



**Magu v Irungu & another (Environment & Land Case E004 of 2023)  
[2024] KEELC 650 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 650 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE E004 OF 2023  
LN GACHERU, J  
FEBRUARY 15, 2024**

**BETWEEN**

**KAMAU MAGU ..... PLAINTIFF**

**AND**

**JULIUS PETER IRUNGU ..... 1<sup>ST</sup> DEFENDANT**

**NELIUS WANJIRU THUKU (SUED IN HER CAPACITY AS THE  
LEGAL REPRESENTATIVE OF THE ESTATE OF STEPHEN THUKU  
(DECEASED) ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff/Applicant, Kamau Magu, brought this Originating Summons dated 21<sup>st</sup> February 2023, against the Defendants/ Respondents herein and sought for the following orders; -
  - i. That the Applicant has by way of adverse possession acquired land parcel no. Loc 13/ Gitugi/ 877, and the said suit land be registered in the name of Kamau Magu.
  - ii. That the land Registrar Murang'a, be ordered to transfer Land parcel No. Loc.13/Gitugi/877, to the Plaintiff/ Applicant herein.
  - iii. That the Deputy Registrar of this Court do sign the application for Land Control Board, transfer documents and any other application and documents necessary to facilitate transfer of the land parcel No. Loc 13/ Gitugi/ 877, to the Plaintiff/ Applicant.
  - iv. That the Defendants/ Respondents do pay costs of this suit.
2. This Originating Summons is premised on the grounds set on the face thereof and on the Supporting Affidavit of Kamau Magu sworn on 21<sup>st</sup> February 2023. These grounds are;



- i. that the Applicant bought the land parcel of No. Loc 13/ Gitugi/ 877, on 14<sup>th</sup> March 1977, from Julius Peter Irungu and Stephen Thuku( now deceased), who are the registered owners of the said land;
  - ii. that he was put on vacant possession immediately after the execution of the agreement for sale;
  - iii. that the Plaintiff/ Applicant has substantially developed the land for over 45 years;
  - iv. the Plaintiff/ applicant has been in continuous and uninterrupted possession for a period of over 45 years;
  - v. the original entry was lawful;
  - vi. the Defendants/Respondents title has been extinguished by operation of law.
3. In his supporting Affidavit, the Plaintiff/Applicant averred that he bought the suit land, Loc 13/ Gitugi/ 877, on 14<sup>th</sup> March 1977, from Julius Peter Irungu and Stephen Thuku, who are now deceased. That the two were the registered owners of the said land parcel. He annexed a sale agreement as annexure KM1 and KM 2. He alleged that he was put on vacant possession, and he paid the purchase price through various agreements as is evident from annexures KM 3 and KM 4.
  4. It was his further averment that he was put on vacant possession immediately after the agreement was signed, and he had developed the said land substantially as is shown by annexure KM5. It was also his averment that he has been on the suit land for the last 45 years, and his possession was continuous and uninterrupted.
  5. He also averred that in 1979, they went to Kangema Land Control Board, so that he could have the suit land transferred to him. That the Vendors were asked to attend, but they only attended twice, and failed to attend the third crucial meeting of the said Land Control Board. He annexed a copy of the letter from the DO marked as annexure KM6.
  6. It was his contention that he has been in continuous and uninterrupted possession of the Suitland, and he urged the court to order that the Defendants/ Respondents' title in respect of the suit land, being Land Parcel No. Loc 13/ Gitugi/ 877, has been extinguished by the doctrine of adverse possession. He also prayed for a declaration that he is entitled to the suit land and that the Land Registra Murang'a, should be ordered to register him as such. He urged the court to direct that the Deputy Registrar of this Court be authorised to sign all the requisite documents to effect subdivision and transfer of one (1) acre, of the suit land Loc 13/ Gitugi/ 877, to him.
  7. Though the Defendants/Respondents were served with the Summons to enter Appearance as is evident from the Affidavit of Service dated 28<sup>th</sup> February 2023, sworn by Bonface Nganga Ngaara, a Process Server, they failed to Enter Appearance nor file their Defence. Consequently, the Plaintiff/ Applicant filed for Request For Judgement, under Order 10 Rule 10 of the Civil Procedure Rules, 2010, and thereafter, the matter proceeded for Formal Proof on 4<sup>th</sup> October 2023.

