



**Matete v Simiyu & another (Environment & Land Case 3 of 2017)  
[2024] KEELC 1246 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1246 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE 3 OF 2017**

**EC CHERONO, J**

**MARCH 7, 2024**

**IN THE MATTER OF THE LIMITATION OF ACTIONS ACT SECTIONS  
17,18,37 & 38 AND ORDER 37 RULE 7 OF THE CIVIL PROCEDURE RULES  
AND  
IN THE MATTER OF ADVERSE POSSESSION**

**BETWEEN**

**RICHARD BARASA MATETE ..... PLAINTIFF**

**AND**

**ROBAI NAKUMICHA SIMIYU ..... 1<sup>ST</sup> DEFENDANT**

**GEORGE BARASA MUZEE (SUBSTITUTED BY HIS LEGAL REPRESENTATIVE  
JOSEPH CALEB PEPELA SIMIYU) ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff commenced these proceedings vide an amended Originating Summons dated 22<sup>nd</sup> January, 2020 under Section 17 & 38 of the Limitations of Actions Act Cap 22 and under section 7 (d) of the Land Act; Order 37 rule 7 of the Civil Procedure Rules for determination of the following questions;
  - a. Whether or not the Plaintiff/applicant herein has been in occupation of the suit land openly, notoriously, continuously and peacefully for a period exceeding 12 years.
  - b. Whether or not the 1<sup>st</sup> and 2<sup>nd</sup> defendant/respondents title over the suit land has been extinguished by operation of the law.
  - c. Whether or not the court should order the Plaintiff/Applicant to be registered as the proprietor of the suit land in the place of the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondent.



- d. Whether or not the plaintiff/applicant has become entitled to the suit land by the concept of adverse possession.
2. The summons is premised on the grounds shown on the face of the application and the Supporting Affidavit of the Plaintiff sworn on 12<sup>th</sup> January, 2017.
3. The applicant in the supporting deposed that the land parcel LR No Elgon/kaptama/487 measuring 1.6 Ha ('the suit land') belonged to the plaintiff's grandfather namely Wandabwa Muchalia who passed on in 1958. He further stated that the said Wandabwa Muchalia's widow subsequently passed on in 1960 and the plaintiff's father namely Robert Matete Wandabwa moved from the suit land to live with relatives until he became of age in the year 1969 when he returned and resettled on the suit land.
4. The plaintiff averred that oblivious to his deceased father, their neighbour one Aggery Siiyu Kitimu (deceased) had taken advantage of their absence and registered the suit land in his name. The defendants succeeded the said Aggery Simuyu Kitimu and became the registered proprietors thereto. The plaintiff further averred that him and his family have enjoyed uninterrupted and continual possession of the suit land with the defendants as their neighbour since 1969. It was also averred by the plaintiff that he has invested a colossal amount of money in making improvements on the suit property.
5. In response to the said Originating summons, the defendants averred that they are the registered proprietors of the suit land having acquired it from Aggery Simiyu Kitimu and a certificate of title having been issued on 24<sup>th</sup> August, 2012. It was the defendants' further contention that the said Aggery Simiyu purchased the suit land from one John Wafubwa- deceased who was a brother to Wandabwa Muchalia (the plaintiff's father) in the year 1963. The defendants further averred that after selling the suit land, the said Wandabwa Muchalia gave authority to John Wafubwa to deal with the suit land as he wished.
6. The defendants further contend that the said Wandabwa Muchalia had three children only and that the plaintiff was his grandson. It is also averred that after the said Julius Wafubwa sold the suit land, he settled the family of Wandabwa Muchali in various areas with the proceeds of the sale and that the plaintiff herein has been living in Chesamis Market with his father's family having been settled in Kaborom. They argued therefore that the plaintiff has never lived in the suit land and what he does once in a while is to trespass thereon and his various attempts have been resisted.
7. The defendants however denied that there were any developments made by the plaintiff on the suit land and averred that the plaintiff was born in 1975 and therefore cannot allege to have been in occupation of the suit property in 1969. Lastly, the defendants stated that the plaintiff has not satisfied the requirements for the grant of the orders sought and therefore prayed to have the suit dismissed and/or struck out with costs.
8. The matter proceeded for hearing on various dates between 24/10/2023 and 18/12/2023 in which the plaintiff called three witnesses while the defendant called one witness.
9. Richard Barasa Matete (PW1) Was sworn and referred to his witness statement dated 22<sup>nd</sup> September, 2018 and 8<sup>th</sup> March, 2023 which he requested to be adopted as his evidence- in -chief. He equally produced into evidence his list of documents dated 12<sup>th</sup> January, 2017 as PExhibit 1-4 and his further list of documents dated 21<sup>st</sup> March, 2023 as PExhibit 5- 11. In addition, he stated that the defendants have never occupied the suit land and that he is the one in occupation.
10. In cross-examination, the witness testified that his father Robert Wandabwa Matete was a grandson to Wandabwa Muchali, the original owner of the suit land. It was his evidence that his father died in the year 1996 while he (the plaintiff) was born in the year 1977. The witness denied knowledge of the



