



**Kamau & 42 others v Leonid Limited (Civil Appeal 27 of 2021)
[2023] KECA 1221 (KLR) (6 October 2023) (Judgment)**

Neutral citation: [2023] KECA 1221 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL 27 OF 2021
SG KAIRU, JW LESSIT & GV ODUNGA, JJA
OCTOBER 6, 2023**

BETWEEN

JAMES KAMAU	1ST APPELLANT
MZURI MALAU	2ND APPELLANT
MARGARET WANGARI NJENGA	3RD APPELLANT
KHALID S ABEID	4TH APPELLANT
MWABWANGA KARANI	5TH APPELLANT
DAVID N NJUE	6TH APPELLANT
MEJUMAA R MWABAU	7TH APPELLANT
CHIPHOGO M KAMBI	8TH APPELLANT
MWANYASI MJOMBA	9TH APPELLANT
FATUMA C MZUNGU	10TH APPELLANT
HARRY SIMIYU	11TH APPELLANT
HERBERT MWAKIBUA	12TH APPELLANT
PHESTUS MWAMBURI	13TH APPELLANT
CHARO N TSUMA	14TH APPELLANT
SHEHI B NGOWA	15TH APPELLANT
BEMBAJI NDO SHO	16TH APPELLANT
DANIEL NJERU	17TH APPELLANT
SIMON NJUE	18TH APPELLANT
ELISHA KARISA	19TH APPELLANT



CAROLINE MWAZIGE	20 TH APPELLANT
SOLOMON MUNGAI	21 ST APPELLANT
THOMAS MUSUMBA	22 ND APPELLANT
FRANK AMBUNDO	23 RD APPELLANT
CHRISTOPHER WAINAINA	24 TH APPELLANT
SHUFAA A ABDALLA	25 TH APPELLANT
KITONGA MWATU	26 TH APPELLANT
RAMLA A SUDI	27 TH APPELLANT
HASSAN CHIBONDO	28 TH APPELLANT
MWANAJUMA GONA	29 TH APPELLANT
ALI JUMAA	30 TH APPELLANT
HARRY M MWANYALO	31 ST APPELLANT
THADEUS M WASWA	32 ND APPELLANT
GIDEON HARE	33 RD APPELLANT
GABRIEL IRIGO	34 TH APPELLANT
SAHADA MAALIM	35 TH APPELLANT
STEPHEN KIOKO	36 TH APPELLANT
MCHE TSUMA WASHE	37 TH APPELLANT
MUMBE LUCAS	38 TH APPELLANT
PHOEBE A OTOMBO	39 TH APPELLANT
MONICA A OWESI	40 TH APPELLANT
VITALIS OTIENO	41 ST APPELLANT
ALICE AUKO	42 ND APPELLANT
ABDUL KARIM AHMED	43 RD APPELLANT

AND

LEONID LIMITED	RESPONDENT
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(An appeal against the judgment of the Environment and Land Court at Mombasa (Omollo, J.) delivered on 21st September 2020 in ELC Case No. 253 of 2015)

JUDGMENT

1. In this appeal, the appellants have challenged the judgment of the Environment and Land Court (ELC) (A. Omollo, J.) dated September 16, 2020 and delivered on September 21, 2020 in which the ELC dismissed their suit for adverse possession and ordered them to vacate, within ninety days, from the



