



REPUBLIC OF KENYA



KENYA LAW
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**Kioko & another v Mulinge & another (Civil Appeal 447 of 2019)
[2025] KECA 274 (KLR) (21 February 2025) (Judgment)**

Neutral citation: [2025] KECA 274 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 447 OF 2019
A ALI-ARONI, AO MUCHELULE & GV ODUNGA, JJA
FEBRUARY 21, 2025**

BETWEEN

JOSEPH NDUVA KIOKO 1ST APPELLANT

RABECA NTHENYA NDUVA 2ND APPELLANT

AND

JUSTINE PENINA MUNYIVA MULINGE 1ST RESPONDENT

MUNYAO KIOKO KIKEU 2ND RESPONDENT

*(Being an appeal from the Judgment of the Environmental and Land Court at Machakos
(Angote, J.) delivered on 18th January 2019 in ELC Case No. 459 of 1998 (O.S))*

JUDGMENT

1. The appellants filed an Originating Summons on 4th December 1998 which was amended on 21st October 2011, seeking a declaration that they had acquired ownership rights and title to Land Parcel Nos. Machakos Town/Block 3/1150 and Machakos Town/Block 3/1151, (suit properties), through process of adverse possession. Additionally, the appellants prayed for an order directed at the Land Registrar of Machakos to register the suit properties in their names. They also sought a permanent injunction to restrain the respondents, their servants, agents, or otherwise, from trespassing on or in any other manner interfering with the suit properties.
2. The affidavit of the 1st appellant supported the Originating Summons, wherein he deposed that; the 2nd appellant was his wife, and they occupied the suit properties openly, continuously, and without disturbance for over thirty (30) years and that their occupation was adverse to that of the respondents, who were registered as the owners of the suit properties on 13th October 1998 and 27th May 1999, respectively; the registration of the respondents' titles was ineffective, null, and void because the respondents' interest on the titles had been extinguished long before their registration.



3. The respondents were served with the amended Originating Summons and entered appearance vide a memorandum of appearance dated 29th December 1998. An affidavit was filed by the manager of Katelembo Athiani Muputi Co-operative Society Limited in response, on their behalf. The Cooperative Society was removed as a respondent in the amended Originating Summons. The matter was set for hearing, and despite service of the hearing notice, the respondents were absent. Their absence notwithstanding, the matter proceeded to be heard by way of viva voce evidence.
4. The 1st appellant informed the court in his testimony that his parents lived on the suit property and were recognized squatters. His father worked for Katelembo. He testified that he was born on the suit property and has resided there ever since. He married the 2nd appellant in 1987, and they have since occupied the suit properties, which measure approximately 4 acres, though they occupy beyond the same and are on approximately 7 acres.
5. Further, he stated that the area has had squatters' problems for many years, which problem was known to the government. His father's name appeared on the list of squatters. The father died and was buried on the property and after his father's demise in 1998, the 1st appellant continued to live on the land with his family. He claimed that the respondents do not reside on the land, and he is unaware of their whereabouts. He has planted a forest on a portion of the suit property that measures $\frac{3}{4}$ of an acre while he occupies the remaining portions.
6. In her testimony, the 2nd appellant confirmed that she is the 1st appellant's wife and rehashed the evidence of the 1st appellant. She also stated that she has lived on the suit properties since marriage in 1987.
7. The 1st appellant presented in evidence various documents indicating that they had been living on the disputed properties before they were registered in the respondents' names. He also submitted correspondence dating back to 1976, showing that the appellants' father, Kioko Kamweli, had settled on the land with his family since 1920 and worked there.
8. It is noteworthy that during the proceedings, the respondents filed an application to set aside the ex-parte proceedings and for leave to defend the suit. The application was opposed via a replying affidavit sworn by the 1st appellant on 5th December 2017. The court dismissed the application in a ruling delivered on 25th May 2018. The matter thus proceeded undefended.
9. In a judgement dated 18th January 2019, the court observed that the title extract for Machakos Town/Block 3/1150 showed that the 1st respondent was registered as a proprietor on 13th October 1998. Whereas the 2nd respondent was registered as Machakos Town/Block 3/1151 proprietor on 27th May 1999. Further, the court noted that before the suit properties were registered in favour of the respondents, the same had been registered in the name of the Government of Kenya on 24th February 1997.
10. The trial court appreciated that the respondents did not challenge the 1st appellant's claim that he was born on the disputed land and had since lived on it, and there was no evidence that the respondents had ever occupied the suit properties. However, the court considered that the law regarding adverse possession specifies that the time begins to run for such claims when the land is registered in favour of the owner or their predecessor in title.
11. The court, having determined that the respondents were registered as the owners of the two properties on 13th October 1998 and 27th May 1999, respectively, and their predecessor in title, the government, was registered on 24th February 1997, it found that twelve (12) years had not elapsed between the registration of the land in favor of the respondents and the filing of the suit. Further, the court also



observed that even if the land had all along been registered in favour of the government, the appellants' claim could not have succeeded as section 41 of the *Limitation of Actions Act* excludes any person from acquiring title to or any easement over government land or land otherwise enjoyed by government. In the end, the court dismissed the appellants' case.