succession cause of the estate of Aggrey Simiyu which saw the defendants acquiring title over the suit land through transmission.

11. In re-examination PW1 testified that this suit has been filed on his behalf and that despite being the registered owners of the suit land, the defendants have never filed a suit to remove him from the land since they acquired the same
12. Alex Juma Matete (PW2) also referred to his witness statements dated 22<sup>nd</sup> September, 2018 and 8<sup>th</sup> March, 2023 which he requested to be adopted as his evidence- in -chief. In cross examination, he testified that the plaintiff is his brother. It was his testimony that his father Robert Matete was buried in a separate piece of land and that Julius Wafula was a clan member but not a brother to his father. The witness went on to reiterate the claim. In re-examination he testified that the suit land was registered in the name of Aggrey Simiyu at the time of land adjudication and not Julius Wafubwa as he has mentioned in his evidence. The court re-examined the witness where he testified that the plaintiff is the one living in the suit land where they were all born.
13. Joseph Wanjala Werunga(PW3) Was sworn and referred to his witness statements dated 22<sup>nd</sup> September, 2018 and 8<sup>th</sup> March, 2023 which he requested to be adopted as his evidence- in -chief. In cross examination, he stated that the plaintiff is his grandson. He testified that the plaintiff's father Robert Matete was buried in the suit land. It was his further evidence that his land is neighbouring the suit land i.e plot no 488. In re-examination, the witness stated that he is a neighbour of the plaintiff who occupies the suit land.
14. Robai Nakumincha Simiyu(DW1) Was referred her witness statement dated 14<sup>th</sup> November, 2023 which she requested to be adopted as her evidence- in -chief. She testified that she is the wife of Aggrey Simiyu and she purchased the suit land from one Julius Wafubwa. It was her evidence that her husband died in the year 1965. She stated that the plaintiff was a trespasser on the suit land. She referred to the list of documents dated 15/10/2018 which she produced in evidence.
15. In cross-examination, she stated that she has not been living on the suit land and that the plaintiff has lived on the suit land for more than 40 years despite the land being registered in her name. She confirmed that the plaintiff has extensively developed the land without her permission. She sought to have the plaintiff evicted from the suit land. She contends that Land Parcel No Kimilili/kamukuywa/91 is not located near the suit land. It was further her evidence that the suit land initially belonged to the Wandabwa Muchila. She testified that D-Exhibit 3 and 4 did not have any bearing on the current case.
16. In re-examination, she stated that in D-Exhibit 2 and 3, she had been sued by her stepson Andrew Wanyonyi who was claiming the suit land. It was her evidence that she had not filed a case seeking to remove the plaintiff from the suit land.
17. Parties thereafter took directions and agreed to file and exchange written submissions within given timelines.
18. In his submissions, the plaintiff argued that he had satisfied the requirements for the orders sought on the defendant's admission during cross-examination. He relied in the case of Joseph Macharia Kairu v Kenneth Kimani Muiruri (2021). He therefore urged the court to grant the orders sought in the amended originating summons.
19. The court has carefully considered the pleadings, documents tendered in evidence, the oral testimonies and written submissions as well as the applicable law. The issues that commend for determination in my view are:



- i. Whether the plaintiff has proved the ingredients of adverse possession concerning 1.6Ha of LR No Elgon/kaptama/487 against the defendant?
  - ii. If the answer to paragraph(i) above is in the affirmative, whether plaintiff is entitled to the prayers sought?
20. The law on adverse possession is provided for under the *Limitation of Actions Act*. 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.

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 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”.

Section 17 of the same Act extinguishes the rights of a registered owner where there is a successful claim for adverse possession. Section 38 on the other hand provides as follows;

- “(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.”

