



REPUBLIC OF KENYA



KENYA LAW
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**Mbaruk v Gaddim & another (Civil Appeal E122 of 2022)
[2025] KECA 1023 (KLR) (5 June 2025) (Judgment)**

Neutral citation: [2025] KECA 1023 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E122 OF 2022
AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA
JUNE 5, 2025**

BETWEEN

NASSOR SALIM MBARUK APPELLANT

AND

FAUZ GADDIM 1ST RESPONDENT

NAGIB GADDIM 2ND RESPONDENT

(Appeal from the decision of the Environment and Land Court at Mombasa (N. A. Matheka, J.) delivered on 28th June, 2022 in Mombasa ELC CAUSE 386 OF 2017 (O.S))

JUDGMENT

1. The Appellant, Nissor Salim Mbaruk, filed an Originating Summons seeking the following orders;
 - a. Whether he has acquired title to the suit property by adverse possession? If so it be declared and decreed that he has acquired title to all that parcel of land known as Plot No. Kilifi/Mtwapa/229 (the suit property) by adverse possession.
 - b. Whether the Defendants (Respondents) title to the suit property has been extinguished by operation of the law? If so, it be declared and decreed that pursuant to the provisions of Section 17 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya, the Respondents title to all that title of land known as Plot No. Kilifi/Mtwapa/229 is extinguished.
 - c. Whether he is entitled to be registered as the owner of the suit property? If so, it be declared and decreed that he be registered as the owner of all that parcel of land known as Plot No. Kilifi/Mtwapa/229
 - d. Whether by dint of Section 8 of the *Limitation of Actions Act*, Cap 22, Laws of Kenya, and the Defendants (Respondents) are barred from claiming any eviction? If so, the Defendants



(Respondents) be stopped from evicting him from the parcel of land known as Plot No. Kilifi/Mtwapa/229

- e. That costs of this application be in the cause.
2. The Appellant claimed to have occupied the suit property from 1993. He stated that he built a house and planted coconut trees on the land, and that his occupation has been peaceful and uninterrupted and with the knowledge of the Respondents. On 20th October 2017, he woke up to find leaflets deposited on the suit property threatening him with eviction. He denied being the Respondents' caretaker, or that he had been paid to be a care taker. He claimed to have cultivated and kept livestock on the suit property, and that, owing to his occupation, he sought to be declared the owner of the suit property. He produced in evidence photos taken in 2017.
 3. The Appellant further called PW2 Ramadhan Said his neighbour, who testified that he has known him since 1990, and that the Appellant had been cultivating on part of the suit property, keeping livestock since the 1990s and had built a home and planted trees.
 4. The Respondents, who are brothers, testified that they are the registered proprietors of the suit property. They stated that the Appellant had never occupied the suit property for A period of 12 years or at all as claimed; that the Appellant had approached their uncle Mbarak Ali Gadim (deceased) sometime in the late 1990's and requested permission to cultivate a portion of the property. Their late uncle, who was the caretaker and manager of their property, granted the Appellant permission to cultivate a portion of the land, provided that he (the Appellant) shared some of the produce with their uncle. They asserted that the Appellant lived at Mzambarauni in the neighboring area.
 5. In support of their case, they called DW 3, Zaki Ali, who testified that the land belonged to the Respondents, and that the Appellant was allowed to cultivate the land, and that he did not live there, but lived elsewhere. DW4, Hassan Hamisi Kishungi, testified that he used to occupy the portion adjacent to the Appellant's portion of the suit property where he carried out poultry farming. He started his chicken business on the suit property in 1998, and had put up a banda. He was there for 2 years until he left in 2000. He stated that the Appellant was not residing on the suit property, but was only cultivating the land; that the farm belonged to the Respondents who would allow farmers to cultivate the land.
 6. DW5, Mohammed Said, testified that he was the driver of the Respondents' father, and that the Appellant approached him and requested to cultivate the land and was allowed to do so. He denied that the Appellant lived on the parcel and stated that he was there last in 2008.
 7. DW6, the Chief in Mtwapa from 2001 to 2021, stated that the Appellant lived in Mzambarauni and not on the suit property. She stated that there were no permanent structures on the land but only mud structures.
 8. Upon considering the evidence, the trial Judge held that the Appellant did not prove his claim and, in so concluding, proceeded to dismiss the suit.
 9. Aggrieved, the Appellant has filed an appeal to this Court on the grounds that the learned Judge was in error in holding that the Appellant did not prove that he has been in occupation of the suit property from 1993 without interruption; that the Appellant's possession of the suit property was not continuous; in failing to consider the Appellant's evidence, authorities and submissions; in holding that the alleged activities of Hassan Hamisi Kishungi (DW4) amounted to interruption of the Appellant's occupation of the suit property; in accepting the Respondents' claims that the Appellant was in occupation of the suit property with the permission of their deceased uncle without any proof; in holding that the Appellant had failed to establish that his possession of the suit property was



