



**M’Ikunyua v M’Anampiu & 2 others (Enviromental and Land Originating Summons 45 of 2020) [2024] KEELC 3237 (KLR) (18 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 3237 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 45 OF 2020**

**CK YANO, J**

**JANUARY 18, 2024**

**BETWEEN**

**ISAAC KALAWA M’IKUNYUA ..... PLAINTIFF**

**AND**

**WILFRED KIREA M’IKUNYUA M’ANAMPIU ..... 1<sup>ST</sup> DEFENDANT**

**DAVID KIUNYE M’IKUNYUA M’ANAMPIU ..... 2<sup>ND</sup> DEFENDANT**

**TITUS GITONGA M’IKUNYUA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff instituted this suit by way of an Originating Summons dated 17<sup>th</sup> September, 2020 claiming to be entitled to LR. Nos. Nyambene/Kitheo/601, Nyambene.Kitheo/447 and Nyambene/Kitheo/535 by way of adverse possession. The originating summons is brought under Order 37 rule 7 & 8 of the civil Procedure Rules and Section 7, 37 and 38 of the *Limitation of Actions Act* and is supported by the affidavits of Isaac Kalawa M’ikunyua and M’ikunyua M’Anampiu Kayau sworn on even date.
2. The 2<sup>nd</sup> defendant filed his replying affidavit dated 30<sup>th</sup> November, 2020 and filed in court on 22<sup>nd</sup> December, 2020 denying the plaintiff’s claim.
3. The plaintiff and the defendants are step brothers and their common father is one M’IkunyuaM’AnampiuKayau who originally owned the suit parcels of land measuring 0.88Ha, 0.97Ha and 0.17Ha respectively.

**The Plaintiff’s Case**

4. The plaintiff’s case is that in or about the year 2000, their father, M’Ikunyua M’Anampiu Kayau shared his land to all his sons, including the defendants and the plaintiff. The plaintiff states that he was given vacant possession of the said suit parcels of land as his share and has been in exclusive possession and



use up to the time of filing suit. That however on 20<sup>th</sup> July, 2020 when the plaintiff and his father went to collect the title deeds so that the properties could be transferred to the plaintiff, they were astonished to discover that the defendants had become registered owners of the said parcels of land as follows:-

LR. No. Nyambene/kitheo/601 was registered in the name of the 1<sup>st</sup> defendant, LR. No. Nyambene/Kitheo/477 was registered in the joint names of M’Ikunyua M’Anampiu Kayau and the 2<sup>nd</sup> defendant, and LR. No. Nyambene/kitheo/535 was registered in the joint names of M’Ikunyua M’Anampiu Kanyau and the 3<sup>rd</sup> defendant.

The plaintiff avers that their father is therefore unable to transfer the said parcels of land to him as planned.

5. It is the plaintiff’s case that the defendants were registered as co-owners of the suit parcels of land when the plaintiff has been in occupation of the whole parcels of land and even after registration, has been utilizing them peacefully and notoriously for more than 20 years which is well in excess of 12 years, hence is entitled to the same by adverse possession.
6. The plaintiff testified as PW1 and adopted his statement and supporting affidavit dated 17<sup>th</sup> September, 2020 as his evidence-in-chief. He also produced the certificates of official search, title deeds for the suit properties as well as photographs as P. Exhibits 1- 8 respectively. The plaintiff testified that he had done a lot of developments on the three parcels of land where he was brought up and is living with his children. He stated that the defendants have other parcels of land which they were given by their father and in which they live in.
7. The plaintiff was cross-examined by the defendants and re-examined by Mr. Atheru, Learned Counsel for the plaintiff.
8. M’Ikunyua M’Anampiu Kayau, a father to both the plaintiff and the defendants testified as PW2. He stated that the suit Parcels of land belong to the plaintiff and that he gave them to the plaintiff because he is the one who takes care of him. He adopted his statement dated 7<sup>th</sup> September, 2020 as his evidence-in-chief. He was also cross-examined and re-examined.

