



**Edward v Malia (Environment & Land Case E006 of 2022)  
[2024] KEELC 3902 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3902 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE E006 OF 2022**

**EC CHERONO, J**

**APRIL 30, 2024**

**IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA.**

**BETWEEN**

**JOSEPH WALIAULA EDWARD ..... PLAINTIFF**

**AND**

**PETER MUNIALO MALIA ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff commenced these proceedings vide Originating Summons dated 1<sup>st</sup> August, 2022 under Section 38 of the Limitations of Actions Act Cap 22 and Order 37 rule 7 of the Civil Procedure Rules for determination of the following Questions/issues;
  - a. A declaration that the plaintiff has become entitled to be the registered owner/proprietor of 8.5 Acres of land out of land parcel NO BUNGOMA/TONGAREN/2689 measuring approximately 4.306Ha or thereabout by adverse possession which the plaintiff has been in and continues to enjoy quiet, peaceful and uninterrupted possession for over (12) years preceding the presentation of this suit.
  - b. That there be an order compelling the defendants to subdivide and transfer 8.5 Acres of land out of land parcel NO BUNGOMA/TONGAREN/2689 measuring 4.306Ha or thereabouts in favour of the plaintiff and in the event that he declines, an order do issue directing the Deputy Registrar of this court to sign transfer documents and any other documents to enable transfer of 8.5 Acres out of the suit property herein in favour of the plaintiff.
  - c. That the costs of the originating summons be borne by the defendant.
2. The summons is premised on the grounds cited in the application and particularly in the Supporting Affidavit of the Plaintiff dated 1<sup>st</sup> August, 2022.



3. It was the plaintiff's case that land parcel NO BUNGOMA/TONGAREN/2689 (hereinafter 'the suit land') is registered in the name of PETER MUNIALO MALIA, the defendant herein and that he(the plaintiff) has been living peacefully on an area measuring 8.5 Acres of said land parcel NO BUNGOMA/TONGAREN/2689 since 1987 to date having bought the same from the defendant vide various agreements for sale dated 3<sup>rd</sup> March, 1988, 17<sup>th</sup> February, 1988 and 15<sup>th</sup> December, 1988. The plaintiff further deposed that he made his last payment for the suit property on 23<sup>rd</sup> January, 2002 but the defendant has been reluctant to transfer the suit land to him. It was his averment that since he took possession of the suit land, he has constructed a house, erected a fence, planted trees and done extensive farming. He therefore argued that he is entitled to be registered as the proprietor of 8.5 Acres of land parcel NO BUNGOMA/TONGAREN/2689 since he has been in occupation since 1987.
4. In opposition to the Originating summons, the defendant in his replying affidavit sworn on 26<sup>th</sup> September 2022 stated that he is the registered owner of land parcel NO BUNGOMA/TONGAREN/2689 measuring approximately 4.306Ha and that the plaintiff purchased 5 acres of land to be excised out of land parcel NO BUNGOMA/TONGAREN/2689 on 5<sup>th</sup> November, 1987 and paid Kshs.45,000/= which was half the consideration leaving a balance to be paid between 5<sup>th</sup> November,1987 and 15<sup>th</sup> December,1987 which amount the defendant alleges has not been paid to date.
5. The defendant further stated that there have been disputes between him and the plaintiff before the local administration and that the plaintiff's occupation of the suit land has not been peaceful and/or un-interrupted as alleged. The defendant denied ever receiving the balance of the consideration as stated by the plaintiff and added that one Peter Mbaya mentioned in the said agreements was a stranger to him and this suit. It was further stated that the plaintiff purchased the suit land from the said Peter Mbaya on 15<sup>th</sup> Decemeber,1987 in a transaction the defendant was not part of. Lastly, the defendant questioned the actuality of the further agreements indicating final payments of the consideration and denied knowledge of the same.
6. The plaintiff filed a supplementary affidavit sworn on 17<sup>th</sup> November, 2022 where he reiterated the statements in his supporting affidavit as attached to the originating summons and added that he purchased 3 Acres of land being part of of land parcel NO BUNGOMA/TONGAREN/2689 from one Peter Mbaya who had purchased from the defendant herein. He reiterated that he has been peacefully in occupation of 8.5 Acres of land out of land parcel NO BUNGOMA/TONGAREN/2689 since 1987.
7. After taking directions, the matter was fixed for hearing and proceeded on various dates with each party calling one witness.
8. PW1JOSEPH WALIULA EDWARD in support of his claim, the Applicant referred to the averments contained in his Originating Summons, supporting affidavit dated 1<sup>st</sup> August, 2022 and his witness statement dated 5<sup>th</sup> April, 2023 and sought to have them adopted as his testimony- in -chief. He also referred to his list of documents dated 6<sup>th</sup> July, 2023 containing seven (7) documents which he produced as PExhibit 1-7. The plaintiff testified that the defendant is the registered owner of land parcel NO BUNGOMA/TONGAREN/2689 which is a sub-division from Land Parcel No.209.
9. The witness stated that he has lived in the suit land for over 36 years Since 1987. He testified that he purchased 5 ½ Acres of land from the defendant for Kshs.82,500/= and an additional 3 Acres from one Peter Mbaya for Kshs 60,000/= who had purchased the said 3 Acres from the defendant vide PExhibit 3,4,5 and 7 making a total of the 8 ½ acres as per PExhibit 7. He testified that he has lived on 8 ½ Acres of land forming part of land parcel NO BUNGOMA/TONGAREN/2689 since 1987 and