continuous and not broken for any temporary purposes or any endeavors to interrupt it for a period of 12 years; and in holding that the Appellant failed to prove his case on a balance of probability.

10. The Respondents have filed a notice to affirm the decision on the grounds that; the Respondents were the bona fide owners of the suit property and hold an unchallenged title; that the Appellant was a licensee having been given permission, which was corroborated by the evidence of DW 1, DW 2, DW 4 and DW 5 and, consequently, possession was not adverse; that the Appellant did not prove that he had been in occupation of the suit property since 1993 without interruption, and that his possession of the suit property was continuous for a period of 12 years; that the structures exhibited in PEX 3 did not belong to, and nor were they erected by, the Appellant; that they were put up by DW 4; that, given the evidence, the Appellant did not prove his case on a balance of probabilities.
11. Though both parties filed written submissions, when the appeal came up for hearing on a virtual platform, neither counsel for the Appellant nor the Respondents were in court. Needless to say, on the basis of the submissions, we have proceeded to render a Judgment.
12. The Appellant submitted that the Respondents did not interfere with the Appellant's occupation of the suit property, and did not seek recovery of the land or try to remove him by any other means; that it is the Appellant who sought to actualize his prescriptive rights over the land; that the activities of the witnesses could not stop time which had accrued in 1993 from running.
13. Counsel further submits that there was no evidence that the Respondents' uncle authorized by the Respondents to be the caretaker of the suit property, with powers to allow others to cultivate on it; that there was nothing presented by the Respondents to show that they were bound by any decision he made, so that if he allowed someone to occupy and make a living on the suit property then they could not remove that person even after his death.
14. For their part, the Respondents submitted that the Appellant failed to produce any evidence to confirm possession since the year 1993 as alleged; that it is not in dispute that the Respondents are the registered owners of the suit property. The issue is whether or not they hold a good title against the Appellant's claim for adverse possession. It was submitted that the Appellant failed to prove his claim, and also failed to show how the learned Judge was in error in so finding.
15. We have considered the grounds of appeal as well as submissions by counsel and the authorities cited. Being a first appeal, the duty of this Court is to analyze and re-assess the evidence on record and reach our own independent conclusions. In *Selle vs Associated Motor Boat Co. Ltd* [1968] EA 123, it was expressed thus:

“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 (*Abdul Hameed Saif -v - Ali Mohamed Sholan* (1955), 22 E. A. C. A. 270).”
16. Having considered the appeal and the Respondents affirmations, in our view the central issue for determination is whether the learned Judge was wrong in finding that the Appellant had not proved his claim for adverse possession of the suit property.



17. In addressing the Appellant’s occupation of the suit property, the learned Judge had this to say:

“I find that the plaintiff was a licensee having been given permission by the plaintiff’s uncle. Once that said uncle died the plaintiff has now changed the story and wants to claim the land by way of adverse possession”.

18. Land ownership by way of adverse possession is underpinned by statute in Sections 7, 13, 17 and 38 of the Limitations of Actions Act (Cap 22).

19. Section 7 of the Act provides:

“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. Section 13, on the other hand, stipulates:

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”.

21. Section 17 goes on to provide that:

“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”.

22. Finally, Section 38(1) and (2) states that:

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.”



23. In the case of *Chevron (K) Ltd vs Harrison Charo Wa Shutu* [2016] KECA 248 (KLR) this Court aptly set out the conditions for adverse possession thus:

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 vs. Liverpool College* (1900)1 Ch.19, 21."

24. The law and requirements for adverse possession were also spelt out in the case of *Mbira vs Gachuhi*, [2002] I EALR 137 where it was held that:

.... 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 statutory prescribed period without interruption...."

