

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND CASE NO. 9 OF 2024
IN THE MATTER OF LIMITATION OF ACTIONS ACT
CHAPTER 22 LAWS OF KENYA
AND
IN THE MATTER OF A CLAIM OF ADVERSE POSSESSION
PURSUANT TO THE LIMITATION OF ACTIONS ACT
AND
IN THE MATTER OF LR. NO. BUKIRA/BUHIMUNONO/753
BETWEEN
ANNE WANGECHI MICHAEL.....
APPLICANT
VERSUS
CHARLES OPILA MUNALA.....
RESPONDENT

JUDGEMENT

1. By an Originating Summons dated 6th February 2024, the Applicant brought the instant claim under Order 37 Rules 1 and 2, Order 40 Rules 1 and 2 of the Civil Procedure as with sections 7 and 38 of the Limitation of Actions Act, Chapter 22 Laws of Kenya, the Land Registration Act, the Land Act and Article 60(1) (A) of the Constitution of Kenya. At this point, it is worth noting that some of the provisions that were cited in support of the originating summons, such as the Land

Registration Act, the Land Act and Article 60(1) (A) of the Constitution of Kenya, were irrelevant for the purpose of the Summons. Nevertheless, the Applicant posed a number of the following questions for determination. They are posed verbatim or as drafted:

- 1.** Whether the Respondent's right to recover the portion measuring 0.06 hectares in total of LR No. Bukira/Buhirimunono/753 currently registered in the Respondent's name is barred under the Limitation of Actions Act, Chapter 22 Laws of Kenya and the Respondent's title thereto extinguished on account of adverse possession by the Applicant which adverse possession has been for a period exceeding 12 years and the same has been open, peaceful, continuous and uninterrupted.
- 2.** Whether upon finding favour of the Applicant in paragraph 1 above herein, the Applicant is entitled to be registered as an owner of the land he has acquired by way of adverse possession which land measures 0.06 hectares, whole of LR Bukira/Buhirimunono/753.

- 3.** Whether upon being registered as the owner of whole of Bukira/Buhirimunono/753 measuring 0.06 hectares, the Respondent holds the 1.4 acres thereof in trust for the Applicant who has acquired title by way of adverse possession.
 - 4.** Whether the Respondent should therefore be ordered to transfer the whole LR No. Bukira/Buhirimunono/753 measuring 0.06 hectares to the Applicant and in default the Deputy Registrar to execute the subdivision and transfer documents in favour of the Applicant.
 - 5.** Whether the Respondent should be permanently restrained by way a permanent injunction from interfering and/ or trespassing onto the whole of LR. Bukira/Buhirimunono/753 which parcel measures 0.06 hectares and has been acquired by the Applicant by way of adverse possession.
 - 6.** Whether the court should order that the Respondent pays costs of this application.
- 2.** The Originating Summons was based number of grounds as given hereinafter. That parcel No. Bukira/Buhirimunono/753 measuring 0.06 hectares (herein referred to as the suit land)

was registered in the name of the Respondent. The Applicant purchased the whole of the suit land measuring 0.06 hectares from one Charles Onila Munala in the year 2000. The vendor was registered as the sole proprietor of the whole parcel. The Applicant took immediate possession of the suit land in that year, fenced and started cultivating it. The Respondent had now refused to transfer the suit parcel of land to the Applicant.

3. Notwithstanding the breach of contract, the Applicant remained and continued to retain possession of the suit personal land measuring 0.06 hectares. The Applicant's occupation and possession of the suit land had been a continuous or without interruption for a period of 23 years. In any event the Respondent was aware, knowledgeable and cognizant of the Applicant's occupation of the land.

4. In light of the foregoing the Respondent's rights to recover that land had been extinguished by effluxion of time. Besides, the Applicant had continuously, openly and without interruption occupied and cultivated the whole of the suit land without interference by the Respondent. The Respondent had retained the title of the suit land subject to

the rights and interests of the Applicant. Furthermore, the Respondent had not taken and/or commenced any precipitate action to defeat or interrupt the Applicant's occupation. The Applicant's occupation constituted an overriding interest.

- 5.** Consequently, the Applicant's rights were sanctioned and/ or vindicated vide Section 30 of the Registered Land Act (now repealed). Besides the Applicant's interest was protected under Section 28 of the Land Registration Act, No. 3 of 2012. In the circumstances, the Applicant's occupation of the suit land had been adverse to the interests of the Respondent. The Applicant had acquired prescriptive rights over the suit land and his rights over it merited his registration, as prayed.
- 6.** The Applicant supported the Summons by her Affidavit which she swore on 6th February 2024. She repeated the contents of the grounds in support of the Summons save that she added, by way of deposition annexures to the Affidavit, to evidence the fact that she bought the suit land in the year 2000. She annexed as AWM1 a copy of the Agreement; annexure AWM2 a Letter of confirmation of the sale; AWM3

a copy of the title of the suit land; and AWM 4 photographs showing her occupation thereof.