- respondent's property known as Plot No 2380/V/MN Miritini (the property) within Mombasa and in default the respondent to be at liberty to take possession and to demolish all structures thereon.
2. In their suit commenced by Originating Summons dated June 17, 2008, the appellants claimed to be entitled to the property by virtue of adverse possession asserting that the respondent is the registered proprietor of the property measuring 1.389 hectares; that they had been in open, continuous, and uninterrupted occupation of the property for over thirty years; and that they had developed the property by building businesses and residential houses thereon.
 3. With the leave of the trial court, proceedings continued as if commenced by way of Plaintiff and the respondent's Replying Affidavits deemed to be a Defence and Counterclaim. The respondent pleaded that it purchased the property in September 1989 from Kenya Textiles Company Limited (the vendor) and at the time there were only five squatters on the property who agreed to vacate the property upon being paid compensation by the vendor and that none of the five squatters are amongst the appellants; that as early as the year 2004 the respondent objected to occupation of the people on the property; and that none of the appellants have been on the property long enough to claim to have acquired any rights "whether prescriptive or otherwise whatsoever".
 4. The hearing of the suit commenced before Mohamed Ibrahim, J. (as he then was). Thereafter it proceeded before M. Kasango, J. and was concluded before A. Omollo, J. who took the defence evidence. After reviewing the evidence and considering the submissions tendered on behalf of the parties, the learned Judge concluded that the evidence of the fourteen appellants who testified (all other appellants did not testify) fell below the standard of proof for a claim of adverse possession; that the appellants "entered the suit land after 1995 some as licensees" and "thus cannot maintain a claim of adverse possession" because "their occupation does not meet the 12 year threshold"; and because as licensees, their entry was with permission and no evidence was led to demonstrate when their possession dispossessed the respondent.
 5. Although the appellants have challenged the judgment of the ELC on 11 grounds set out in the memorandum of appeal dated April 13, 2021, the principal question is whether the appellants established that they are entitled to the property by virtue of adverse possession.
 6. In his written and oral submissions, learned counsel for the appellants Mr Tindi urged that the principles applicable in a claim for adverse possession in relation to registered land are set out in the decision of this Court in *Wambugu vs Njuguna* [1983] KLR 172 and the decision of the ELC in the case of *George Ogake Pius vs Esther Nyasani Makori & 2 others* [2018] eKLR; that the Judge erred in concluding that none of the appellants proved to have completed an uninterrupted 12 years on the property; that the 1st appellant, James Kamau, testified that he started occupying the property in 1982 while the respondent bought the property in 1989; that an alleged meeting held in the year 2001 did not stop time from running; and that the respondent did not take steps to evict the appellants.
 7. Counsel submitted that the learned Judge erred in relying upon the agreement made between the vendor and squatters in 1989 in that, that agreement did not relate to the property and did not affect the appellants' occupation of the property.
 8. Counsel urged that PW2, Nzuri Malau, who is the 2nd appellant, testified that he was in occupation of the property for 36 years; that there is evidence of notorious occupation of the property irrespective of whether the 2nd appellant knew the exact size of the portion of the property he occupied and that the failure to produce a survey report to show which portion of the property was occupied does not disentitle the appellants to the claim.



9. Counsel submitted that contrary to the learned Judge’s finding, PW5, Khalid Said Abeid (4th appellant) and PW11, Ramla Abdalla Sudi (27th appellant) qualified for adverse possession notwithstanding their mistaken believe that Kenya Railways Corporation was the owner of the property having been in continuous occupation of the property for more than 12 years. According to counsel, the Judge also erred in “heavily relying on the evidence of PW5, Khalid Said Abeid (4th appellant) and PW6 Charo Nzai Tsuma (14th appellant).”
10. It was submitted that whereas PW4 Herbert Mwakibua (12th appellant) testified that he entered the property in 1990, the Judge wrongly found that he entered the property in 1999. Counsel concluded by submitting that the Judge misdirected herself in finding that the appellants obtained permission to stay on the property as licensees, yet the licences were not being issued by the respondent.
11. In opposition to the appeal, learned counsel for the respondent Mr Hassan in his written and oral submissions urged, on the authority of the decision in Richard Wefwafwa Songoi vs Ben Munyifwa Songoi [2020] eKLR that for a claim founded on adverse possession to succeed, the person in possession must have peaceful and uninterrupted use of the land and must show on what date he came into possession; the nature of possession; whether the possession was known to the other party; the length of time his possession has continued; and that the possession was open and undisturbed for the requisite 12 years.
12. In relation to the 1st appellant, counsel submitted that he contradicted himself; that while he testified having been on the property in 1982, in cross examination he stated he had been on the land since 1995 and that he built on the property in the year 2000; that beyond his claims, the 1st appellant did not tender any other evidence; that his claim that he entered the property in 1982 is therefore not credible; that the credibility of 1st appellant’s claim is further dented by the testimony of PW6 Charo Nzai Tsuma (14th appellant) who stated that he entered the property in 1997 when ‘there was no one on the land’.
13. Moreover, it was submitted, it was the 1st appellant’s testimony that he entered the property with the permission of people who were there before him who informed him it was government land; that he produced hawking licenses demonstrating that he was allowed by the government to hawk on the property and that there was no demonstration of *animus possidendi*, or intention to possess.
14. It was urged that based on the evidence, the appellants began to invade the property around the year 2000-2001; that in the year 2005, a meeting involving the Government administration was held, at which the 1st appellant was present, with a view to resolving the squatter issue; that the appellants did not demonstrate that they were occupying the entire property and neither did they establish, with a degree of certainty as they were obliged to do, the portions of the property they were occupying. The case of Wilson Kazungu Katana & 101 others vs Salim Abdalla Bhakswein & another was cited for the proposition that the appellants had the burden of proving and specifically identifying the portions in their possession from the larger premises.
15. It was submitted that the 4th appellant, like the 1st appellant contradicted himself regarding the date of alleged entry into the property; that he stated he entered the property in 1999 but later changed to say it was in 1990; that his claim that he occupied a portion of the property measuring 40 by 70 was unsupported by any evidence.
16. It was submitted that PW5 stated that he entered the property on the basis of an agreement with Kenya Railways Corporation dated April 14, 1997 and twelve years had not lapsed by the time of filing the suit; that based on their testimony, the 5th and 11th appellants entered the property with the permission of Kenya Railways Corporation and their possession could not be adverse to anyone. It was urged that the totality of the appellants evidence raised doubts regarding the credibility of their claims and the



