

THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC L (O.S) NO. E023 OF 2023

JAMES KANYUA

APPLICANT

VERSUS

MOHAMMED NURU KARIUKI 1ST

RESPONDENT

MARIAM NYAMBURA MOHAMMED 2ND

RESPONDENT

JUDGEMENT

1. The Applicant commenced the instant suit vide Originating Summons dated the 23rd November 2023, in which he seeks the following Orders:

- a) That the title registered in the Respondents' name (Mohammed Nuru Kariuki and Mariam Nyambura Mohammed) over nought decimal one three six five (0.1365) hectares or thereabout, being part of property Grant

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Number I.R 47615/1 otherwise known as LR.NO.209/10715 located in South C, Nairobi, has been extinguished by the Applicant's adverse possession thereof for a period of more than 12 years in terms of the Limitations of Actions Act.

b) That this Honourable Court be pleased to issue an order of declaration, declaring the Applicant herein as the rightful owner of nought decimal one three six five (0.1365) hectares or thereabout, being part of property Grant Number I.R 47615/1 otherwise known as LR.NO.209/10715 located in South C, Nairobi by way of adverse possession.

c) That an order that the Land Registrar Nairobi register the Applicant as the absolute proprietor of nought decimal one three six five (0.1365) hectares or thereabout, being part of property Grant Number I.R 47615/1 otherwise known as LR.NO.209/10715 located in South C, Nairobi, in place of the Respondents.

d) That that the Land Registrar Nairobi be directed that the order herein shall be an

instrument of transfer of ownership of the whole suit property from the Respondents to the Applicant.

e) That the costs of this Application be provided for.

2. The Originating Summons is premised on grounds on its face and on the Applicant's supporting and further affidavit. He avers that since the year 2001, he has occupied the suit property, being 0.1365 hectares of part of **Grant Number I.R 47615/1** also known as **LR. NO. 209/10715** openly, uninterruptedly, exclusively and continuously thus he has acquired a rightful title by way of adverse possession. He explains that he entered the said property when it was a dumping ground, cleared it and made it habitable and that he has continuously been developing it.
3. He claims that in April 2023, some individuals with instructions from the Respondents, threatened him, from maintaining the property. Further, that while he has never

known the owner of the suit property for the last twenty one (21) years, a recent search indicates that it is owned by the Respondents and unless the Court intervenes, he will be evicted and his rights extinguished. He annexed photographs and title to the suit property in evidence.

Response

4. The Originating Summons is opposed by the 2nd Respondent who filed a replying affidavit. She avers that together with the 1st Respondent, they are registered proprietors of the suit property, which they have been in possession of, from the time of acquisition in 1989. Further, that she was married to the 1st Respondent but following divorce she filed **Nairobi High Court Civil Case No. 3365 of 1993** and in the suit, they recorded a consent concerning their properties, of which the 1st Respondent relinquished all his interests in the suit property thus there is no dispute between her former husband and herself and that the suit property belongs to her.

5. She asserts that she has been paying rates for the suit property and has been using it to earn a living and regularly visits it. She points out that recently, a Lease was issued to Shanxi Lu' Engineering Company Limited through her company, Feridan Graphic Limited. Further, that in March 2024, she applied to Nairobi City County Government for approval for construction of a perimeter wall, which application was approved but when she started excavation around 1st November 2024, the Applicant purported to forcibly enter the suit property claiming ownership prompting her to dig deep into his mischief and that is when she discovered that he had obtained default judgement herein on 30th May 2024, which was successfully set aside vide this Court's Ruling dated 28th April 2025.
6. She insists that she has never ceased being in occupation of the suit property from the time of purchase (1989) and avers that it has never been a dumping site as alleged by the Applicant.

7. In his further affidavit in response to the 2nd Respondents' reply, the Applicant insists that this claim was properly circulated in the local dailies. Further, that the suit property has never been Leased to a Chinese Company for purposes of providing a working space or to hoard materials, but the said Chinese Company or their agents attempted to access the land but he repulsed them. He contends that the invitation to evict him is a clear confirmation that he has always been in occupation of the suit property.
8. The Originating summons was canvassed by way of written submissions.

Submissions

9. The Applicant submits that under Sections 7, 13 and 38 of the Limitation of Actions Act, adverse possession is one of the modes of land acquisition in Kenya as it extinguishes title of a proprietor in favour of the adverse possessor at the

expiration of twenty (12) uninterrupted years of occupation. Further, that Section 28(h) of the Land Registration Act recognizes adverse possession as an overriding objective. He insists that the doctrine applies herein as he has been in possession of the suit property since 2001, uninterrupted. Further, that in the period of over twelve (12) years, no one claimed to be its owner, while the Respondents have no evidence of physical occupation. Further, that there is no evidence that his possession was with the permission of the Respondents.