25. So that, in order for a claim of adverse possession to be proved, the following requirements must be demonstrated by the claimant. These are that:

- i. the date on which the claimant came into possession;
- ii) the nature of the possession;
- iii) the fact that his possession was known to the other party;
- iv) the length of the continued possession; and
- v) the possession was open and undisturbed for the requisite 12 years. In other words, it must be proved that the occupation was adverse to the registered owner of the land, and that the occupation by the adverse possessor was for a period of 12 years, "nec vi, nec clam, nec precario"; without permission, without secrecy and interruption. See the oft cited cases of *M'Mikua vs Muchiri & another* [2024] KECA 1882 (KLR); *Titus Mutuku Kasuve vs Mwaani Investments Limited & 4 others* [2004] eKLR; *Titus Kigoro Munyi vs Peter Mburu Kimani*, Civil Appeal No. 28 of 2014; *Wambugu vs Njuguna* [1983] KLR 172); and *Karuntimi Raiji vs M'makinya* [2013] eKLR.

26. In this case the question begs as to whether the Appellant has satisfied the above factors so as to prove adverse possession. The Appellant's contention is that he occupied the suit property without the Respondents' knowledge in 1993 and constructed a house where he has lived for the past 12 years and more. The Respondents however refuted his claim and asserted that the Appellant was on the suit property with permission from their uncle, the Late Mbarak Ali Gadim, who authorized him to cultivate the land. The arrangement between them was that the Appellant would give their uncle some of the produce harvested from the land. The defence witnesses, DW3 Zaki Ali Mohamed, the Appellant's in- law, Hassan Hamisi Kishungi (DW4), and DW5, Mohamed Mahfudh Said, a former driver, confirmed that they were aware that it was the Respondents' uncle, the caretaker of the suit property, who gave the Appellant permission to cultivate the property. In particular, Hassan Hamisi Kishungi (DW 4) stated that, like the Appellant, he too sought permission from Mbarak Gadim to build temporary structures on the suit property and to carry out poultry farming.



27. A consideration of the evidence does not disclose that the Appellant dispossessed the Respondents from the suit property, or that the activities that he was undertaking on the portion that he cultivated were adverse to them. Although the Appellant relied upon photographs alleged to have been taken in 2017, nothing in the pictures depict, firstly, the permanency of his occupation, or the alleged period of occupation. DW 4 evidence clearly indicated that it was he, and not the Appellant, who constructed the structures in the photograph that the Appellant claims he built and occupied. Furthermore, the evidence of PW3 and PW6 left no doubt that the Appellant did not reside on the suit property, but resided in Mzambarauni.
28. What comes out of the evidence is that the Appellant was a mere licensee on the suit property having been granted permission to cultivate the land.
29. In the case of *Mtana Lewa vs Kahindi Ngala Mwangandi* [2015] eKLR, this Court was clear that adverse possession cannot arise where occupation is under a licence. This Court stated:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or in action of the owner.

The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity, and in extent to show that possession is adverse to the title owner.” (emphasis ours)

30. Similarly, in *Teresa Wachuka Gachira vs. Joseph Mwangi Gachira* [2009] eKLR, the Court considered the issue of dispossession to be a question of fact, depending solely on the evidence and the peculiar circumstances of each case, and the Court held that:

We have considered the evidence on record ourselves and we are satisfied that the appellant did not discharge the onus placed on her in establishing a case for entitlement to the disputed land through adverse possession. There is no proof of exclusive, continuous and uninterrupted possession of the land for twelve years or more before the suit against her was filed. Possession could have been by way of fencing or cultivation depending on the nature, situation or other characteristics of the land. Periodic use of the land is not inconsistent with the enjoyment of the land by the proprietor.”

31. Having been authorized to cultivate on the suit property meant that the Appellant was at all times a licensee. This being the case, he cannot now turn around and convert the permission he was granted to be on the land into a claim for adverse possession. As a consequence, as did the learned Judge, we too find that the case of adverse possession was not made out to the required standards. In sum, the appeal has no merit and is hereby dismissed in its entirety.

32. The Appellant shall bear the costs of the appeal.

It is so Ordered.

DATED AND DELIVERED AT MOMBASA THIS 5TH DAY OF JUNE, 2025

A. K. MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.



.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