- has extensively developed the suit land by building permanent structures, planting trees and farming thereon. It was his testimony that the defendant occupies the remainder of the portion of land.
10. The plaintiff stated that the complaints made by the defendant to the County Commissioner and DCIO were countered and subsequently dismissed by the defendant's clarifications and justifications. The witness added that at the time the defendant was raising the complaints, he had been in occupation of the land for over 20 years. PW1 further stated that the agreement dated 5<sup>th</sup> November, 1987 was between the defendant and the said Peter Mbaya and that he was not a party to it. He testified that he has no outstanding balance due and owing to the defendant.
  11. During cross-examination, the witness testified that the first agreement is dated 17<sup>th</sup> February, 1998 while the last agreement is dated 23<sup>rd</sup> November, 2002. He testified that he finalized the payment for the land in 1987. The witness during his testimony also referred to PExhibit 7 as the conclusive agreement dated 23<sup>rd</sup> January 2002, drawn by the District Officer. According to this document, the plaintiff paid the defendant Kshs. 29,500 for the additional ½ acre, bringing the total payment for 5 ½ acres to Kshs. 82,500, stating he had already paid Kshs. 53,000. The witness further stated that his portion of land was surveyed by a surveyor and demarcated.
  12. In re-examination, the witness testified that he purchased 5 acres from the defendant in 1987, 3 acres from Peter Mbaya in 1987 and ½ and Acres from the defendant on 23<sup>rd</sup> January, 2002.
  13. DW1 PETER MUNIALO MALIA adopted his witness statement dated 4<sup>th</sup> June, 2023 as his testimony in chief and relied on his replying affidavit to the Originating summons sworn on 4<sup>th</sup> June, 2023. He equally produced in his evidence documents contained in his list of documents dated 4<sup>th</sup> June, 2023 as DExhibit 1-6. He testified that he sold 5 Acres of land forming part of Land Parcel No. BUNGOMA/TONGAREN/209 to one Peter Mbaya who indicated that he was buying for his son Joseph Waliuwa Edward at a consideration of Kshs. 90,000/= where Kshs. 45,000/= was paid leaving a balance of Kshs. 45,000/= which has not been paid to date. He further testified that later, he sold an additional 3 Acres to the said Peter Mbaya from Land Parcel No. BUNGOMA/TONGAREN/633.
  14. It was his further testimony that he resides in Land Parcel No. BUNGOMA/TONGAREN/209 where he is farming and has constructed a dwelling house. He testified that he has never appeared before the DO's office for any agreement and neither has he ever entered into any Sale agreement with the plaintiff.
  15. In cross-examination, the witness testified that he sold 8 acres of land to one Peter Mbaya which land was invaded by the plaintiff since 1987. He confirmed that the plaintiff has been cultivating the suit land which forms part of Land Parcel No. BUNGOMA/TONGAREN/2689 and that he has reported the forceful invasion of the plaintiff to the authorities but has never filed a case in court over the same. It was his further evidence that his son occupies 2 Acres of the remainder of Land Parcel No. BUNGOMA/TONGAREN/2689. He urged that the plaintiff should move out of the suit land since he has not received the balance of the consideration for the same.
  16. In re-examination, the witness reiterated his evidence as above.
  17. After the close of their respective cases, the Parties agreed to file and exchange their respective submissions.
  18. The plaintiff through his advocate filed his submissions dated 31<sup>st</sup> December, 2023 where he submitted that Land Parcel No. BUNGOMA/TONGAREN/2689 is registered in the name of the defendant and that the plaintiff has been in occupation of a portion of the said land since 1987 with the defendant making no attempts to evict him or sue for the alleged unpaid balance. He argued that the defendant's