10. To buttress his averments, the Applicant relied on the following decisions: **Pina Waithera Kamau v Shmina Mandal & another [2021] eKLR; Elms v Heard (Environment Land Case 135 of 2022) 2025 KEELC 3155 (KLR) (4 April 2025) (Judgement)** and **Wilson Njoroge Kamau v Nganga Muceru Kamau [2020] eKLR.**

11. On her part, the 2nd Respondent submits that all the photographs produced by the Applicant as annexures 'JK - 1' **ELC L (O.S) NO. E023 OF 2023** **Judgement**

ought to be struck out for failure to comply with the mandatory requirements of Section 106B of the Evidence Act. To this end, reliance is placed on the decisions in **John Lokitare Lodinyo v I.E.B.C and 2 Others [2018] eKLR** and **Richard Nyagaka Tong'i v Independent Electoral & Boundaries Commission & 2 others Election Petition No. 5 of 2013 [2013] eKLR**.

- 12.** She also submits that the Applicant has failed to prove his claim of alleged ownership of the suit property for reasons that whereas he claims to have found the suit property as a dumping site, he has not provided any evidence to substantiate evidence of entry into the property in early 2001, or the business he alleges to have been carrying on there. She argues that there is a huge contradiction in the Applicant's narration of his alleged occupation as on one part, he alleges that he found the suit property as a dumping site, cleared it and made it habitable and on the other part,

he alleges that he was confronted by some men when he went to the property to clear bushes. She contends that in totality, the Applicant has failed to meet the threshold of adverse possession as per the law as well as common law.

13. She contrasts the Applicant's evidence with hers and contends that she has demonstrated how the suit property was purchased and how she has been utilizing it, evidence that remains uncontroverted. Further, that she has been visiting her property regularly and under Section 26 of the Land Registration Act (2012), her title can only be impeached if there was fraud or impropriety during acquisition, issues the Applicant has not proved.

14. To buttress her averments, the 1st Respondent relied on the case of **Kasuve v Mwaani Investment Limited & 4 others [2020] eKLR.**

Analysis and Determination

15. Upon consideration of the Originating Summons including the respective affidavits, annexures and rivalling submissions, the following are the issues for determination:

- **Whether the Applicant's photographs annexed to his affidavits herein ought to be expunged.**
- **Whether the Applicant has established entitlement to (0.1365) hectares of part of land Grant Number I.R 47615/1 also known as LR.NO.209/10715 South C, by way of adverse possession.**

16. The Applicant claims that he peacefully entered into the suit property in 2001, when it was a dumping site, cleared and made it habitable. Further, that he has continuously been developing the suit property and has been in open, exclusive and continuous possession thereon.

17. The suit had been heard unopposed and a Judgement was delivered on 30th May 2024 but vide this Court's Ruling of 28th April 2025, the said Judgement was set aside.

Subsequently, the 2nd Respondent put up a defence. She
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contends that since they purchased the suit property in 1989, they have never parted with possession. Further, that she regularly visits and has issued a Lease to Shanxi Lu' Engineering Company Limited through her company, Feridan Graphic Limited. She insists that she pays rates and was in the process of constructing a perimeter wall, when on 1st November 2024, the Applicant purported to forcibly enter the suit property.

- 18.** The 2nd Respondent also objects to the Applicant's production of photographs annexed to his affidavit ('JK1") as evidence on the basis that mandatory requirements of Section 106B of the Evidence Act have not been met.
- 19.** On whether the mandatory provisions of Section 106B of the Evidence Act have been flouted, I will highlight provisions of Section 106B of the Evidence Act which stipulates thus:

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored,

recorded or copied on optical or electromagnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

(2) The conditions mentioned in subsection (1), in respect of a computer output, are the following

—

(a) The computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;

(b) During the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) Throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

(d) The information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of subsection (2) was regularly performed by computers, whether—

- (a) By combination of computers operating in succession over that period; or**
 - (b) By different computers operating in succession over that period; or**
 - (c) In any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.”**
- (4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—**
- (a) Identifying the electronic record containing the statement and describing the manner in which it was produced;**
 - (b) Giving such particulars of any device involved in the production of that electronic record as may be appropriate for the**

purpose of showing that the electronic record was produced by a computer;

(c) Dealing with any matters to which conditions mentioned in subsection (2) relate; and

(d) Purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

(5) For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment, whether in the course of activities carried on by any official, information is supplied with a view to its being stored or

processed for the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.”

20. In this instance, the parties opted to file written submissions to canvass the instant Originating Summons. Further, that at no point did the Respondents object to the production of the annexed photographs ('JK1') since there was no Certificate for Production of Electronic Evidence. It is my considered view that since the annexed photographs were already admitted as part of the evidence and are part of the Court record, the 2nd Respondent is estopped from raising an objection, to their production, in her submissions. Further, that the issue of admissibility cannot be raised in submissions if it was not raised at the point of hearing. In the foregoing, I decline to allow the 2nd Respondent's Objection seeking to expunge the said photographs from the Court record.