### **Defendant’s Case**

9. Wilfred Kirea M’Kunyua M’Anampiu, the 1<sup>st</sup> defendant testified as DW1. He stated that their father (PW2) gave each one of them land but the same are jointly registered in their names and their father. He wants the titles rectified so that their father’s name is removed from the titles so that each of the parties retains his title in his sole name. DW1 was also cross-examined by Mr. Atheru.
10. David Kiunya M’Ikunyua M’Anampiu the 2<sup>nd</sup> defendant testified as DW2. He relied on his replying affidavit as his evidence – in- chief. He testified that he was given the land by their father but that the plaintiff cut down trees thereon and wants the plaintiff to compensate him for the said trees. He was also cross-examined by Mr. Atheru.
11. Titus Gitonga M’Ikunya, the 3<sup>rd</sup> defendant testified as DW3. He also stated that the land was given him by their father and is surprised that their father is asking the plaintiff to claim it. He too was cross-examined.

### **Plaintiff’s Submissions**

12. In his submissions dated 2<sup>nd</sup> November, 2023 filed through the firm of Thurania Atheru & Company Advocates, the plaintiff gave a brief introduction and summary of the case. The plaintiff’s counsel cited Section 7, 13(1), 17 and 38(1) of the *Limitation of Actions Act*, Section 28(h) of the *Land*



- Registration Act and Section 7 of the Land Act. Learned Counsel for the plaintiff identified the issues for determination as to whether the plaintiff has acquired absolute title of the suit parcels of land by way of adverse possession and whether this court should issue orders of permanent injunction.
13. Regarding the first issue, the plaintiff's counsel relied on the case of *Tabitha Waitherero Kimani Versus Joshua Ng'ang'a* [2017]eKLR and submitted that the plaintiff's occupation of the suit parcels of land has been open and notorious since he has been utilizing the land and has extensively developed it. Secondly, that the possession and usage has been continuous for about 23 years.
  14. On the 2<sup>nd</sup> defendant's submission that the plaintiff's entry was permissive the plaintiff's counsel submitted that the plaintiff is not claiming adverse possession against his father, but his brothers who caused their names to be registered as joint owners of the suit properties. That his father has no objection to the plaintiff being registered as the owner of the suit properties. Learned counsel for the plaintiff submitted that a claim for adverse possession is attached to land and not title and relied on the case of *Maweu Versus Liu Ranching & Farming Cooperative Society* [1985]eKLR as quoted in Civil Appeal No. 264 of 2011 *Gachuma Gacheru Versus Maina Kabuchina* [2016]eKLR and Eldoret Civil Appeal No. 212 of 2012; *Isaac Cypriano Shingore Versus Kipketer Togom* [2016] eKLR. It is submitted that the plaintiff took possession of the suit properties in the year 2000 and the defendants caused themselves to be registered as joint owners in the year 2011 but since then, they have never taken any step to evict the plaintiff or to ascertain their rights over the suit properties.
  15. It is the plaintiff's submissions that having proven that he is entitled to half of the suit parcels of land by way of adverse possession, then he has every right to be protected from being prevented to enjoy the usage of his land. That the defendants are already threatening to sell the suit properties to third parties hence the need for a permanent injunction to be issued against the defendants. The plaintiff's counsel cited Section 38(1) of the Limitations Act and Section 24(a) of the Land Registration Act. It is the plaintiff's submissions that he has proven his case on the threshold required for any civil matter and urged the court to declare that he has acquired the suit properties by way of adverse possession, that the Deputy Registrar of this court be authorized to execute all necessary documents transferring the properties to the plaintiff, issue an order of permanent injunction as well as costs of this suit.
  16. The 2<sup>nd</sup> defendant filed submissions dated 24<sup>th</sup> October, 2023 through the firm of Kaberia Arimba & Company Advocates who gave a brief background of the case. It is the 2<sup>nd</sup> defendant's submissions that the orders sought by the plaintiff are misplaced and that the plaintiff is working in cahoots with their father to deprive the 2<sup>nd</sup> defendant his land. That their father was unable to explain why he transferred the said properties to the defendants in the first place and now wants the same transferred to the plaintiff.
  17. Learned counsel for the 2<sup>nd</sup> defendant submitted that the plaintiff and the 2<sup>nd</sup> defendant are brothers and that as per the plaintiff claim, he was awarded LR. No. Nyambene/Kitheo/477 by their father hence his alleged occupation is permissive and the claim for adverse possession may not issue. The 2<sup>nd</sup> defendant's counsel cited Section 7, 13 and 38 of the Limitation of Actions Act and relied on the case of *Wambugu Versus Njuguna* [1983]KLR 172 and *Mombasa Teachers Co-operative Savings and Credit Society Limited Versus Robert Mulumbi Katana & 15 Others* [2018]eKLR and submitted that the plaintiff has on a balance of probabilities not established that he meets the threshold for the grant of orders of adverse possession. That in any event, LR No. Nyambene/Kitheo/477 is currently registered in the names of the 2<sup>nd</sup> defendant and M'Ikunyua M'Anampiu yet the plaintiff chose to sue the 2<sup>nd</sup> defendant and left out the said M'Ikunyua M'Anampiu. It is the 2<sup>nd</sup> defendant's submission that the plaintiff's suit is incompetent, lacks merit and ought to be dismissed with costs to the 2<sup>nd</sup> defendant.