testimony was not credible since it was at variance with his witness statement and replying affidavit. Counsel referred the court to paragraph 4,5, and 6 of the defendants written statement dated 4<sup>th</sup> June, 2023 where the defendant stated that the plaintiff did not take possession of the suit land since he had not completed payment of the consideration and that no developments had been made on the suit land which information was at cross-purposes with his oral testimony. The plaintiff urged the court to grant the orders sought in the Originating Summons.

19. The defendants on the other hand filed their submissions dated 19<sup>th</sup> February, 2024 where they submitted on three issues. First, the defendant submitted that the agreement for the purchase of 5 acres by Peter Mbaya who was an agent of the plaintiff was not completed and that there is actually no proof that the same was ever completed. On the second issue, the defendant submitted that the unpaid balance of Kshs. 45,000/= meant that time did not start running since full payment was not made. He argued that the plaintiff could not definitely state when the alleged last installment was made to him. Reliance was placed in the case of Public Trustee vs. Wanduru Ndegwa (1984) eKLR Nairobi Appeal No. 73 of 1982, Joseph Gachumi Kiritu vs. Lawrence Munyambu Kabura (1996) eKLR and Hosea vs. Njiru & Others (1974) EA 526. For this reason, it was argued that the plaintiff's claim ought to be dismissed with costs.
20. I have considered the pleadings, list of documents, submissions and authorities cited by the parties. From the materials placed before me, the key issue for determination is whether or not the Plaintiff has acquired title by way of adverse possession and ideally whether he is entitled to the orders sought.
21. The concept of adverse possession and its essential elements have been explored and laid down in numerous decisions by the superior courts. One such decision where these requirements for adverse possession was set out was the case of Mbira –v- Gachuhi (2002) IEALR 137 in which the court 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 statutory prescribed period without interruption....”
22. In the case of Maweu vs. Liu Ranching and Farming Cooperative Society 1985 KLR 430 the Court also held;

“Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”.
23. Further, the Court of Appeal in Francis Gicharu Kariri – v- Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (Nairobi) approved the decision of the High Court in the case of Kimani Ruchire –v – Swift Rutherfords & Co. Ltd, (1980) KLR 10 at page 16 letter B, where Kneller J. held that:

“The plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion). So the plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it by way of recurrent consideration.”
24. Guided by the foregoing authorities which are persuasive and binding, a party claiming title to land under adverse possession ought to prove that the possession was “nec vi, nec clam, nec precario,” that is



to say, without force, secrecy, permission, or alternatively put, not by force, nor stealth, nor the license of the owner.

25. The first element to consider in determining this matter is whether the plaintiff is in actual possession of the portion (8.5 Acres) of the suit land claimed. It is the plaintiff's contention that he purchased 8 ½ Acres of Land Parcel No BUNGOMA/TONGAREN 2689 and has since been in occupation of the same having extensively developed it by putting up permanent structures thereon and cultivating the remaining portion. During cross-examination, the defendant confirmed that the plaintiff has been in occupation of the suit land since 1987. This is further confirmed by the numerous complaint letters in an attempt to solve what was referred to as a land dispute produced as DExhibit 3-6. Therefore, it is not in dispute that the plaintiff is in actual occupation of the suit land.
26. The second element to consider is whether the plaintiff's possession of the suit property was without permission, peaceful, notorious and uninterrupted for at least twelve (12) years. This court is guided by the principle outlined in the case of Gabriel Mbui Vs Mukindia Maranya [1993] eKLR where the learned judge stated: -
- “ a) ....
  - c) The occupation of land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupant.
  - d) The non-permissive, actual possession hostile to the current owner must be un equivocally exclusive, and with an evinced unmistakable animus possidendi, that is to say occupation with the clear intention of excluding the owner as well as other people.” (emphasis added).
27. The plaintiff claims that he initially purchased 5 Acres at a consideration of Kshs.53,000/= from the defendant vide various agreements and purchased an additional 3 Acres from one Peter Mbaya who had bought the same from the defendant at Kshs. 60,000/=and later purchased ½ acre from the defendant at Kshs. 29,500/= an acre to make the total acreage 8 ½. It was his assertion that the final instalment was paid in the year 1987 and that he has been in occupation of the entire 8 ½ Acres ever since without any interruptions.
28. The respondent on the other hand stated that he initially sold 5 acres of land from Land Parcel No. BUNGOMA/TONGEREN 209 to one Peter Mbaya who was the plaintiff's agent at a consideration of Kshs. 90,000/= and was only paid Kshs. 45,000/=. It was his further testimony that he sold an additional 3 acres to the said Peter Mbaya from Land Parcel No. BUNGOMA/TONGAREN/633. The defendant denied selling the alleged ½ acre to the plaintiff. It was his contention that he has not effected transfer of the 8 acres purchased by the said Peter Mbaya because he has not been fully paid. It was his argument that the plaintiff is in occupation of the 8 acres comprised in Land Parcel No. BUNGOMA/TONGAREN/2689.
29. From the summary of the evidence and testimony of the witnesses in this case, it is apparent that the plaintiff took occupation of the suit land after a series of land sale agreements in 1987 as a bonafide purchaser for value. In Mwinyi Hamis Ali – v- Attorney General and Philemon Mwaisaka Wanaka, Civil Appeal No. 125 of 1997 it was held that “adverse possession does not apply where possession is