### **Plaintiff's Case**

8. PW1, Kamau Magu, gave evidence for himself and called no witness. He testified that he is a peasant farmer and that he knew Stephen and Julius, who were brothers. That they sold to him land Parcel No. Loc 13/ Gitugi/ 877, which land was in their names.



9. He also relied on the Supporting Affidavit dated 21<sup>st</sup> February 2023, and also, he produced the list of documents as his Pexhibits 1. He also relied on the various sale agreements mentioned in his list of documents. He told the Court that he has been on the suit land for more than 45 years.
10. It was his testimony that he has developed the suit property, and he produced photographs showing the developments on the suit land. It was his testimony that the Defendants/Respondents have never evicted him and they do not live on the suit land. He also testified that he is the one who uses the land.
11. After the close of the Plaintiff's case, he filed written submissions through his Advocate T.M Njoroge & Co Advocates, who submitted by reiterating the averments made in the Supporting Affidavit. It was submitted that the Plaintiff's entry into the suit land was lawful, but the Defendants/Respondents have not transferred the land to him.
12. He also submitted that he lodged a caution on 22<sup>nd</sup> November 1978, to protect his purchaser's interest and the caution is still subsisting. He further submitted that the Summons herein are uncontroverted, and since the Plaintiff's claim was not challenged, he urged the court to allow his claim.
13. This Court has considered the pleadings herein, the annexures thereto, the viva voce evidence in Court, plus the written submissions and finds as follows;
14. The Plaintiff's/Applicant's claim is for Adverse Possession, wherein, this is a legal process whereby a non-registered owner, but occupant of land gains ownership of title and that land after a certain period of time. In other words, Adverse Possession is a means by which someone may acquire title to land of another person through certain acts, over a defined period of time. In Kenya, the Period is 12 years.
15. Section 7 of the [Land Act](#) provides, Adverse possession, or prescriptive right is one method of land Acquisition in Kenya See Section 7 of [Land Act](#) which provides;
  - 7). Methods of acquisition of title to land Title to land may be acquired through—
    - (a) allocation;
    - (b) land adjudication process;
    - (c) compulsory acquisition;
    - (d) prescription;
    - (e) settlement programs;
    - (f) transmissions;
    - (g) transfers;
    - (h) long term leases exceeding twenty-one years created out of private land; or
    - (i) any other manner prescribed in an Act of Parliament.
16. Further, Section 7 of the [Limitation of Actions Act](#), is the bedrock for claims of adverse possession. It 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.



17. Further, Section 13, of the said *Limitation of Actions Act*, (Cap 22 LOK), provides that; -

- “(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, 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 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 a fresh 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) of this Act, the land in reversion is taken to be adverse possession of the land”.

18. Again, Section 38(1) & (2), of the same Act provides,

“38. Registration of title to land or easement acquired under Act

- (1) 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.
- (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”

19. Courts have variously dealt with claims for adverse possession, and therefore this is not a novel issue. In the case of *Mate Gitabi vs Jane Kabubu Muga & Another* (Nyeri Civil Appeal No. 43 of 2015) (UR) the court held as follows;

“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 force, without licence or permission of the land owner, the intention to have the land”.

20. Therefore, it is clear that for a claim of adverse possession to crystalize, dispossession of the owner of land must be apparent. This aspect is found in the Latin maxim of *nec vi, nec clam, nec precario*: that is without secrecy, without force and without permission. See the case of *Munyaka Kuna Company Limited -Vs- Bernado Vicezo De Masi* (The Administrator of the Estate of Domenico De Masi (Deceased) (2018) eKLR, where the Court stated; -

“To establish adverse possession, a litigant must prove that he has both the factual possession of the land and the requisite intention to possess the land (*animus possidendi*). Secondly, one must prove that he has used the suit land without force, without secrecy, and without



persuasion (*nec vi nec clam nec precario*), for the prescribed limitation period of twelve years.

Third, he must demonstrate that the registered owner had knowledge (or the actual knowing) that the adverse possessor was in possession of the suit property. Fourth, the possession must be continuous; it must not be broken or interrupted.”