7. The court need not rehash the rest of the contents of the disposition since they are similar to those of the grounds as stated above.

8. In addition to the deposition the Applicant filed a witness statement dated the same date. In the statement she stated that she was a businesswoman who hailed from Isebania. Further, that she bought the land in the year 2000. It was approximately 0.06 hectares which was the whole that parcel of land known as Bukira/Buhirimunono/753. The vendor handed over the original title deed to her. She took immediate possession of the land, fenced and started cultivating it. Ever since, her occupation had been continuous, open and uninterrupted for twenty three (23) years. In the year 2023 she visited the Area Chief who confirmed the sale of the land. She wished to be registered as the owner of the entire parcel. She also annexed to the statement a List of four (4) documents which showed facts of the content she stated above.

9. When the Originating Summons was served the Respondent did not enter appearance. Therefore, the suit proceeded by way of formal proof. The parties did not submit.

10. During the hearing the Applicant repeated the contents of her witness Statement. She adopted the same as her evidence in chief. Then she testified that she bought the said land from deceived Charles Opila whom she now sued because she bought the land from him in the year 2000 but he had not transferred it to her. She added that he was evasive whenever she called on him to transfer the land to her. She produced as PExh 1 the sale agreement dated 15th September 2000. She also produced as PExh 2 photographs of a maize plantation on the land. She added that the land was in the name of Charles Munala and produced a copy of Title Deed and Certificate of Official Search as PExh 3(a) and (b). She added nobody had ever interrupted her occupation since the year 2000. She produced as PExh 4 a copy of the letter by the Area Chief which is dated 5th March 2023. She prayed that she registered as the owner of the parcel of land.

11. The Applicant did not submit on the evidence adduced and left it to the court to decide the same.

ISSUE, ANALYSIS AND DETERMINATION

12. This court considered the pleadings in this Originating Summons, the evidence tendered by the applicant both by way of written statement and oral testimony and is of the view that the issue for determination is basically whether the Applicant/Plaintiff has proved her case on a balance of probabilities. Attendant to it is who to bear the costs of the Originating Summons.

13. The law on adverse possession is governed by Section 38(1) of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya, as read with Sections 7, 13 and 17 of the Act. A claim for adverse possession succeeds when a party claiming the land proves the elements thereof. These elements are stipulated in the Limitation of Actions Act.

14. Section 7 of the Act is couched on the following terms:-

“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.”

15. The Act makes a further provision for adverse possession at **Section 13** 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 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 afresh 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), the land in reversion is taken to be adverse possession of the land.”

16. Under section 38 of the Limitation of Actions Act, a party claiming land by adverse possession may approach the court for a declaration that the property devolved to him in accordance with the doctrine. Section 38(1) of the Act states as follows;

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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 a proprietor of the land.”

17. These provisions have been expounded by a number of authorities. The first one this Court wishes to be guided by is the *locus classicus* of **Mtana Lewa v Kahindi Ngala Mwangandi (2015) eKLR**, wherein the court said:-

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.

18. Therefore, for a claim of adverse possession to succeed certain conditions must be fulfilled. The Court of Appeal in the case of **Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR** stated as follows:-

“At the expiration of the twelve-year period the proprietor’s title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the

High Court for an order that he be registered as the proprietor of the land.

Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it. See **Littledale v Liverpool College (1900)1 Ch.19, 21.**

19. This court thus needs to know whether the plaintiff has tendered evidence to prove the *nec vi, nec clam, nec precario* principle. In **Abdulkhall Mohamed Abdulkhalik Mazurui & 2 others v Josiah Kafuta J. Mtila & another [2021] KECA 653 (KLR)** the Court of Appeal held,

“The burden of proving adverse possession lay with the 1st Respondent who made the claim. That burden was to be discharged by him demonstrating, on a balance of probabilities, that his possession was adverse; open, peaceful, without consent of the 1st and 2nd appellants and for an uninterrupted period of 12 years, expressed in Latin as *nec vi, nec clam, nec precario*. Or, as Lord Hoffmann put it in **R. vs. Oxfordshire County Council ex p. Sunningwell Parish Council** [2000] 1AC 335 at 350, '**not by force, nor stealth, nor the licence of the owner**'. See also **Kimani Ruchine vs. Swift Rutherford & Co.Ltd** [1980] KLR on this point.”

