. He deposed in his Replying affidavit that he has been in occupation of the suit land and has put up a house and planted tree thereon. He averred that he was aware that one Philip Nandokha, father to Isaac Nandokha purchased land measuring $\frac{3}{4}$ acres from Wellington Chepkwesi and that Daniel Nandokha, the legal administrator of the estate of Philip Nandhoka has sued Wellington Chepkwesi for the issuance of title in Bungoma ELC Case No. 42 of 2021 based on adverse possession.
11. He further deposed that in the above mentioned case (ELC No.42 of 2021), the claim was for E.Bukusu/ N. Nalondo/5068 and not E.Bukusu/ N. Nalondo/5714. He contends that the Applicants land lies in E.Bukusu/ N. Nalondo/5068. He averred that the Applicant was his neighbor and that she was in occupation of a different parcel of land and not the suit land.
12. In support of his, case he called three witnesses.
13. DW1 Frednad Nyongesa Wanjala adopted his replying affidavit sworn on 21th October,2022 and produced the 6 annexures therein. He equally adopted his witness statement dated 8th March,2023 as his evidence in chief and his List of documents dated 1at March, 2023 which contained 10 Items as DExhibit No.1-10. In cross examination, he reiterated his case as above. In re-examination he stated that the plaintiff ought to claim for land from Isaac Nandhoka as the suit land was his. DW1 stated that the plaintiff was residing in parcel no. 1738 registered in her husband's name.
14. DW2 Wellington Chepkwesi adopted his witness statement dated 1st March, 2023 as his evidence in chief. He stated that he sold the suit land to the Respondent in 2020 after harvesting maize which he had planted and that it was not true that the Applicant was in use of the land. The witness testified that is father Joash Chepkwesi was the registered owner of parcel No.168. He testified that he sold 1 Acre to the Respondent after the estate of Joash Chepkwesi was distributed to its beneficiaries. It was further his testimony that in 1994, he sold 3 $\frac{1}{2}$ Acres to Philip Nandhoka after his father died. He testified that after his father died and the subsequent succession proceedings, he subdivided parcel 168 into parcels No. 5714 and 5068 and that the land he sold to Philip Nandokha is in 5068. It was his testimony that the Applicant has never been in occupation of the suit land. In re-examination, the witness stated that the Respondent was included in the succession proceedings of the estate of Joash Chepkwesi as a beneficiary and upon subdivision of E.Bukusu/ N.Nalondo 168, parcel No. 5068 was registered in his name while parcel no.5714 was registered in the name of the Respondent. DW2 testified that the Respondent initially purchased 5Acres from him before he purchased the suit land.
15. DW3 Francis Maina adopted his witness statement dated 1st March, 2023 as his evidence in chief and sought to correct an error that the Respondent resides in parcel 5714 and not 5068 as indicated. He thereafter associated himself with the evidence by DW1& DW2.

Applicants Submissions

16. The Applicant submitted on three issues. She contends that she has been in occupation of the suit land since 2009 to date which is over 12 years without interruption as shown in the photos produced in her evidence. It was her submission that the Respondent purchased the suit land recently and the structures as shown in his evidence were erected recently purposely to deny the Applicant her genuinely acquired land. It was her further submissions that the trees as shown in her photos in support of her case were



mature trees planted over 8-12 years ago. On that basis, she asked the court to allow her application and grant the orders sought in the Originating summons dated 29/9/2022.

Respondents Submissions

17. In his submissions, the Respondent contends that the Applicant has not proved her case on a balance of probabilities and was thus unworthy of the orders sought. He argued that the Applicant purchased non-existent land and from an individual who did not have capacity to sell. It was submitted that the Applicant can only claim land in E.Bukusu/N.Nalondo 5068 on the conclusion of Bungoma ELC No. 142 of 2021.
18. The Respondent further submitted that the Applicant has not proved the element of adverse possession as she did not discharge the burden of proof as required under Section 107 (1) of the *Evidence Act*. It was argued that the photographs presented by the Applicant are in respect of land parcel No.1738 where she resides and not the suit land. The Respondent submitted that the Applicant in cross-examination testified that she does not reside on the suit land and as such, her allegation of having extensively developed the suit land was false and aimed at misleading the court. Counsel placed reliance in the case of *Joseph Macharia Kairu v Kenneth Kimani Muiruri* (2021)eKLR.
19. It was further submitted by the Respondent that he was the legitimate owner of the suit land and has been in occupation since 2020 and that the plaintiff's claim which comes 2 years after his occupation was in bad faith. Lastly, the Respondent contends that the Plaintiff/Applicant's oral and written testimony was full of discrepancies and that the Applicant was bound by her pleadings and relied on the case of *Chalicha FC & Others v Obiambo & 9 others* (1987) eKLR.