by consent and in a court of law, sympathy takes a second stand as the Court is governed by statutes.”  
In *Wambugu – v- Njuguna*, (1983) KLR 172 at holding 4, the Court held:

“Where the claimant is in exclusive possession of the land with leave and license of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined”

30. It is my finding that the entry by the plaintiff of the suit land in 1987 was with permission of the defendant who was the vendor. In the case of *Public Trustee – v- Wanduru*, (1984) KLR 314 at 319 Madan, J.A. stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.
31. In support of his case, the plaintiff produced into evidence various documents. Those documents produced into evidence include photographs indicating that the plaintiff has constructed a permanent structure on the suit land and planted crops thereon. PExhibit 3 is an agreement dated 17<sup>th</sup> February, 1988 between the defendant who was the vendor and one Peter Mbaya as the purchaser for 3 Acres of land at a consideration of Kshs. 60,000/= . According to this agreement, Kshs 25,000/= was paid leaving a balance of Kshs. 35,000/= . PExhibit 4 is an agreement dated 3<sup>rd</sup> March, 1988 where the defendant acknowledges receipt of a further Kshs. 20,000/= leaving a balance of Kshs. 15,000/= . PExhibit 6 is also an agreement between Peter Mbaya, the defendant and the plaintiff dated 15<sup>th</sup> December, 1988 for the purchase of 3 Acres at a consideration of 60,000/= where the same was paid in full. PExhibit 5 contains two separate agreements showing that Peter Mbaya made further payments on 4<sup>th</sup> April, 1988 of Kshs.57,000/= and completed payments on 25<sup>th</sup> May, 1988 by paying Kshs.3,000/= . PExhibit 7 is an agreement dated 23<sup>rd</sup> January, 2002 between the plaintiff and defendant for an extra ½ Acre at a consideration of Kshs. 29,500/.
32. On the part of the defendant, he produced the title deed for Land Parcel No. BUNGOMA/TONGAREN/2689 as DExhibit 1. DExhibit 2 was an agreement dated 5<sup>th</sup> November, 1987 which indicates that he sold 5 Acres of land to the plaintiff in the body of the agreement but indicates Peter Mbaya as the purchaser. In the said agreement, the consideration was Kshs. 90,000/= and Kshs. 45,000/= was paid leaving a balance of Kshs. 45,000/= . DExhibit3-6 are letters between the defendant and the County commissioner over an alleged land dispute between the plaintiff and the defendant.
33. On close scrutiny of both documentary and oral evidence by both parties, it is not in contention that the plaintiff took occupation of the suit land in the year 1987. From the evidence, it emerges that the plaintiff came into occupation of the suit land as a bonafide purchaser for value and therefore took possession of the suit land with license pursuant to an agreement. In the case of *Public Trustee – v- Wanduru*, (1984) KLR 314 at 319 Madan, J.A. stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.
34. From the evidence produced by the parties, it is not clear how the plaintiff came into occupation of the 5 acres. On this, the plaintiff alleges to have purchased the same for Kshs.53,000/= from the defendant which he claims he fully paid but does not produce any document in support. The defendant on his part alleges that Peter Mbaya purchased the same from him on behalf of the plaintiff vide the sale



agreement dated 5<sup>th</sup> November, 1987 for which there is an unpaid balance of Kshs.45,000/=. Looking at the abovementioned agreement, it is unclear who the purchaser is since the same indicates that the plaintiff was the purchaser and later Peter Mbaya is indicated as the purchaser.