learned trial Judge correctly made that observation; that for there to be adverse possession, the nature of possession must be hostile not only to the holder of the title but the rest of the world; that the appellants cannot claim that their possession was with the permission of the Kenya Railways Corporation or the Government and at the same time assert a claim for adverse possession.

17. Counsel submitted that the contention by the appellants that the agreement between the vendor, Kenya Textiles Limited, and the squatters related to a different property, as opposed to the property, has no basis; that the evidence of DW1 was clear that the respondent purchased Plot No 645 which was then subdivided into Plot Numbers 2379 and 2380, the subject of the dispute. It was submitted further that the trial court rightly dismissed the claims by the 29 appellants who failed to testify.
18. We have considered the appeal and the submissions. As already indicated, the principal question in this appeal is whether the appellants established that they are entitled to the property by virtue of adverse possession. Section 38 of the [Limitation of Actions Act](#), on which the appellants founded their claim provides 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.”
19. In [Mtana Lewa vs Kabindi Ngala Mwangandi](#) [2015] eKLR, Asike-Makhandia, JA explained that:

“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 or 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. This doctrine in Kenya is embodied in section 7 of the [Limitation of Actions Act](#), ...”
20. As correctly submitted by counsel, to succeed in a claim for adverse possession, it is necessary for a claimant to establish that the parcel of land in question is registered in the name of the respondent; the claimant must be in open and exclusive possession of the parcel in an adverse manner to the title of the real owner; and the claimant must have been in occupation for a period in excess of twelve years having disposed the owner or there having been discontinuance of possession by the owner. In [Mbira vs Gachubi](#), (2002) IEALR 137 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....”
21. More recently in [Richard Wefwafwa Songoi vs Ben Munyifwa Songoi](#) [2020] eKLR this Court expressed that:

“For a claim founded on adverse possession to succeed, the person in possession must have a peaceful and uninterrupted user of the land. Physical fact of exclusive possession and the



animus possidendi to hold as owner in exclusion to the actual owner are important factors in a claim for adverse possession.”

22. The court in that case stated that a person who claims adverse possession must show, among other things: the date on which he came into possession; the nature of his possession; whether the fact of his possession was known to the other party; for how long his possession has continued and; that the possession was open and undisturbed for the requisite 12 years. The Court cited with approval an earlier decision in *Alfred Welimo vs Mulaa Sumba Barasa*, CA No 186 of 2011, where Court expressed as follows:

“It is trite that adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it; for as Robert Megarry aptly observed in his Megarry’s manual of the *Law of Property*, 5th ed page 490, the owner may have little present use for the land and that land may be used by others, without the users demonstrating a possession inconsistent with the title of the owner. So the mere fact that the appellant abandoned possession of the suit property and went to live at Ndalu scheme by and of itself does not establish adverse possession. The abandonment of possession must be coupled with the respondent taking possession of the land with *animus possidendi* (the intention to possess) and asserting thereon rights that are inconsistent with those of the appellant as the owner of the land...”