21. For one to acquire title by adverse possession, as the Plaintiff/ Applicant is claiming, there are certain principles or tests to be fulfilled. These are; one must have occupied the land to the exclusion of others; the occupation must be without the consent of the owner; the occupation must be for a continuous period and uninterrupted period of at least 12 years. See the case of *Wambugu ...Vs...Njuguna (1983)* KLR page 172 where the Court of Appeal held as follows;

- “1. In order to acquire by statute of limitations title to land which has a known owner the owner must have lost his right to the land either by being dispossessed of it or by having continued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed of the suit land for a continuous period of twelve years as to entitle him, the respondent to title to the land by adverse possession.
2. The *limitation of Actions Act*, on adverse possession contemplates two concepts: dispossession and discontinu-ance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not the claimant has proved that he has been in possession for the requisite number of years.”

22. It is apparent that for a claimant to be entitled to land by adverse possession, he/she must prove that he has been in exclusive possession of the land openly and as of right, without interruption for a period of 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition. See the case of *Kasuve VS Mwaani Investments Ltd & 4 Others (2004)* eKLR 184, where it was held that:

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

23. However, the right to adverse possession does not accrue automatically, unless the person in whose right has accrued takes action. This action is taken by filing a claim to Court as provided by Section 38 of the *Limitation of Actions Act*. The Plaintiff/Applicant has thus filed this claim to assert his claim See the case of *Mtana Lewa v Kahindi Ngala Mwangandi [2015]* eKLR the Court held;

“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 licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

24. For this Court to determine whether the Plaintiff/Applicant herein has satisfied the ingredients for adverse possession, these questions must be answered,
- i. How did the Applicant take possession of the suit property?
  - ii. When did he take possession and occupation of the suit property?
  - iii. What was the nature of possession and occupation?
  - iv. How long has the applicant been in possession of the land?
25. It is evident that the Plaintiff's/Applicant's suit is not defended since the Defendants/ Respondents, did not enter appearance nor file defence. However, it does not mean because the Plaintiff's suit is uncontroverted, then the Plaintiff's claim has to be allowed automatically. The Plaintiff/Applicant has a duty to call sufficient evidence and prove his claim on the required standard of balance of probabilities. See the case of *Samson S. Maitai & Ano...Vs...African Safari Club Ltd & Ano. (2010) eKLR*, where the Court held that: -

“.....I have not seen judicial definition of the phrase ‘formal proof’. ‘Formal’ in its ordinary dictionary meaning refers to being ‘methodical’ according to rules of evidence. On the other hand, according to Halsburys Laws of England, Vol. 17 Paragraph 260, proof is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption”.

26. From the available evidence in Court, it is clear that the Plaintiff/Applicant entered into the suit land after entering into a number of sale agreements with Julius Peters Irungu & Stephen Thuku. The Plaintiff's/Applicant's mode of entry, and possession, was as a result of the sale agreements and therefore it was permissive. It is evident that for a claim of adverse possession to suffice, the claimant must show that the entry was non-permissive and without licence. See the case of *Mombasa Teachers Co-operative Savings & Credit Society Limited Vs Robert Muhambi Katana & 15 others [2018] eKLR*), where the Court held:

“non permissive or non-consensual, actual open, notorious, exclusive and adverse use/ occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, *nec vi nec clam nec precario*”.

27. Since the entry of the Plaintiff/Applicant on the suit land was permissive, then it follows that a claim for adverse possession cannot be sustained. However, there are exceptions, to this holding since once the last instalment is paid, then time for purpose of Limitation of actions begins to run after the payment of the last instalment. See the case of *Wanyoike v Kahiri [1979] KLR*, at page 239 Justice Todd (as he then was), held that;

“in a purchase scenario, the period of limitation starts to run on the date of the payment of the last installment of the purchase.”