## Analysis and Determination

18. The court has carefully considered the pleadings, the evidence on record and the submissions filed. I have also taken into account the authority relied on and the Law. The issues that arise for determination are:-

- i. Whether the plaintiff is entitled to the suit properties by way of adverse possession?
- ii. Whether the plaintiff is entitled to the orders sought?
- iii. Who should bear the costs of the suit?

19. The doctrine of adverse possession is embodied in Section 7 of the Limitation of Action Act which 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”.

20. Sections 13, 17, and 38 of the same Act provides as follows:

13(1) A right of action to recover land does not accrue unless the land is in 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 Section 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 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.

21. 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.

38(1) where a person claims to have become entitled to 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.

22. Further, Order 37 rule 7 of the Civil Procedure Rules provides that:-

- “(1) An application under Section 38 of the *Limitation of Actions Act* shall be made by Originating Summons.
- (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.
- (3) The court shall direct on whom and in what manner the summons shall be served”



23. As already stated the plaintiff is claiming to be entitled to the suit properties by adverse possession. The plaintiff and the defendants are step brothers. The suit properties originally belonged to their father, M'Ikunyua M'Anampiu Kayau (PW2). LR. Number. Nyambene/Kitheo/477 is registered in joint names of the 2<sup>nd</sup> defendant and the said M'Ikunyua M'Anampiu Kayau while LR. No. Nyambene/Kitheo/535 is registered in the joint names of the 3<sup>rd</sup> defendant and M'Ikunyua M'Anampiu Kayau. The other suit land LR. No. Nyambene/Kitheo/601 is registered in the name of the 1<sup>st</sup> defendant. The said M'Ikunyua M'Anampiu Kayau is the one who gave the land to the plaintiff and the defendants who are his sons and caused the registration to be effected as stated herein above. In this case the plaintiff has not sued their father, despite being a joint registered owner of two of the suit properties.
24. It is Trite Law, and I need not cite any authority, that to succeed in a suit for adverse possession, one needs to demonstrate that he has been on the land *nec vi, nec clam, nec precario*, that is without violence, without secrecy and without permission of the registered owner, for a continuous, uninterrupted period of 12 years. The claimant also needs to demonstrate the necessary *animus possidendi* or intention to acquire the land.
25. From the evidence on record, it is clear that in this case, the plaintiff is on the suit land with the permission of their father and by virtue of being one of the sons of the Original owner of the suit properties.
26. In the case of *Gabriel Mbui Versus Mukindia Maranya* [1993]eKLR, Kuloba J, while considering the definition of "Adverse possession" stated as follows:-
- ".....it is possible to define adverse possession" more fully, as the non-permissive physical control over land coupled with the intention of doing so by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owners enjoyment of the land for the purposes for which the owner intended to use it..."
27. In the said case, Kuloba J, went on and stated that: -
- "The occupation of the land by the intruder who pleads adverse possession must be nonpermissive use, i.e. without permissions from the true owner of the land occupied it has been held many times that acts done under the licence or permitted by, or with love of the owner do not amount to adverse possession and do not give licensee or permitted entrant any title under the limitations 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. The stranger must show how and when his possession ceased to be permissive and became adverse. The rule on adverse possession does not become adverse before the end of the period during which one is permitted to occupy the land. Accordingly, where a permissive possession or occupation accorded on the grounds of clarity or relationship was intended, limitation operates from the time when possession first became adverse: a licensee (whose possession is only permissive) cannot claim title only by possession was adverse to that of the licensor to his knowledge and with his acquiescence; where possession was consensual or contractual in its inception, it cannot be called "adverse".