23. With those principles in mind, did the appellants establish their claims for adverse possession? The suit was instituted by 43 appellants led by James Kamau, the 1st appellant as the champion who swore the supporting affidavit on behalf of the other appellants and testified as PW1. Of the 43 appellants, only 14 gave evidence. The remaining 29 appellants did not testify and consequently their claims were rightfully dismissed without much ado.
24. The 14 appellants who testified are the 1st appellant, James Kamau; the 2nd appellant, Mzuri Malau; 3rd appellant, Margaret Wangari Chege; 4th appellant Khalid Said Abeid; 6th appellant, David Njeru Njue; the 8th appellant, Chiphogo M. Kambi; 11th appellant, Harry Makliaso Simiyu; 12th appellant, Herbert Mwakibua; 13th appellant, Phestus Mwaburi; 14th appellant, Charo Nzai Tsuma; 19th appellant, Elisha Karisa; 21st appellant, Solomon Mungai Gicheha; 25th appellant, Shuffa Ali Abdalla; and 27th appellant, Ramla Abdalla Sudi.
25. In his evidence, the 1st appellant, James Kamau(PW1) stated that he is a businessman and moved into the property in 1982 and found other people who had Makuti mud homes and Swahili houses; that the Council gave him a licence as a hawker in 1994; that he put up a permanent building, both residential and commercial; that the respondent went to the property in 2008; that there was a case with the Municipal Council for demolishing houses. Under cross examination, he stated that he “came on the land” and occupied in 1995 and was welcomed by the people on the land and was told it belonged to the Government as “crown land”; that he built on the property in 2000 and in 2007 attended a meeting. In re- examination he stated that “I entered in 1982” and maintained that he had lived on the property “since 1982” and that demolitions were done in 2009.
26. The 2nd appellant, Mzuri Malau (PW2) stated that he has lived on the property for over 36 years but was told in 2008 that the property belongs to the respondent. Under cross examination he stated that he does not know the size of the plot; that in 2008 the Municipal Council directed demolition of structures; that he knew the property to be Government land; and that he did not know the owner of the property. The trial Judge noted that the 2nd appellant was changing his evidence when questioned about attending a meeting with the administration.



27. The 3rd appellant, Margaret Wangari Njenga (referred to as Margaret Wangari Chege in the transcript) (PW14) stated that she started business in 1984 and produced a licence for a retail shop. She stated that in 2005 the land belonged to Kenya Railways Corporation and that in the month of May that year, they wrote to Kenya Railways Corporation inquiring whether they could pay rent.
28. The 4th appellant Khalid Said Abeid (PW5) stated that he got on the plot “of Kenya Railway” in 1997 and got a permit in 1999 and carries on hardware shop; that he was given notice by the Municipal Council to remove illegal structures. He stated in cross examination that he would not have moved the court if there was no demolition and that he had not completed 12 years.
29. The 6th appellant, David Njeru Njue (PW10) stated that he lives in Miritini on Government land; that he wanted to be the owner of the plot he occupies having lived there for a long time since 1993 at the age of 19; and that he got permission to build from occupants.
30. The 8th appellant, Chiphogo M. Kambi (PW3) a carpenter stated that he entered the property in 1986, built a kiosk and then a big house and no one was disturbing his stay; that the Railway then began to charge him and in 2008 received letters giving notice to vacate within two weeks; that he occupies approximately 2 acres and that he would like to pay the respondent for the same; that his neighbours were paid off in 1989 but did not move out of the land but were later removed and relocated by the District Officer in 2008; and that he had a licence for his business which he lost when his structures were demolished.
31. The 11th appellant, Harry Makliaso Simiyu (PW13) stated that he started video show business on the property in 1995 where he was introduced by elders “Kamau and Mabox”; that he had Council business permit; that he received notice of demolition by the Council in 2008; and that he lost everything after demolition. He stated that when he moved into the property, he “found a group with leadership Kamau” and thought “Mabox” was the owner; and that in 1995 there was no bush on the property but there were “structures everywhere”.
32. The 12th appellant, Herbert Mwakibua (PW4) stated that he had a workshop at Miritini; that he cleared bush and built his workshop which was demolished by the respondent. [The trial judge noted that “the witness first said he was on the land in 1999 now says 1990”]; that he did not know the owner of the property; that he occupies a 40 by 70 portion and got a licence for his business. He stated that he recalled a meeting on May 7, 2005 with the DC and the Chief’s Office which he attended; and that he entered the property without permission of the owner.
33. The 13th appellant, Phestus Mwamburi (PW12) stated that he is employed by ‘Doshi’ and is resident on the property with his family where he sells shoes and second hand clothes; that in 2008 he got notice that the structures on the property were illegal and that someone was using the Municipal Council to claim the land; that he had been there more than 8 years and was doing business until March 2009 when demolition occurred; that he had a business permit of the Municipal Council of 2008 which allowed him carry out business. Under cross examination, he stated that he moved to the property in 1983 but upon being asked to produce his identity card he stated that he “started living in 1991”; that when he went to the property it was not bushy; that his documents got lost when demolition occurred.
34. The 14th appellant, Charo Nzai Tsuma (PW6) stated that he does business and resides on the property since 1997; that when he started business on the property in 1997, he was there alone and was later joined by other people; that his house was demolished by the Municipal Council. He re- stated under cross examination that he entered the property in 1997 and at the time “there were no other people there” and that “those who say they were there before 1997 they were on the other side of the sea”.