28. From the exhibits produced in Court, the last instalment was paid on 18<sup>th</sup> May 1978, wherein the Vendors, Irungu Mwangi and Stephen Thuku, acknowledged receipt of the full amount of purchase price, being Ksh 12,500/=. Since the vendors acknowledged receipt of the said final instalment, then limitation of actions set in, and time began to run. Further, it is evident that on 22<sup>nd</sup> November 1978, the Plaintiff/ Applicant filed a caution over the suit land claiming purchasers' interest. Therefore, the Plaintiff/ Applicant holding of the suit property became adverse to the vendors' title. Even after time began running, there is no evidence that the Vendors ever asserted their right against the Plaintiff/ Applicant herein. From 1978, to 2023, it was over a period of 45 years.
29. On the issue of when the Plaintiff/ Applicant entered into the suit land, it is evident that the Plaintiff/ Applicant had given evidence that he took possession of the suit land as soon as he paid the last instalment. The Court has seen the sale agreement dated 5<sup>th</sup> March 1979, wherein the vendors Julius Irungu and Stephen Thuku, had allowed the Plaintiff/ Applicant to start using the land, because they were unable to refund to the Plaintiff of Ksh 12,500/=:, which was the already paid purchase price. The Plaintiff's/ Applicant's holding of the suit land became adverse to the vendors in 1978, after the payment of the last instalment, and after the Plaintiff/ Applicant lodged a caution in 1978, against the title, as he claimed purchaser's interest. Therefore, the Court finds that the Plaintiff/ Applicant herein took possession and occupation of the suit property in 1978, and his possession and occupation has been open, exclusive and without interruption. He took such possession with intention of owning the portion of land purchased by him.
30. On the nature of occupation, the Plaintiff/ Applicant averred that he has been in open, continuous and exclusive occupation, a fact that was not controverted by the Defendants/ Respondents, as they did not file a defence. To determine, the nature of the holding, the Court will rely on the case of *Mbira v. Gachuhi* (2002) 1 EALR 137, where it held;
- “... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption...”
31. On how long the Plaintiff/ Applicant has been in possession, it is evident that the Plaintiff/ Applicant has been in possession of the suit land since 1978. This is more than 12 years, and his occupation has been open, without secrecy, without force, and with intention of acquiring ownership of the said land. Adverse possession accrues to land and not title and since the Vendors or Defendants/ Respondents have never taken any step to evict the Plaintiff/ Applicant, the Plaintiff as a claimant has proved that he dispossessed the Defendants / Respondents herein and is therefore entitled to ownership of the suit property through adverse possession. See the case of *Samuel Kihamba vs Mary Mbaisi* (2015) eKLR where the court held:
- “Strictly, 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 force, without secrecy, 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 phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land”
32. Having considered the available evidence, the Court finds that there is nothing that stopped time from running, as the Plaintiff/ Applicant took possession of the suit land in 1978, the Defendants/



Respondents never asserted their rights. At the time of filing this suit, the Plaintiff/Applicant had been in possession and occupation of the suit land for a period of more than 45 years. See the case of Paul Macharia Wangunya vs. Mwangi Macharia Wangunya & Anor [2015] eKLR, where the Court held that;

“time begins to run when there is some person in adverse possession of the land and not by virtue of the fact that the land is vacant. In respect of registered land, adverse possession dates from the granting of the certificate of title, for that is when the Title holder is prima facie entitled to possession and therefore entitled to take action against any intruder to the land”.

33. Further, it is evident that the Plaintiff/Applicant herein had dispossessed the owners, or the owners had discontinued their possession of the suit land for more than 12 years. There was also sufficient evidence to prove that the Plaintiff/Applicant had been in continuous and exclusive possession of this suit land since 1978, and thus he has acquired the title to this land by virtue of adverse possession.
34. In totality, the Court finds and holds that the Plaintiff/Applicant has proved his case on the required standard of a balance of probabilities. For the above reasons, Judgement is entered for the Plaintiff/Applicant against the Defendants/ Respondents herein as prayed in the Originating Summons dated 21<sup>st</sup> February 2023, in terms of prayers No.1, 2, 3 and 4 of the said Summons.

Judgement is entered accordingly.

**DATED, SIGNED AND DELIVERED IN MURANG'A THIS 15<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**L. GACHERU**

**JUDGE**

**Delivered online in the presence of;**

Absent for Plaintiff/Applicant

1<sup>st</sup> Defendant/Respondent

Absent for

2<sup>nd</sup> Defendant/Respondent

Joel Njonjo - Court Assistant

**L. GACHERU**

**JUDGE**

**15/2/2024**