21. As to whether the Applicant has acquired the suit property through adverse possession, I wish to highlight certain legal provisions governing adverse possession hereunder. Section 7 of the Limitation of Actions Act provides 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.”

22. Section 38 of the Limitation of Actions Act stipulates inter alia:

“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.”

23. The Court of Appeal restated what a party making a claim for Adverse Possession ought to prove in **Titus Mutuku Kasuve v Mwaani Investments Limited & 4 others [2004] eKLR** as follows:

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

24. Further, in **Mate Gitabi vs Jane Kabubu Muga alias Jane Kaburu Muga & 3 Others [2017] eKLR**, the Court of Appeal stated thus:

“For one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force, and without license or permission of the land owner, with the intention to have the land. There must be an apparent

dispossession of the land from the land owner.
These elements are contained in the Latin maxim
nec vi, nec clam, nec precario...” Emphasis Mine

25. In the current scenario, the Applicant claims that since the year 2001, he has occupied the suit property, being 0.1365 hectares of part of Grant Number I.R 47615/1 also known as LR.NO. 209/10715 openly, uninterruptedly, exclusively and continuously. He explains that he entered the said property in 2001 when it was a dumping ground, cleared it and made it habitable and that he has continuously been developing it. Further, that while he has never known the owner of the suit property for the last twenty-one (21) years, a recent search revealed that it was owned by Respondents. He annexed photographs and title to the suit property in evidence.

26. The 2nd Respondent vehemently opposed the Applicant’s claim of the suit property through adverse possession and insists that she has been paying rates for the said suit property, has been using it to earn a living and regularly

makes visits to it. She contends that recently, a Lease was issued to Shanxi Lu' Engineering Company Limited through her company, Feridan Graphic Limited. Further, that in March 2024, she applied to Nairobi City County Government for approval for construction of a perimeter wall, which application was approved but when she started excavation around 1st November 2024, the Applicant purported to forcibly enter the suit property claiming ownership and that is when she discovered he had obtained a default judgement herein on 30th May 2024, which has since been set aside. She insists that she has never ceased being in occupation of the suit property from the time of purchase (1989) and denies it was ever a dumping site as alleged by the Applicant.

27. The Applicant in his further affidavit insists that the suit property has never been Leased to a Chinese Company for purposes of providing a working space or to hoard materials but contradicts himself when he admits that the said Chinese

Company or their agents attempted to access the said land but he repulsed them.

28. From the evidence tendered, the Applicant except for stating that he entered the suit property in 2001, did not indicate the date or month he did so. Further, on perusal of the annexed photographs (annexure 'JK1'), I note the land is vacant except for three neighbouring walls. The Applicant at paragraph 3 of the supporting affidavit stated that he entered the suit property when it was a dumping ground, cleared it and made it habitable and has continuously over the years been developing it. However, from the photographs annexed to the supporting affidavit there is no single development on the suit property. Since there is no single development on the suit property, I opine that there is no apparent dispossession of the land from the Respondents as claimed by the Applicant. Further, at paragraph 5, he states that in April, 2023, some individuals had been coming to the suit property, when he went to clear the bushes, they

threatened to beat him up. That in essence means the suit property was not habitable as he had earlier claimed.

29. In the case of **Wambugu V Njuguna (1983) KLR 173** the Court of Appeal articulated the requirements a party is expected to fulfill in a claim for adverse possession and held thus:

‘Adverse possession contemplates two concepts: Possession and discontinuance of Possession. It further held that the proper way of assessing proof of Adverse Possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.’

30. From the evidence presented herein, noting that the Applicant has not denied that the Respondents were attempting to put up a wall on the suit property, to my mind, the burden of proof was upon the Applicant to demonstrate

dispossession of the Respondents who should have discontinued their possession for the statutory period but I am reluctant to believe that the suit property as it looks from the annexed photographs, has been utilized from 2001 as claimed. The Applicant in his supporting affidavit further confirmed that he was utilizing the suit property and had never known the owner but in a claim for adverse possession, the owner should have been aware that there was an adverse possessor on the suit property but did nothing, which is not the case herein as the 2nd Respondent even demonstrated her leasing the suit property, obtaining approval to construct a perimeter wall and commencing excavation thereon.

31. Based on the evidence presented in Court while associating myself with the decisions cited above and relying on the legal provisions cited, I find that the Applicant has not fulfilled all the tenets of adverse possession to enable him claim ownership of the suit property.

32. It is against the foregoing that I find that the Applicant has not proved his case on a balance of probability and will dismiss it with costs.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS
14TH DAY OF MAY, 2026**

**CHRISTINE OCHIENG
JUDGE**

In the presence of:

Ms Imali for Applicant

Amboso holding brief for Shago for Respondents

Court Assistant: Joan