21. A simple definition of Adverse possession or homesteading is a doctrine founded in law that allows a person who has unlawfully occupied another person’s land for a continuous period of at least twelve years to acquire land belonging to another by operation of law and to apply to be registered as owner and be issued with a title.
22. In the case of *Kasuve v Mwaani Investments Limited & 4 others* 1 KLR 184, the Court of Appeal held that:

“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 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”.

23. From the above and numerous other decisions by the superior courts, it is clear that for a party seeking to be declared as having acquired another person’s land by adverse possession, she must prove that she



has been in open, continuous non-permissive and exclusive possession of the land in question for at least twelve years. Exclusive possession was defined in the case of *Gabriel Mbui v Mukinda Maranya* (1993) eKLR where the Honourable Court held that;

“Exclusive possession means that the exercise of dominion over the land must not be shared with the disseized owner, the land being in actual possession with intent to hold solely for the possessor to the exclusion of others.”

24. The plaintiff testified that his father settled on the suit land in the year 1969, got married and sired children. It was his further testimony that he has lived on the suit land ever since he was born continuously without interruption ever since he was born to the exclusion of the defendants. It was further his testimony that he has extensively developed the suit land by constructing permanent structures thereon and planting trees. His evidence was further supported by the testimony of PW2 and PW3 who testified that indeed the plaintiff has been in occupation and use of the suit land openly, continuously, uninterrupted and adverse to the defendants.

25. During cross-examination, DW1 stated that the plaintiff is the one in occupation of the suit land and that his occupation has been for over 40 years. It was further her testimony that he has extensively developed on the land by constructing his homestead therein. The witness further testified that she has never attempted to evict the plaintiff from the suit land in order to buttress her rights. In Malindi CoA Civil Appeal No 29 of 2016:- *Peter Kamau Njau v Emmanuel Charo Tinga* [2016] eKLR the Court held:

“in order to stop time which has started running, it must be demonstrated that the owner of land took positive steps to assert his right by, for instance taking out legal proceedings against the person on the land or by making an effective entry into the land.

26. Further, in *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR, the court found that adverse possession was a constitutional claim where a registered owner loses his land and title out of his default or inaction in failing to take action against a trespasser for a period of 12 years without interruption while knowing it and without license or authority to possess or occupy, the land.

27. From the evidence as tendered by both parties, it is clear that the plaintiff has been in occupation of the suit land for over 12 years. From the photographic evidence tendered by the plaintiff, it is clear that the Plaintiff has been in exclusive possession and control of the suit land and demonstrated his animus possidendi in developing the same by building a permanent house and cultivating crops thereon.

28. This court is therefore satisfied that the plaintiff has been in open, exclusive, continuous and uninterrupted occupation of the suit land for more than 12 years and that he has not relinquished his possession nor did the Defendant take possession from him since 1977 to date. The plaintiff used the suit land in an adverse manner to the Defendant's title (animus possidendi).

29. It is immaterial that the defendant was issued with a certificate of title in the year 2012 since the principle of adverse possession operates on the land as opposed to the title. The Court of Appeal in Civil Appeal No 164 of 2011 *Gachuma Gacheru v Maina Kabuchwa* [2016] eKLR, cited with approval the case of *Maweu v Liu Ranching & Farming Cooperative Society* [1985] eKLR where it was held:

“Lastly, on argument by the respondent that time in adverse possession can only begin to run once title is issued, we disagree and set out the sentiments of the Court in, *Maweu v Liu Ranching & Farming Cooperative Society*, [1985] eKLR: “What logic is there in saying that this concept of the absolute and indefeasible title may only be lost, after twelve years



of suffering adverse possession from the time of registration, but not for shorter periods because the adverse possession commenced during the time of the owner's predecessor. How is it lost at all?

Adverse possession is a fact to be observed upon the land. It is not to be seen in a title, even under cap 300. Any man who buys land without knowing who is in possession of it risks his title, just as he does, if he fails to inspect his land for twelve years after he had acquired it. If such title can be lost at all, its absolute and indefeasible nature obviously refers to other matters than adverse possession.

30. For that above reasons, I find that the Plaintiff's claim for adverse possession has been proved to the required standard and the same is allowed as prayed in the amended originating summons dated 22nd January, 2020.

31. The defendants shall bear the costs of this suit.

**DATED, SIGNED AND DELIVERD AT BUNGOMA THIS 7<sup>TH</sup> DAY OF MARCH, 2024 .**

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**HON.E.C CHERONO**  
**ELC JUDGE**

In the presence of;

Mr. Wamalwa R. for the plaintiff

Defendants/advocate-absent

Bett C/A-present

