



**Gicubi v Nthiga (Environmental and Land Originating Summons
156 of 2017) [2025] KEELC 5860 (KLR) (25 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 5860 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 156 OF 2017**

AK BOR, J

JUNE 25, 2025

BETWEEN

SIMON NTHIGA GICUBI PLAINTIFF

AND

MUGO NTHIGA DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit through the amended originating summons dated 20/4/2021 seeking to be declared to have become entitled to a portion measuring 1½ acres out of the land known as Nthawa/Riandu/3298 by way of adverse possession. He averred that the Defendant was the registered owner of the subject parcel of land. That on or about 1994, he settled on a portion of the land together with his family after purchasing it from the Defendant who did not transfer the land to him. Further, that the Defendant had never interfered with his occupation and that the Defendant had not occupied the 1½ acre portion for a period of 12 years. He stated that he had developed the portion of the land where he has his homestead and had planted indigenous trees, miraa stems, bananas, avocados trees and other food crops. He claimed that during the entire period he had openly and continuously lived on the that portion of the land together with members of his family without disturbance from anyone.
2. The Defendant admitted that he was the registered proprietor of Nthawa/Riandu/3298 and that he entered into a sale agreement with the Plaintiff in 1994 to sell 1½ acre parcel of land at the agreed consideration of Kshs. 45,000/=. His position was that the Plaintiff only paid him Kshs. 33,000/= leaving a balance of Kshs. 12,000/= which remained unpaid to date. He stated that he showed the Plaintiff a portion to cultivate while awaiting completion of the sale but sometime in 2002, they had a dispute over the land and the matter was taken up by the chief, Nthawa location.
3. That since the Plaintiff was unwilling to pay the balance of the purchase price, it was resolved that he would refund the sum of Kshs. 33,000/= and the Plaintiff to vacate from the said land. The Plaintiff refused to accept the refund and filed a suit at Siakago Law Courts claiming the said portion of land



but the suit was dismissed. The Defendant denies that the Plaintiff's occupation gave him the rights he seeks because the Plaintiff entered the land with his consent and he had not paid the balance of the purchase price and his occupation has not been uninterrupted. He sought to have the Plaintiff's suit dismissed.

4. The issue for determination is whether the Plaintiff has acquired title to 1½ acres out of Nthawa/Riandu/3298 by way of adverse possession. The guiding principles for determining a claim for adverse possession were laid down in *Wambugu v Njuguna* [1983] KLR 172. The Court held that in order to acquire title to land which has a known owner by the statute of limitations, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. That the proper way of assessing proof of adverse possession was whether or not the title holder had been dispossessed or had discontinued his possession for the statutory period and not whether or not the claimant had proved that he had been in possession of the requisite number of years.”
5. In *Samuel Kihamba v Mary Mbaisi* [2015] KECA 853 (KLR) the court stated that for one to succeed in a claim for adverse possession, he must prove and demonstrate that he had occupied the land openly without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. That 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.
6. From the above principles, it follows that in order for a person to succeed in a claim for adverse possession, they must prove use and occupation or in other words possession of the land, with the knowledge of the owner and such use and occupation must not be broken or interrupted for a period of twelve years. The possession must also be open and notorious with the intention to defeat the registered owner's title.
7. Turning to the facts of this case which are not disputed, the Plaintiff entered the suit land in 1994 pursuant to a sale agreement with the Defendant. It is also not in dispute that the Plaintiff did not fully pay the purchase price of the 1½ acre portion that he is claiming. The Plaintiff could have paid Kshs. 32,500/= as he claimed or Kshs. 33,000/= as the Defendant claimed out of the agreed purchase price of Kshs. 45,000/=. The Plaintiff took possession of the suit land.
8. The Plaintiff's possession cannot be said to be adverse in law because he entered the land under a sale agreement and his occupation was with the Defendant's permission. That occupation was not hostile to the Defendant's title. In *Cheromei v Muigai* [2024] KEELC 5604 (KLR) it was held that adverse possession could only arise out of non-permissive possession yet from the facts of that case, the Applicant gained entry into the land by virtue of the agreement for sale. The court observed that it was not a strange phenomenon to allow a purchaser possession of the property being sold before the transaction was completed. That in most instances, that was allowed pending completion of the transaction. The court noted that such a purchaser was not allowed onto the property as a trespasser, but were understood to be on the land with permission from the registered owner.
9. It is not in contention that a dispute arose between the parties over the land in 2002 and the Chief handled the dispute and referred the parties to a panel of elders. The Defendant produced copies of the proceedings before the elders where it was agreed that the Plaintiff would complete payment of the purchase price and meet the cost of subdividing the suit land and the Defendant was to transfer the agreed portion to him. That was to be done within six months, although it is not indicated from when, in default of which the Defendant was to refund Kshs. 33,000/= to the Plaintiff without claim of interest. It appears that none of this events took place.