35. The 19th appellant, Elisha Karisa (indicated in the proceedings as PW8 instead of PW9), a clerk, stated that he lived on the property since 1995 and that he sued the respondent for demolishing his structure without notice; and that prior to the demolition in 2009, he did not know the respondent. Under cross examination he stated that when he entered the property “not all the plaintiffs before court were in the land” but that there are people who also have since vacated.
36. The 21st appellant, Solomon Mungai Gicheha (PW7) stated that he has been on the property since 1995 and lives there with his family having ran away from Naivasha on account of land clashes; that he was allowed onto the property by village elders; that his house was demolished and had to re-build and was in court to know why their houses were demolished.
37. The 25th appellant, Shuffa Ali Abdalla (also indicated in the proceedings as PW7 instead of PW8) stated that she started business in 1979 until March 2009 when her kiosk was demolished; that she got permission from Mzee Charo to occupy the property and got to know the respondent when her structure was demolished; that prior to 1989 when the respondent bought the property she was living there. She stated under cross examination that she was 19 years old in 1979 when she entered the property and that the demolition was in 2009 and that she had since rented out the plot she occupied.
38. The 27th appellant, Ramla Abdalla Sudi (PW11) stated that she is a business lady residing on the property since 1985 and rans a hotel; that when she moved to the property, there was about six of them and the property was bushy and did not seek anyone’s permission; that the Council later demolished. Under cross examination the witness stated that initially she paid rent monthly to Kenya Railway in the amount of Kshs.100.
39. Abdulgafoor Vaiani (DW1) and his son Mohamed Arafat Vaiani (DW2), both directors of the respondent stated in evidence that the respondent bought plot number 645 from the vendor, Kenya Textiles Limited, in 1989 at which time there were five people living there; that with a view to handing over vacant possession of the plot to the respondent, the vendor negotiated with the five occupants to vacate and paid them compensation and they vacated; that thereafter the respondent took possession, fenced off the plot and then subdivided it into two namely, 2379 and 2380, sold 2379; that until 2000-2001 when the property was invaded by squatters, it was empty and the appellants were not truthful in stating that they were in occupation before that time. According to DW2, when the squatters refused to move after efforts in that regard, he met the Chief who arranged for a meeting with all concerned; that following that meeting some of the squatters moved out, but others refused to do so.
40. Based on the foregoing, and having ourselves reviewed the record and the evidence, the appellants case was strewn with glaring inconsistencies and contradictions. For instance, the 1st appellant, James Kamau, who was referred to by another appellant as the team leader, deponed in the affidavit sworn in June 2008 in support of the originating summons that he occupied the property “for over twenty-five (25) years since the early 1980’s”. In the grounds in support of the O.S. dated June 17, 2008 it was averred that the appellants had been in possession “for over thirty (30) years.” In his testimony, the 1st appellant stated, in one breath, that he entered the property in 1982 and in another stated that it was in 1995.
41. The 14th appellant, Charo Nzai Tsuma (PW6) was categorical in his testimony that when he moved into the property in 1997, there were no other occupants and that other people joined later.
42. Contradictory oral evidence in cross examination by the 1st, 4th, 12th and 13th appellant as to the date of occupation of the suit land and the admission by the 19th appellant that he had no proof that he entered the suit land in 1995 is equally telling. The evidence of 12th, 4th and 27th appellants was to the effect that they went onto the suit land with the permission of Kenya Railways Corporation, while the



8th appellant was paying rent to the Kenya Railways Corporation; that the 11th, 3rd, 13th, 6th and 12th appellants, were on the suit land as business persons with business licenses from the municipal council.

43. On the whole, there was contradictory evidence regarding the dates when the appellants allegedly occupied the property. The trial court for good reason disbelieved their evidence.
44. Regarding identification of portions occupied, this Court in *Wilson Kazungu Katana & 101 Others v Salim Abdalla Bakshwein & another* [2015] eKLR stated that “The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession.” The appellants were obliged to identify or describe the portions of the property they were allegedly occupying which they did not do. See *Gitbu vs Ndete* [1984] KLR 776.
45. Overall, the impugned judgment of the ELC was based on lack of credibility of the appellants’ testimonies and we have no basis for interfering with that decision. The appeal fails and is dismissed with costs to the respondent.

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF OCTOBER 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