12. Aggrieved by the judgment, the appellants raised 7 grounds of appeal in their memorandum of appeal dated 11th September 2019, where they seek that the judgment of the High Court be set aside, the amended Originating Summons be allowed, and for costs in the appeal and the High Court.
13. The grounds of appeal are; the learned judge erred in dismissing the claim despite the appellants' pleadings not being contested; asserting that the period before registration could not be considered when determining the limitation period and failing to take into account the evidence of possession of the suit land by the appellants and their parents, who occupied the land before them; in failing to recognize that the Government of Kenya did not possess any proprietary rights over the suit land, as the same was owned by the Katelembo Athiani Muputi Co-operative Society Limited, which had formally acknowledged the appellant's long possession of the land and had abandoned its defence against the appellants' claim; and overlooking the fact that by the time of registering the suit properties, the limitation period in favour of the appellants had already crystallized.
14. In his submissions dated 24th July 2020, learned counsel for the appellants contended that the appellants' case was unchallenged and uncontroverted, that they demonstrated how the respondents casually appeared before the trial court and later disappeared and only resurfaced after the hearing had long proceeded. Learned counsel in this respect relied on the case of *Maweu vs. Liu Ranching & Farming Limited [1985] eKLR Civil Appeal No. 2 of 1983*, where the court stated that public policy underlying the Limitations of Actions Act entailed that a long period of possession should not be disturbed by a negligent owner or owners in succession.
15. Learned counsel further contended that the trial court had failed to consider the fact that the appellants had demonstrated that the 1st appellant's parents had been living and working on the suit properties as early as 1920; the 1st appellant was born on the same and married the 2nd appellant in 1987, and they have all along been in occupation; the suit properties were registered in the respondents' names, despite the appellants being in open, continuous and uninterrupted occupation; the respondents' registration was subject to the overriding interests acquired by the appellants under section 28 of the *Land Registration Act 2012*. In support of his assertion, learned counsel relied on the case of Peter Mbiri Michuki vs. Samuel Mugo Michuki [2014] Nyeri Civil Appeal No. 22 of 2013, where this Court relying on the decision of *Mwangi & Another vs. Mwangi [1986] KLR*, held that the rights of a person in occupation or possession of land are equitable rights which are binding on the land.
16. On the government's interest on the suit property, learned counsel submitted that the government did not have any proprietary rights over the suit land as Katelembo Athiani Muputi Co-operative Society Limited owned the same and that the registration of the Government of Kenya against the titles was a compulsory acquisition and by such registration, the government did not assume ownership of the suit parcel but instead held them for the benefit of the eventual allottees.
17. Learned counsel referred to the case of *Benson Mukuwa Wachira vs. Assumption Sisters of Nairobi Registered Trustees [2015] eKLR*, in submitting that equity looks on that which ought to have been done, as done and that it would be reasonable to consider that since the appellants were in continuous, uninterrupted possession and control of the property over a considerable time, they ought to be the registered owners of the suit properties.



18. Learned counsel for the respondents filed submissions dated 27th August 2020 where he contended that from the face of the title extracts produced by the appellants during the trial, the suit properties were registered in favour of the Government of Kenya on 24th February 1997 and in favour of the respondents in 1998 and 1999, respectively; and that the appellants did not produce any evidence to the effect that the suit properties had been registered before the year 1997.
19. Learned counsel contended that the time before the suit parcels were registered in the Government of Kenya's name, should not be considered while computing time for adverse possession, and even if such time was to be considered, the appellants did not inform the court why they had not applied for registration of the suit properties in their name; and also assuming that they had acquired an interest, the same would have been defeated when the suit parcel was acquired by the government in 1997 and thus any subsequent claim by the appellant remains an afterthought. In support, he quoted the case of Sisto Wambugu vs. Kamau Njuguna [1983] eKLR, urging that a claim for adverse possession contemplates possession and discontinuance of possession where the title holder had been dispossessed of his possession for the statutory period and not whether the claimant had proved possession for a number of years.
20. Learned counsel for the respondents submitted further that as at the time the appellants filed the instant suit at the ELC Court at Machakos in the year 1998, no overriding interest had been created thereon in their favour as the period of occupation if any was about 8 months and 1 year after the suit parcels were registered in 1998 and 1999 and thus less than the statutory period of 12 years. In support he relied on the case of Dhariwal Hotels Limited vs. Sato Properties Limited [2011] eKLR, where the court held that time begins to run from the date the property is registered.
21. Learned counsel for the respondents asserted that the Government of Kenya was the first to be registered as the owner of the suit land, obtaining indefeasible title as the 1st registered owner in 1997; hence, the claim that the time before the land was registered should be considered is untenable and contrary to the doctrine of absolutism. In support, he relied on the case of Ambale vs. Masolia [1976] eKLR, where the High Court discussed the doctrine of absolutism and referenced the case of Obiero vs. Opiyo and Others [1972] EA 227. Learned counsel urges the court to dismiss the appeal with costs to the respondents.
22. This being the first appeal, we must analyze and re-assess the evidence on record and reach our independent conclusions. This approach was adopted in the case of Arthi Highway Developers Limited vs. West End Butchery Limited & 6 Others [2015] eKLR, where the court cited the case of Selle vs. Associated Motor Boat Co. [1968] EA 123 and held as follows; -