20. From the evidence adduced this court is of the view that the Applicant has proved her case on a balance of probabilities for the following reasons. The applicant stated that she bought the suit land from the defendant in the year 2000 and took occupation thereof. She had since been in occupation to date. This evidence was not controverted by any written or oral testimony hence it stands unchallenged and proves that a sale and occupation of the sit land took place in that year. She produced as PExh 2 photographs to

show her occupation thereof. PW1 produced as PExhibit 1 a copy of the agreement which, indeed, shows the seller was Charles Opila Munala. The agreement was witnessed by two people, namely, Michael Ayot Onyango and Edina Kanini Nyamari. It was dated 15th September 2000. Furthermore, the Certificate of Official Search she produced as PExh 3(b) as supported by the copy of Title Deed, PExh 3(a) show that the registered owner of the suit land was Charles Opila Munala, the Respondent. Of the Certificate of Official Search as evidence of ownership the law is now clear.

21. The requirement on a certified copy of an extract of title to land being claimed by virtue of adverse possession has been expounded in various precedents. In **Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another (supra)**, the Court of Appeal held that:

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 an O. S. anchored on adverse possession that an extract of the title to the subject land be annexed to the application.

22. In **Sarah Kimani v John Wanyoike Gerald (supra)**, the court determined that:

The purpose of annexing an extract of the title is to ascertain who the title holder is, and when the title holder acquired rights over the said land. It provides a means to the court to ascertain the existence and proprietorship of the suit land. See Symon Gatutu & 587 others v E.A. Portland Cement (2011) eKLR. It is therefore not a technicality as submitted by the Plaintiff, but a mandatory requirement in a claim of adverse possession (emphasis added).

23. Having ascertained that the purpose of the certified copy of the extract of title is to ascertain the ownership of the land, the question this court should seek to answer is whether an official search would suffice in the instant circumstances? This question was addressed by the Court of Appeal in **Johnson Kinyua v Simon Gitura Rumuri, Civil Appeal no. 265 of 2005**. The court held that:

On our part, we have weighed the submissions made on behalf of the parties. Concerning the effect of failure to annex an extract of title we are of the view that nothing turns on this as the disputed land is registered under the Registered Land Act and a search certificate under the Registered Land Act duly signed by the Registrar constitutes evidence of the entries set out in the certificate. Thus section 36(2) of the Registered Land Act provides:

“Any person may require an official search in respect of any parcel, and shall be entitled to receive particulars of the subsisting entries in the register relating thereto and certified copies of any

documents or of the registry map or of any plan filed in the registry.”

Concerning the same point section 37(2) of the Registered Land Act states:

“Every document purporting to be signed by a Registrar shall, in all proceedings be presumed to have been so signed until the contrary is proved.”

In our view reference to certified extracts in Order 37 refers to titles under the other systems of land registration and not to Registered Land Act type of registration. Under the latter system of registration, we think a search certificate meets the requirements of the relevant law.

24. Thus, the upshot of the evidence analysed above before the three decisions regarding the requirement of a Certificate of Official Search, it is clear the Applicant has proved her case on a balance of probabilities and is entitled to the reliefs sought. Therefore, judgment is entered for the Applicant against the Respondent as follows:

1. The Respondent’s right to recover the portion measuring 0.06 hectares in total of LR No. Bukira/

Buhirimunono/753 is barred under the Limitation of Actions Act, Chapter 22 Laws of Kenya and his title thereto extinguished on account of adverse possession by the Applicant.

2. The Applicant is entitled to be registered as the owner of the land parcel No. LR Bukira/Buhirimunono/753 which measures approximately 0.06 hectares.

3. The Respondent is hereby ordered to transfer forthwith the whole LR No. Bukira/Buhirimunono/753 measuring approximately 0.06 hectares to the Applicant, in any event not more than thirty (30) days from the date of this Judgment, in default the Deputy Registrar to execute the transfer documents in favour of the Applicant.

4. There be and is hereby issued a permanent injunction restraining the Respondent from interfering and/ or trespassing onto the whole of LR. Bukira/Buhirimunono/753 which parcel measures 0.06 hectares.

**5. The Respondent having not defended the suit/
Originating Summons is spared from payment of
costs. Thus, the Applicant to bear own costs.**

25. Orders accordingly.

**JUDGMENT Dated, Signed and Delivered virtually via the
Teams Platform this 9th day of April 2026.**

HON. DR. IUR NYAGAKA

JUDGE

In the presence of,

Court Assistants: Lola

Parties absent