

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ELC NO 10 OF 2022 (O.S)
IN THE MATTER OF LIMITATIONS OF ACTIONS ACT
AND
IN THE MATTER OF THE PARCEL OF LAND KNOWN AS NAKURU
MUNICIPALITY BLOCK 21/188

SIMON GITHUA KAMUNGE.....PLAINTIFF
VERSUS
STEPHEN KIPKEMOI ARAP KOECH.....DEFENDANT

JUDGMENT

1. By an Originating Summons dated 16th May, 2022, the Plaintiff sued the Defendant seeking the following orders:
 - a) *THAT the Plaintiff be declared to have become the legal owner entitled by adverse possession having occupied, cultivated, and developed the parcel of land continuously and uninterrupted for over fifteen (15) years since the year 2007 and as the sole proprietor of all that parcel of land named Nakuru Municipality Block 21/188.*
 - b) *THAT the Honourable Court do direct that Nakuru County Land Registrar rectify the land register accordingly and the Plaintiff be registered as the sole proprietor of the said parcel of land, namely Nakuru Municipality Block 21/188.*
 - c) *THAT the last original title deed in respect of Nakuru Municipality Block 21/188, which is with the Defendant, be dispensed with.*
 - d) *THAT the Defendant pay the costs of this suit.*

2. The Defendant filed his response vide a replying affidavit sworn on 6th February, 2023, and deponed that he is the registered owner of the suit property and that the Plaintiff was in occupation through his permission.

PLAINTIFF'S CASE

3. PW1, Simon Githua Kamunge, adopted his witness statement dated 24th June, 2022, as his evidence in chief, and stated that he knew the Defendant/Respondent when he visited his place on 3rd March, 2022. PW1 denied that the Respondent permitted him to occupy the suit land in 2007. It was his testimony that when he occupied the land, it was more like a dumpsite after which he started planting vegetables. He further stated that the land had neither any structure nor a fence.
4. According to PW1, the Respondent promised to sell the suit land to him, but he stated that he did not have the money to buy it. He produced his list of documents dated 6th June, 2023, as Pex Nos. 1 to 8. He testified that the Respondent gave him a copy of the title.
5. It was his testimony that he developed the suit land and built permanent houses with 8 rooms which he rented out. PW1 also stated that he has been paying land rates, but the title was in the Respondent's name.
6. Upon cross-examination by Mr. Muthomi, PW1 confirmed that the plot was vacant and nobody interfered with his occupation. He stated that in 2009, he built a semi-permanent house to see if anyone would claim the land. He confirmed that the name on the demand notice and payment receipt was Cheragos Arap Langat.

7. PW1 further confirmed that the water payment receipt was in his wife's name, but the electricity payment receipt did not specify the plot number. PW1 also informed the court that he had discussed with the Respondent on whether he could buy the plot, and that he did not have the approved building plans from the County.
8. Upon re-examination by Mr. Chege, he reiterated that he did not get the approvals for building from the County.

DEFENDANT'S CASE

9. DW1, Stephen Kipkemoi Arap Koech adopted his replying affidavit sworn on 6th February, 2023, as his evidence in chief and produced the annexures as Dex No.1 to 3.
10. DW1 stated that he acquired the suit property, Nakuru Municipality Block 21/188, in 2001. He testified that he knew the Plaintiff in 2005 and that in 2007, after the post-election violence, the Plaintiff approached him looking for a secure place for his business. DW1 testified that the Plaintiff wanted a temporary structure to carry out his bakery business, which he was operating in a nearby plot.
11. It was DW1's testimony that they had a gentleman's agreement allowing the Plaintiff on his plot, and that the Plaintiff was to stay on the plot until normalcy returned but he extended his stay. He went on to testify that when he asked him to vacate the plot, the Plaintiff requested to buy the plot, which he agreed.
12. DW1 gave evidence that he engaged the Plaintiff in 2016, regularly, after which they agreed on a purchase price of Kshs.5million, but never entered into a written agreement. He further stated that in 2018, his family discouraged him from selling the suit parcel. He added that he had given the Plaintiff a copy of

the title for purposes of getting a loan which he did not secure. He testified that he was issued a title in 2001, but he did not change the details for rate payment at the council.

13. Upon cross-examination by Mr. Mwangangi, he stated that the Plaintiff had a bakery near his plot. He further stated that he had asked the Plaintiff to vacate in 2008, after normalcy had returned, and another verbal notice in 2016.
14. The Defendant stated that he did not go to the Municipal Council to change the Rate payment details, and had never given the Plaintiff permission to pay the rates on his behalf. Further that he had not authorized the Plaintiff to build permanent structures.
15. Upon re-examination, by counsel, DW1 stated that the Plaintiff still operated a bakery on the suit property and that he was privy to the conversation between the Plaintiff and the bank when the Plaintiff wanted to secure a loan. DW1 stated that he served the Plaintiff with a notice to vacate in 2016.

