



**Machiegwa v Chweya (Enviromental and Land Originating Summons  
2 of 2023) [2024] KEELC 1039 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 1039 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 2 OF 2023  
YM ANGIMA, J  
FEBRUARY 29, 2024  
(FORMERLY NYAHURURU ELC(OS) CASE NO. E005 OF 2023)**

**BETWEEN**

**EVANS WARO MACHIEGWA ..... PLAINTIFF**

**AND**

**MARGARET K. CHWEYA ..... DEFENDANT**

**JUDGMENT**

1. By an originating summons dated 03.04.2023 filed pursuant to Section 38 of the *Limitation of Actions Act* (Cap.22) and Order 37 rule 7 of the Civil Procedure Rules, 2010 the Plaintiffs sought determination of the following questions:
  - a. Whether the Plaintiff has acquired title deed by adverse possession over L.R. No. Nyandarua/Ol'Kalou Salient/443 measuring approximately 6.5 H.A.
  - b. Whether L.R. No. Nyandarua/Ol'Kalou Salient/443 should forthwith be registered in the name of the Plaintiff and whether the Defendant should be ordered to sign all the necessary transfer documents in favour of the Plaintiff and in default the Deputy Registrar of the court to do the same.
  - c. Whether the Land Registrar should dispense with the production of the original title deed for L.R. No. Nyandarua/Ol'Kalou Salient/443 while transferring the land to the Plaintiff.
  - d. Who should pay the costs of the suit.
2. The Plaintiff pleaded that he had been in open, continuous, exclusive and uninterrupted possession and occupation of the suit property for about 38 years without any claim by the Defendant or anyone claiming through her. He further pleaded that he entered the suit property in 1986 and had ever since been in possession without the Defendant's permission and without any interruption from her side.



3. It was the Plaintiff's contention that he had undertaken various developments on the suit property such as constructing a house and planting a live fence. It was, therefore, his contention that he had acquired the suit property through the doctrine of adverse possession and that the Defendant had lost her right of recovery thereof due to effluxion of time under the *Limitation of Actions Act* (Cap.22).
4. The record shows that the Plaintiff sought and obtained leave of court to serve the originating summons through substituted service since the Defendant's whereabouts were unknown to him. The Plaintiff consequently served the originating summons by advertising it once in the Daily Nation Newspaper giving the Defendant at least 21 days to enter appearance. The record further shows that the Defendant did not enter appearance to the summons despite service. As a result, the suit was heard in her absence.
5. At the trial hereof, the Plaintiff testified on his own behalf as the sole witness. He adopted the contents of his supporting affidavit sworn on 03.04.2023 as his evidence in-chief. He also produced the 8 annexures to his supporting affidavit as exhibits in support of his claim. It was his evidence that he had been in continuous occupation of the suit property for 37 years and that he had constructed a house thereon where he resided with his wife and children. He consequently urged the court to allow his claim for adverse possession of the entire suit property.
6. The court has considered the pleadings and evidence on record. The elements of adverse possession were considered in the case of *Kasuve –vs- Mwaani Investments Ltd & 4 Others* [2004] 1KLR 184 as follows:

“...and in order to be entitled to 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 dispossession of the owner or by the discontinuation of possession by the owner on his own volition, *Wanja vs Sakwa No.2* [1984] KLR 284. A title by adverse possession can be acquired under the *Limitation of Actions Act* for part of the land...”
7. Similarly, in the case of *Chevron (K) Limited –vs- Harrison Charo Wa Shutu* [2016] eKLR it was held, inter alia, that:

“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.”
8. The court has noted that the Plaintiff's evidence was neither challenged nor controverted at the trial since the Defendant did not participate in the trial. The court is thus inclined to accept the Plaintiff's evidence as true. The court accepts that the Plaintiff entered the suit property in 1986 but for purposes of adverse possession time shall be reckoned with effect from 01.11.1988 when the Defendant became registered as the proprietors of the suit property. In the event, the Defendant's limitation period for recovery thereof expired on 31.10.2000.



9. There is no indication on record to show that the Plaintiff's occupation was secretive or with the permission of the true owner. The court accepts the Plaintiff's evidence that his possession was open, without the permission of the Defendant, and without interruption in the legal sense. The court is thus satisfied that the Plaintiff has satisfied the requirements for proving his claim for adverse possession to the required standard.
10. The upshot of the foregoing is that the court is satisfied that the Plaintiff's originating summons has merit and that it has been proved to the required standard. As a consequence, the court makes the following orders for disposal of the originating summons dated 03.04.2023:
  - a. A declaration be and is hereby made that the Plaintiff, Evans Waro Machiegwa, has become entitled to be registered as the proprietor of Title No. Nyandarua/Ol'Kalou Salient/443 on account of the doctrine of adverse possession.
  - b. The Deputy Registrar of the court shall sign all the necessary forms, documents and instruments on behalf of the Defendant to facilitate the transfer of the suit property in the name of the Plaintiff.
  - c. The Land Registrar – Nyandarua shall cause the Plaintiff to be registered as proprietor of Title No. Nyandarua/Ol'Kalou Salient/443 and shall for that purpose dispense with production of the original title deed and all documents in the possession, custody or control of the Defendant.
  - d. There shall be no order as to costs since the suit was not defended.

It is so decided.

**JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 29<sup>TH</sup> DAY OF FEBRUARY, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

**In the presence of:**

Mr. Waichungo for the Plaintiff

N/A for the Defendant

C/A - Carol

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**Y. M. ANGIMA**

**JUDGE**