28. In the case of Samuel Kihamba Versus Mary Mbaisi [2015]eKLR, the Court of Appeal grappled with the question whether a close relative could sustain a claim for adverse possession. The court held that this is a determination of fact and the burden of proof lies on the claimant. In the said case, the issue was whether a step mother to the appellant had acquired the subject land by way of adverse possession. The appellant in the suit maintained that he had allowed his step mother licence to occupy the land. The Court of Appeal stated as follows:-

“We are persuaded by various dicta which we have quoted and relied upon in this judgment and must state that it would create havoc for families and the Society of Kenya generally if the principle of adverse possession applied within families against close relatives”.

29. It is no doubt common for relative to allow each other possession of land while one is away or even as they await sharing of the land. In this case, the plaintiff and the defendants are step brothers who are fighting over what was and even partly still remain their father’s land. In my view, by virtue of his relationship with the defendants, the plaintiff cannot be regarded as an “intruder” as stated in the case of Mbui Versus Maranya (Supra). From the evidence on record both the plaintiff and the defendants father appears to have shared out and transferred some of his properties to his sons. One of the parcels of land registered is in his name jointly with the 2<sup>nd</sup> defendant while another is registered in his name jointly with the 3<sup>rd</sup> defendant. Other parcels have been registered in the sole names of either the plaintiff or the defendants, including LR. No. Nyambene/Kitheo/601 which is in the name of the 1<sup>st</sup> defendant herein.

30. On the facts of the case, and being guided by the decision of the Court of Appeal in the case of Samuel Kihamba Versus Mary Mbaisi (supra) and being persuaded by the reasoning in Mbui Versus Maranya (supra), I am not persuaded on a balance of probabilities that the plaintiff has acquired title to the suit parcels of land by way of adverse possession. It is my finding that the plaintiff’s claim has not met the threshold for the grant of orders of adverse possession. It is clear to me that the plaintiff entered the land with the permission of his father who has since transferred some parcels of land to his sons and still caused others to be jointly registered in his name and some of those sons. It is worth noting that the plaintiff has not sued his father yet he is a co-owner of two of the suit properties.

31. The upshot of the above is that the plaintiff’s suit is dismissed.

32. Considering the relationship of the parties who are siblings, I order that parties bear their own costs.

33. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MERU THIS 18<sup>TH</sup> DAY OF JANUARY, 2024.**

**HON. C. YANO**

**ELC – JUDGE**

**In the presence:**

Court Assistant: Kiragu

Ngeera holding brief for Atheru for plaintiff

No appearance for the advocate for the defendants

2<sup>nd</sup> defendant present in court

**HON. C. YANO**

**ELC – Judge**