PLAINTIFF'S SUBMISSIONS

16. Counsel for the Plaintiff filed submissions dated 18th November, 2025, and identified the following issues for determination:
 - a) *Whether the Plaintiff indeed resided on the suit property with the permission of the Defendant.*
 - b) *Whether the Plaintiff's occupation of the suit property was adverse to the Defendant.*
 - c) *Who bears the cost of the suit.*
17. On the first issue, counsel submitted that the Defendant was not able to establish that he granted the Plaintiff access to the suit property for him to reside temporarily. Counsel further submitted that the Defendant did not

provide any evidence of his alleged personal relationship with the Plaintiff or the alleged permission/consent for the Plaintiff to occupy and settle on the suit property and relied on Section 107 of the Evidence Act. Similarly, counsel submitted that there was no correspondence from the Bank on the failure of the Plaintiff to qualify for the loan.

18. On the second issue for determination, as to whether the Plaintiff's occupation was adverse to the Defendant, counsel relied on **Sections 7, 13 and 38 (1) (2) of the Limitation of Actions Act** and the cases in **Kasuve Vs Mwaani Investments Limited & 4 others 1 KLR 184, and Kamataka Board of Wakf v Government of India & Others [2004] 10 SCC 779, Tabitha Waitherero Kimani v Joshua Ng'ang'a [2017] eKLR, Bandi v. Dzomo & 76 Others (Civil appeal 16 of 2020) (2022) KECA 584**, and submitted that Plaintiff has proved that he has been in continuous and uninterrupted occupation and possession of the suit land for more than 12 years without the consent of the Defendant, and as such, he is entitled to the orders sought.
19. On the final issue of costs, counsel relied on Section 27 of the Civil Procedure Act and urged the court to award the Plaintiff costs of the suit.

DEFENDANT'S SUBMISSIONS

20. The Defendant's counsel filed his submissions dated 6th February, 2026, and identified the following issues for determination:
 - a) *Whether the Plaintiff's possession of the suit property met the legal threshold for adverse possession under Kenyan laws.*
 - b) *Whether the Plaintiff acted in good faith or abused a position of trust and humanitarian indulgence.*
 - c) *Whether the Plaintiff is entitled to the reliefs sought.*

d) Who should bear the costs for the suit.

21. On the first issue, counsel relied on Section 107 of the Evidence Act on burden of proof and the cases of **Christopher Kioi & another v Winnie Mukolwe & 3 others [2017] KEELC 3729, Teresa Wachuka Gachira Vs Joseph Mwangi Gachira (2009) eKLR (KLR) Kakuzi Limited V Makuyu Club (Suing through Joel Wanoike, Irungu Ndirangu & SK Kirubi as Trustees of the Club) [2024] KECA 1607 (KLR) Titus Mutuku Kasuve vs. Mwaani Investments Limited & 24 others [2004] eKLR, Wambugu vs. Njuguna [1983] KLR 172**, on the requirements of proof of adverse possession.
22. It was counsel's submission that the Plaintiff took possession of the suit property with the permission, and authority of the Defendant as shown from the Defendant's testimony that he knew the Plaintiff who resided and operated a bakery business at London area within Nakuru, and cited the case of **Gabriel Mbui V Mukindia Maranya (1993) eKLR**.
23. Counsel submitted that the Defendant testified that he knew the Plaintiff and his father, and allowed the Plaintiff and his family to move into the suit property as a temporary solution to displacement. The Defendant further allowed the Plaintiff to put up temporary structures for a bakery business and as such, the entry to the land and putting up the temporary structures were with the consent and permission of the Defendant.
24. It was counsel's further submission that the Plaintiff failed to establish the key ingredients of a claim of the suit property through adverse possession, as the Plaintiff's occupation was permitted and that it had not satisfied the hostile nature required for a claim of adverse possession.

25. Mr. Muthomi stated that the 12-year time required for adverse possession claim had stopped running when the Defendant asserted his proprietary rights through oral means or through an eviction notice and relied on the case of **Mtana Lewa V Kahindi Ngala Mwamgandi [2005] eKLR**.
26. Counsel also relied on the case of **Willy Kimutai Kitilit V Michael Kivet (2018) eKLR** and submitted that the Plaintiff entered the suit property as a beneficiary of Defendant's goodwill during a national crisis, and that the entry was neither hostile nor adverse but rather grounded in trust. Therefore, the Plaintiff was under a moral obligation to respect the Defendant's ownership and the limited nature of the permission granted.
27. Counsel urged the court to dismiss the Plaintiff's case with costs to the Defendant.