Analysis And Determination

20. The key issue for determination in this case is whether or not the Applicant has acquired title by way of adverse possession. If yes, when did time start running for purposes of determining these rights and finally whether or not the Applicant is entitled to the prayers in the originating summons.
21. The doctrine of Adverse Possession is one of the ways of land acquisition in Kenya. I will highlight some of the statutory provisions that underpin the doctrine as set out in the *Limitations of Actions Act* Cap 22 and the Registration of Land Act No 6 of 2012;
22. Section 7 states as follows;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person”
23. Further in Section 13 states as follows;
 - “(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as Adverse Possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in Adverse Possession on that date, a right of action does not accrue unless and until some person takes Adverse Possession of the land.
 - (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in Adverse Possession, the right of action



is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes Adverse Possession of the land.

- (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be Adverse Possession of the land”.

24. Section 16 provides as follows;

“For the purposes of the provisions of this Act relating to actions for the recovery of land, an administrator of the estate of a deceased person is taken to claim as if there had been no interval of time between the death of the deceased person and the grant of the letters of administration.”

25. Section 17 goes on to state;

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

26. Finally, Section 38(1) and (2) states;

- “(1) 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, 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.
- (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

27. The combined effect of these sections is to extinguish the title of the proprietor of land in favour of the adverse possessor at the expiry of 12 years of occupation of the Adverse Possession on the suit land.

28. Section 28(h) of the *Land Registration Act*, 2012 recognizes overriding interests on land, some of which are rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription. Under Section 7 of the *Land Act*, 2012 prescription is one of the ways of acquisition of land.

29. In the case of *Maweu v Liu Ranching and Farming Cooperative Society* 1985 KLR 430, the Court held;

“Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”.

30. The key test is that the owner of the land must have been dispossessed or has discontinued possession of the property. In this particular case, it is the Applicant’s assertion that she purchased the property in the year 2009 from one Isaac Nandhoka, son to Philip Nandhoka who had purchased from Wellington Chepkwesi son of Joash Chepkwesi. In support, the Applicant produced a sale agreement dated 1st April, 2009 signed by both parties and witnessed by various persons including PW2 who was a village



elder. From the agreement, it is clear that payment was by instalments with the last being made on 20th November, 2009.

31. Flowing from the evidence adduced, I find that the Applicant first came into possession of the suit property by virtue of being a purchaser. However, she is also seeking ownership based on adverse possession. The Applicant claims to have been in continuous occupation of the suit property since the year 2009 up until the year 2022 when she claims the Respondent began threatening to evict her and destroyed her crops.
32. Considering the oral evidence of DW1 and DW2, it is alleged that DW2 sub-divided land parcel No. E.Bukusu/N.Nalondo/168 into land parcel No. E.Bukusu/N.Nalondo/ 5714 and 5068. It is further alleged that the land which DW2 sold to Philip Nandhoka and which was thereafter sold to the Applicant by Isaac Nandhoka lies in parcel No 5068 which is registered in his name(DW 2) thus the Applicants claim ought to be in parcel 5068 and not 5714. However, this evidence is contradicted by documentary evidence as produced by both parties i.e D-Exhibit 2 and P-Exhibit1 which is a copy of green card which clearly indicates that land parcel No. E.bukusu/ N. Nalondo/168 was sub-divided into land parcel No. E.Bukusu/ N. Nalondo/5068 and 5069 and parcel No.5714 is a subdivision from parcel No.5068. Notably, parcel No.5068 the very parcel DW2 stated he sold 3 ½ Acres to Philip Nandhoka the father to Isaac Nandhoka who then sold it to the Applicant. From the above analysis therefore, I find the evidence by DW1 and DW2 as untruthful and intended to mislead this Honourable Court.
33. Indeed, from the above analysis, the scales tilt in favour of the Applicant who claims parcel 5714 which is confirmed to be a sub-division of parcel No. E.Bukusu/N. Nalondo/5068 and in which 3 ½ was sold to the family the Applicant purchased ¾ Acres from. Therefore, the Respondents argument that the two parcels are unrelated in my view is untenable. The Applicant has led evidence as to the nature of his occupation which begun as a purchaser but became adverse on payment of the last instalment which, as earlier stated, was in November, 2009.
34. Further, in support of her claim, the Applicant produced photographs showing that she had constructed a semi-permanent structure and planted crops over the land. She also called two witnesses who confirmed that she was in possession of the suit land. PW3 who was a village elder testified that he was a witness to the agreement in which the Applicant bought the suit property and that they measured the size by footsteps. I find the testimony by the said village elder credible and unshaken on cross-examination. The upshot of my finding is that the applicant has been in *De facto* use, and *de facto* occupation of the suit land.
35. On the argument that time ought to start running from the year 2021 when the title was acquired by the Respondent, I wish to rely in the case of *Joseph Macharia Kairu v Kenneth Kimani Muiruri* [2021] eKLR where L.G Gacher J cited with approval the Court of Appeal in Civil Appeal No 164 of 2011 *Gachuma Gacheru v Maina Kabuchwa* [2016] eKLR, when quoting *Maweu v Liu Ranching & Farming Cooperative Society* [1985] eKLR held:

“Lastly, on argument by the respondent that time in adverse possession can only begin to run once title is issued, we disagree and set out the sentiments of the Court in, *Maweu V Liu Ranching & Farming Cooperative Society*, [1985] eKLR: “What logic is there in saying that this concept of the absolute and indefeasible title may only be lost, after twelve years of suffering adverse possession from the time of registration, but not for shorter periods because the adverse possession commenced during the time of the owner’s predecessor. How is it lost at all?”



Adverse possession is a fact to be observed upon the land. It is not to be seen in a title, even under Cap 300. Any man who buys land without knowing who is in possession of it risks his title, just as he does, if he fails to inspect his land for twelve years after he had acquired it. If such title can be lost at all, its absolute and indefeasible nature obviously refers to other matters than adverse possession.

The Plaintiff Society of course relies upon the decision of the earlier court, but no argument on the point of principle was pressed that I could see, with great respect to learned counsel. Certainly he was unable to advance any cogent argument from the reasoning in Alibhai's case, or otherwise why absolute and indefeasible title interfered with the operation of the [Limitation of Actions Act](#) (Cap 22).

There is nothing in the concept of an overriding interest which is new to the law; it is merely an acknowledgement of existing common law. No title which passed to a new owner before registration was provided for, curtailed the period of limitation. The reason lies in the public policy which underlies the [Limitation of Actions Act](#) (Cap 22): namely, that a long period of possession should not be disturbed by the negligent owner or owners in succession.”

36. Based on the above findings, it is my view that in the instant case, time started running in November, 2009 up until the date this suit was brought to court for determination on 29th September, 2022 which is over 12 years
37. Further to the foregoing and despite purchasing the suit land as alleged in the year 2020, the Respondent did not assert his right as a registered owner which would have operated as stopping time from running. From the Applicants claim and indeed the genesis of this suit, it is clear that the Respondent destroyed the claimant's crops causing the Applicant to run to court seeking for injunctive orders against the Respondent. In Malindi CoA Civil Appeal No. 29 of 2016:- [Peter Kamau Njau v Emmanuel Charo Tinga](#) [2016] eKLR the Court held:

“in order to stop time which has started running, it must be demonstrated that the owner of land took positive steps to assert his right by, for instance taking out legal proceedings against the person on the land or by making an effective entry into the land.
38. In view of the foregoing, it is my view that the Applicant has discharged her burden of proof on the required standard.
39. On the issue of costs Section 27 of the [Civil Procedure Act](#) grants the Court discretion to award costs of the suit. Ordinarily, costs follow the event and is normally awarded to the successful litigant. Since I have found the Plaintiff as the successful litigant, it follows that she is entitled to costs of this suit.

Conclusion

40. For the foregoing reasons, I hereby enter judgment for the plaintiff/applicant against the defendant/respondent as follows;
 - a. That the applicant has become entitled to 0.04Ha parcel of the suit land number E.Bukusu/N.Nalondo/5714 by way of adverse possession and/or by acquiring prescriptive rights thereon.
 - b. That the respondent to forthwith transfer 0.4Ha comprised in the land parcel number E.Bukusu/N.Nalondo/5714 to the applicant and in default thereof the Deputy Registrar



of this Court do execute all relevant transfer documents for the said land in favour of the respondent.

c. That costs of this suit shall be borne by the respondent.

It is so ordered.

DATED AND SIGNED AND DELIVERD AT BUNGOMA THIS 9TH DAY OF NOVEMBER, 2023 .

HON.E.C CHERONO

ELC JUDGE

In the presence of

1. Mr. Wamalwa R. for the Defendant/Respondent
2. Mr. Juma Waswa for M/S Adongo for the Plaintiff/Applicant
3. Okwaro C/A