“An appeal to this Court from a trial by the High Court is by way of retrial, and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”
23. Having considered the pleadings, the evidence placed before the court, submissions by respective parties, case law cited, the law, we are of the view that the issues turning for our consideration are the



effect of the respondents failing to adduce evidence on the matter at the trial court, and whether the doctrine of adverse possession is applicable in the circumstances of the case.

24. The appellants initially preferred the suit against 5 respondents, namely Katelembo Athiani Mupati Co-operative Society, Munyao Kioko, Justina Penina, the Commissioner of Lands, and the Attorney General, in an Originating Summons dated December 4, 1998, which was amended on October 21, 2011. In the amended Originating Summons, the appellants dropped the names of the 1st, 4th, and 5th respondents, leaving the names of the respondents named herein, seeking a declaration that they had acquired full rights and title to Land Parcel Nos. Machakos Town/Block 3/1150 and Machakos Town/Block 3/1151 (suit properties), through adverse possession; for an order directing the Land Registrar of Machakos to register the suit properties in their names; and for a permanent injunction to restrain the respondents, their servants, agents, or otherwise, from trespassing on or in any other manner interfering with the suit properties, on basis that the 1st appellant's parents initially occupied the property; he was born there, married his wife the 2nd appellant in 1987 and continued to reside therein; when his father died he was buried on the suit property; they were acknowledged as squatters on the land; the respondents have not been in possession of the suit properties; and that the appellants acquired possessory rights by way of adverse possession.
25. In response to the initial Originating Summons, the 1st, 2nd and 3rd respondent: Katelembo Athiani Mupati Co-operative Society, Munyao Kioko and Justina Penina, filed a joint replying affidavit that was sworn by one Bernard Munyao, a Manager with the Katelembo Athiani Mupati Co-operative Society Limited. Relevant to the matter, he deposed that the Originating Summons was bad in law as adverse possession would not apply to land held or owned by the government, and he denied that the appellants were in possession of the suit property.
26. The respondents did not appear in court to give evidence in support of their assertions for the reasons already stated. The only evidence before the court was by the two appellants, who rehashed the contents of their respective affidavits in support of the amended Originating Summons. The 1st appellant stated that he was born on the suit property. His father worked at Katelembo, and he produced his father's employment cards in support. Further, he stated that he lived on the suit properties with his parents as squatters whom the government acknowledged. His father was identified as a Squatter No. 9. When his father died in 1998, he was buried on the suit property. The proceedings show that. He produced photographs of their development on the suit properties and a letter from the respondents' counsel dated 2nd October 1998, asking them to vacate as they were trespassing on the same.
27. PW2 was the 2nd appellant, who testified that she had lived on the suit properties since 1987 when she married the 1st appellant.
28. We note with concern that the record of appeal did not contain the exhibits referred to by the 1st appellant in his testimony. Since the respondents were not present in court to challenge the appellants' occupation, we do not think the absence of the exhibits in the record of appeal is fatal to the matter before us.
29. It is a cardinal principle of law that he who asserts must prove. Sections 107, 108 and 109 of the [Evidence Act](#) Chapter 80 of the Laws of Kenya states:
 107. Burden of proof –
 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.



2. when a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

107. Incidence of burden -

The burden of proof in a suit or proceedings lies on the person who would fail if no evidence at all were given on either side.

107. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

30. The appellants alleged that in the initial stage, the government held the suit property in trust for Katelembo Athiani Mupati Co-operative Society before it became the registered owner. Apart from the 1st appellant's averments, no documents were produced in evidence. In any event, the Attorney General sued on behalf of the government, and the Katelembo Athiani Mupati Co-operative Society were dropped as respondents.
31. Although in the replying affidavit, the respondents denied the appellants' occupation of the suit premises, their absence in court left their assertion untested, and therefore, the appellants' evidence that they have been in occupation for more than 30 years remains uncontroverted. The question is whether the mere fact of occupation gives them a carte blanche to obtain title to the suit properties. The appellants' first ground of appeal is that "the Environment and Land Court grossly erred in dismissing the plaintiffs' claims, notwithstanding that the appellants' pleadings, affidavits and evidence were not controverted in any manner."
32. It is not enough to merely make an assertion, particularly in this instance. The law must also be on your side, as the doctrine of adverse possession that the appellants are relying on is based not only on possession but also on discontinuance of possession that is detrimental to the rights of the registered owner and pegged on the duration of the possession which must be for a statutory period of 12 years.
33. The appellants may have come to court under section 38(1) of the *Limitation of Actions Act*, which states that:

Where a person claims to have become entitled by adverse possession to land 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. (Emphasis added)

34. This section, however, must be considered along with sections 7 and 13 of the Limitation of Action Act.

Section 7 states:

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.

Section 13

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 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 adverse possession of the land.

The appellants claim that their right of adverse possession first accrued against the government, which held the property in trust for the society, and then against the respondents.

35. For starters, Section 41 states:

This Act does not –

- (a) enable a person to acquire title to, or any easement over –
 - (i) Government land or land otherwise enjoyed by the Government.

Section 41 excludes land in the name of the government from being claimed using the doctrine of adverse possession. In this case, the appellants claim that they were in possession of the suit properties for the 30 years cannot be used to obtain government property. The record in any event shows that the government became the registered owner in 1997.

36. On its part, section 28 of the [Land Registration Act](#), Chapter 300 of the Laws of Kenya provides:

Unless the contrary is expressed in the register, all registered land shall be subjected to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register –

.....

- (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.

37. In Benjamin Kamau Murima & Another vs. Gladys Njeri [CA No. 213 of 1990](#) this Court stated:

“The combined effect of the relevant provisions of section 7, 13, 17 of the [Limitation of Actions Act](#), Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of the land.

In the case of Mtana Lewa vs. Kahindi Ngala Mwangandi [2015] KECA 532 KLR Ouko, JA (as he then was) in his judgment stated:

“In terms of sections 7, 9, 13, 17, 36 and 38 of the [Limitation of Actions Act](#), Chapter 22 of the title of a registered owner of land will be extinguished and vested in a third party who proves that he has been in possession of the land continuously and uninterrupted for a period of 12 years...”

In Chevron (K) Limited (formerly known as Caltex Oil Kenya Limited) vs. Harrison Charo Wa Shutu [2016] eKLR, a case similar in some respect to the case before us, the Court stated:

“The ultimate question still remains whether the respondent had been in possession of the suit property for over 12 years as at the time the suit to evict him was instituted in 2008, and whether his possession was adverse to that of the appellant?”



It is settled principle that a claim for adverse possession can only be maintained against a registered owner. See Sophie Wanjiku John vs. Jane Mwihaki Kimani Nairobi ELC Civil Suit No. 490 of 2010.

Until 1994 the property was Government land hence the period before 1994 does not account for the time to be computed in arriving at the statutory 12 years as there cannot be a claim of adverse possession against public land....”

38. In his judgment, the trial court (Angote, J.) stated:

“... considering that the defendants were registered as proprietors of the two properties on 13th October, 1998 and 27th May, 1999 respectively, and then predecessor in title, the government, was registered as the proprietor of the land on 24th February, 1997, a period of twelve (12) years had lapsed from the period when the suit was registered in their favour and when the suit was filed. The period that the plaintiff lived on the land before the same was registered cannot be computed for purposes of a claim of adverse possession.”

39. We cannot agree more with the trial judge’s sentiments, as he simply restated the law. To succeed in a claim of adverse possession, one must prove occupation adverse to a registered owner of the land subject matter and the occupation by the adverse possessor has to be for a period of 12 years, “nec vi, nec clam, nec precario”; without permission, without secrecy and interruption.

40. The respondents became registered owners according to the appellants’ own documents on the 13th of October, 1998, and the 27th of May, 1999, respectively. That was 3 and 8 months before the suit was filed. The period adverse to the owners started running upon registration. Based on the above background the trial court cannot be faulted, although the respondent did not defend the suit. Plainly put, the appellants did not meet the threshold for adverse possession, irrespective of the fact that the respondents did not defend the suit.

41. The appeal is dismissed. In the circumstances of this case, each of the parties will meet their own costs.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY, 2025.

ALI-ARONI

JUDGE OF APPEAL

A. O. MUCHELULE

JUDGE OF APPEAL

G. V. ODUNGA

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

Deputy Registrar.