ANALYSIS AND DETERMINATION

28. The issues for determination are whether the plaintiff has proved that he has acquired the suit land by way of adverse possession. The doctrine of adverse possession has been defined, described, and explained in many texts and case law as it is one of the ways of acquiring a valid legal title to land by a person who occupies land owned by another, provided specific, strict requirements are met for a designated statutory period, which is 12 years in Kenya.
29. In the case of **Ravji Karsan Sanghani v Pamur Investment 7 Limited [2021] eKLR**, the Court of Appeal in determining whether the Appellant had satisfied the principles to warrant a claim for adverse possession, the court restated the dicta in **Kweyu v Omutut [1990] KLR 709 at page 716**, where Gicheru, J.A. held as follows:

“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period of 12 years, it confers an indefeasible title upon the possessor. (Colour of title is that which is a title in appearance, but in reality). Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford Colour, and second, such possession under it as will be adverse to the right of the true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms (“claim or colour of title”) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land for the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant’s use done publicly and notoriously.”

The court further held that:

For possession to be adverse, it must start with a wrongful dispossession of the rightful owner of the land in a peaceful and open manner; must be continuous and exclusive for over a period of twelve years, with a clear and manifest intent by the claimant of asserting his or her right of ownership of the land in question so as to defeat that of the registered

owner. As Gicheru, J.A. put it, it is not enough for a claimant to simply prove that he has been in occupation of the land for a period exceeding twelve years, the claimant must also prove that the intent of such occupation was to assert right of ownership.”

30. The above dicta covers the ingredients that must be met by an Applicant who seeks the court’s declaration that he/she has acquired the land vide the doctrine of adverse possession. The questions that the court must answer in a case of adverse possession are namely; a) How did the Applicant take possession of the suit property? b) When did he take possession and occupation of the suit property? c) What was the nature of his possession and occupation? d) How long has the Applicant been in possession?
31. It is on record that the Plaintiff was dispossessed during the post-election violence in 2007/2008 and the Defendant who was an Area Chief at the time allowed him to enter into the suit plot and operate a bakery business. The Plaintiff admitted that he had put up temporary structures and later built 8 permanent rooms on the suit property.
32. The Defendant stated that he knew the Plaintiff together with the father and had given the Plaintiff verbal notice to vacate and later they entered into discussions whether the Defendant would sell the suit land to the Plaintiff at a consideration of Kshs. 5Million. The Defendant also told the court that he gave the Plaintiff a copy of the title to secure a loan, which was rejected. The Plaintiff did not debunk this evidence on the discussion to purchase the land, the notice to vacate and the permission to use the property to operate a bakery.
33. The Plaintiff wanted the court to believe that he came from nowhere, found idle plot without the owner, started a business and developed permanent structures.

In the case of **Gabriel Mbui vs Mukindia Maranya (1993) eKLR**, the court held that:

“The occupation of the land by the intruder who pleads adverse possession must be non- permissive use, i.e. without permission from the true owner of the land occupied. It has been held many times that acts done under license non-permissive or permitted by, or with love of, the owner do not amount to adverse possession and do not give the licensee or permitted entrant any title under the limitation statute. If one is in possession as a result of permission given to him by the owner, or if he is in possession of the land as a licensee from the owner, he is not in adverse possession. Permissive occupation is inconsistent with adverse possession.”

34. It is trite that for an applicant to succeed in a claim of adverse possession the occupation must be non-permissive, without the consent of the true owner of the land. The Plaintiff in this case was allowed to occupy the land during the post-election violence, which was a humanitarian act to protect the Plaintiff from harm during that period due to the ethnic flare-up, but it seems the Plaintiff later got ideas to take the land away from the Defendant through the doctrine of adverse possession.
35. Having answered the question on how the Plaintiff got into occupation of the suit land with the permission of the Defendant, it follows that the rest of the questions would be superfluous as an Applicant cannot succeed in a claim of adverse possession where occupation is vide a consent by the true owner. Even if the Applicant were to occupy the suit plot for a period of more than 50 years, it would not amount to anything if the true owner authorized the occupation. No time will be counted in such a scenario, and the issue of continuous occupation does not arise.

36. The Plaintiff has been enjoying the occupation due to the goodwill of the Defendant which he could have nurtured and not rattled the owner with an application for ownership by way of adverse possession.
37. Proof of adverse possession is not a walk in the park, as it is a legal way of dispossessing a legal owner of his land without any compensation. That is the reason why there are specific ingredients, that have to be proved before a court grants such orders. If that were not the case, then anybody could enter a true owner's land and claim that they have acquired the land by way of adverse possession.
38. In the case of **Kakuzi Limited – Versus - Makuyu Club (Suing through Joel Wanoike, Irungu Ndirangu & SK Kirubi as Trustees of the Club) [2024] KECA 1607 (KLR)** the court held that:
- “The burden of proof of adverse possession lies with the one claiming entitlement under adverse possession.”***
39. I find that the Plaintiff has not proved that he has acquired the suit land by way of adverse possession and therefore the Originating Summons is hereby dismissed with costs to the Defendant.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 10TH
DAY OF MARCH 2026.**

**M. A. ODENY
JUDGE**