35. On careful scrutiny of the agreements produced as exhibits in this case, this Court finds that the defendant sold a portion of the suit land to one Peter Mbaya who subsequently sold to the plaintiff and together with a portion of 5 acres he had initially bought from the defendant making a total of 8 acres comprising 5 acres initially and later 3 acres for Kshs. 90,000 and Kshs. 60,000 respectively amounting to a cumulative total of Kshs. 150,000. For ease of reference I will summarize the payments as below;

Date of agreement Amount paid

5.11.1987 Kshs. 45,000/=

17.2.1988 Kshs.25,000/=

3.3.1988 Kshs.20,000/=

4.4.1988 Kshs. 57,000/=

28.5.1988 Kshs. 3,000/=

**TOTAL: Kshs.150,000/=**

36. From the above analysis, I am convinced that the defendant disposed of a total of 8 acres of the suit land vide sale agreements which were subsequently acquired by the plaintiff with the last payment having been made on 28<sup>th</sup> May, 1988. As for the ½ Acre the document presented in support i.e PExhibit 7 is questionable for the reasons that the same seems to be mutilated and is incomprehensible. Further, the parties to the said agreement seem not to have signed the same therefore making the agreement incomplete safe to say the same does not comply with the requirements of Section 3 of the Law of Contracts Act.
37. In my careful consideration, the plaintiff has failed to substantiate occupation of the ½ acre. The defendant's rebuttal of the plaintiff's oral testimony stating that the plaintiff occupies 8 acres was unchallenged. Moreover, no additional evidence was presented to bolster the plaintiff's claim. Consequently, this court finds insufficient grounds to support the plaintiff's assertion regarding the ½ acre.
38. Therefore, if any license or permission had been given by the defendant to enter the suit property from 1988 onwards, the same was terminated on payment of the last instalment on 28<sup>th</sup> May 1988. The continued occupation and possession of the 8 acres of the suit property by the plaintiff from 1988 was therefore adverse to the defendant's title. Computing adversity from 28<sup>th</sup> May, 1988 to 26<sup>th</sup> September, 2017 when the Assistant County Commissioner summoned the parties herein to a land dispute hearing as evidence in DExhibit5 translates to 29 years.
39. From the foregoing therefore, this court is satisfied that the plaintiff's claim for open and uninterrupted possession of 8 acres of Land Parcel No. BUNGOMA/TONGAREN/2689 for a period exceeding 12 years has been proved to the required standard in the Origination Summons filed on 1<sup>st</sup> August, 2022.
40. On the issue of costs, Section 27 of the Civil Procedure Act grants the Court discretion to award or not to award costs of the suit. Ordinarily, costs do follow the event and is normally awarded to the successful litigant. The Plaintiff being the successful litigant is entitled to costs of the Originating Summons.
41. The totality of my evaluation and analysis of the evidence and the law relevant in this matter is that the plaintiff has proved his claim for adverse possession



42. From the foregoing reasons, I hereby make the following consequential orders;-

- a. That the Plaintiff is hereby entitled to be registered as owner/proprietor of 8 Acres of land out of Land Parcel No BUNGOMA/TONGAREN/2689 by operation of law under the doctrine of adverse possession and/or by acquiring prescriptive rights thereon.
- b. The defendant is hereby ordered to subdivide and transfer 8 Acres of land out of Land Parcel No BUNGOMA/TONGAREN/2689 in the name of the plaintiff.
- c. In default of (b) as above, an order is hereby issued directing the Deputy Registrar to dispense the production of the original Title deed and all statutory documents required and the Deputy Registrar of this court to sign transfer documents and any other documents to enable transfer of 8 Acres out of Land Parcel No BUNGOMA/TONGAREN/2689 in favour of the plaintiff.
- d. The Defendant shall bear the costs of this suit.
- e. It is so ordered.

DATED, SIGNED and DELIVERED at BUNGOMA this 30<sup>th</sup> day of April, 2024.

.....

HON.E.C CHERONO

ELC JUDGE

In the presence of;

SUBPARA 1.

Mr. Nyamu for the Plaintiff/Applicant

SUBPARA 2.

Defendant-present

SUBPARA 3.

Bett C/A

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