10. The Defendant claimed that the Plaintiff refused to accept a refund of the purchase price he paid and that he also refused to pay the balance of the purchase price. Instead, the Plaintiff filed a suit in Siakago claiming from the Defendant the portion of the suit land. The Defendant produced a copy of the ruling in Siakago SPM Civil Case No. 66 of 2012 *Simon Nthiga Gicubi v Mugo Nthiga*. From the ruling, it is apparent that the Plaintiff sought to enforce the sale agreement but the suit was dismissed as the court found that the agreement was time barred under Section 4 of the [Limitation of Actions Act](#) and that the Plaintiff failed to obtain leave to file the suit out of time.
11. The Plaintiff argued that the even if he initially entered the land pursuant to the sale agreement in 1994, the Defendant's failure to transfer title and his continued occupation despite the attempted rescission of the contract in 2002 converted his possession into adverse possession. This court is not persuaded by that argument. There was no rescission of the agreement since it is the same agreement that the Plaintiff sought to enforce in the suit in Siakago.
12. For time to start running for purposes of adverse possession, the purchaser's occupation must become adverse that is, it must cease to be referable to the agreement and instead become hostile to the registered owner's rights. This typically occurs when the agreement is repudiated or rescinded and the purchaser remains in possession against the will of the vendor. It was held in [Cheromei v Muigai](#) that time could not begin to run even if the purported contract became null and void by operation of law, until the permission initially granted to occupy the land was expressly revoked and that revocation could be done by the vendor, or by the adverse possessor making it clear that they no longer remained on the land under the auspices of the said permission. This is so that the registered owner is made aware of the risk of losing his title if no steps are taken to evict the purchaser from the land.
13. Further, the court added that since one of the requirements of adverse possession was open possession without secrecy, a purchaser in possession could not sit quietly enjoying rights of possession of land under a contract, and at the same time acquire rights as an adverse possessor over the property without first making it clear to the vendor that they were no longer relying on the permission granted by virtue of the contract. According to the court it was that outright termination of the license or permission that turned what would otherwise be a purchaser in possession into an adverse possessor and vested in them the right to claim adverse possession. That termination of possession gave the vendor the right to re-enter the land to re-assert his rights thereon or to take steps to evict the adverse possessor.
14. In this case, although a dispute arose in 2002, there is no evidence that the Plaintiff's occupation changed in character from permissive to adverse. The sale agreement was never formally rescinded by refunding the money, nor did the Plaintiff assert a new claim adverse to the Defendant's title. On the contrary, the Plaintiff continued to assert his rights based on the sale agreement therefore his possession remained referable to the sale agreement and did not meet the threshold of being hostile or adverse to the Defendant's rights.
15. Where adverse possession arose out of a sale of agreement under which the payment of the purchase price by the adverse possessor was by installments, an action for adverse possession can only arise after the last and final payment has been made to complete the agreed purchase price. It was held in [Gabriel Mbui v Mukindia Maranya](#) [1993] KEHC 161 (KLR) that where adverse possession arose out of a sale of agreement under which the payment of the purchase price by the adverse possessor was by installments and the agreement failed, the period of limitation afforded an action for adverse possession only after the last and final payment had been made to complete the agreed purchase price. The period of limitation starts to run on the date of the payment of the last installment of the purchase price.
16. The Plaintiff does not deny that he never paid the balance of Kshs. 12,000/= and therefore did not complete the transaction. The Plaintiff has not established that his continued occupation of the suit



land has been adverse to the title of the Defendant. He entered the land through a sale agreement and his occupation was not hostile but permissive. There is no evidence of any change in the nature of his possession from permissive to adverse. Without proof that his occupation is without permission and against the Defendant's rights, the claim for adverse possession cannot succeed.

17. The Plaintiff failed to prove on a balance of probabilities that he had acquired title to 1½ acres out of Nthawa/Riandu/3298 through adverse possession.
13. The amended Originating Summons dated 20/4/2021 is dismissed with costs to the Defendant.

DELIVERED VIRTUALLY AT EMBU THIS 25TH DAY OF JUNE 2025.

K. BOR

JUDGE

In the presence of: -

Ms. W. Kamochu holding brief Ms. M. Ndeke for the Plaintiff

Ms. S. Ombongi holding brief for Ms. W. Rugaita for the Defendant

