



**Musau v Muli (Environment & Land Case E004 of 2022)
[2024] KEELC 3327 (KLR) (22 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3327 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E004 OF 2022
CA OCHIENG, J
APRIL 22, 2024**

BETWEEN

DAVID KITAVI MUSAU APPLICANT

AND

BENEDICT MUIYA MULI RESPONDENT

JUDGMENT

1. Through an Originating Summons dated the 21st February, 2022, the Applicant seeks for the following orders against the Respondent:-

That the Applicant be and is hereby the owner by prescription through adverse possession of all that parcel of land known as Machakos/Kiandani/2051 measuring approximately 0.08 Hectares and be issued with a Title Deed by the Land Registrar, Machakos.

That the Respondent do pay the costs of this Application.

2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of DAVID KITAVI MUSAU.

The Respondent despite being duly served via substituted service in the Daily Nation Newspaper dated the 8th June, 2022 failed to enter appearance nor file a Defence to controvert the Applicant's averments. The matter proceeded for hearing where the Applicant called one (1) witness.

Evidence of the Applicant

3. The Applicant as PW1 explained that he is a business man and also the Machakos County Director of Technical Training. He testified that he resides at Kenya Israel. He relied on the averments in his Supporting Affidavit dated the 21st February, 2022 where he explained that the land known as MACHAKOS/KIANDANI/2051 hereinafter referred to as the '*suit land*', is registered in the name



of BENEDICT MUIYA MULLI. It was his testimony that he took active possession of the suit land wherein he started farming and has conducted numerous development projects thereon since 1994. Further, that the suit land is adjacent to the Machakos – Kyumbi road and he has been in open as well as continuous possession thereon from 1994 wherein he has planted crops for subsistence farming and run a small kibanda where he sold food. He stated that he has been in exclusive possession where he has constructed temporary structures and rented out to the members of the public. It was his further testimony that he had constructed a car wash centre on the said suit land, which he has been operating. He contended that he had no authority or consent from the Respondent and has openly remained in occupation of the suit land as he started building permanent houses thereon, in the full glare of the Respondent, the public and the same was undisputed. He sought to be declared owner of the suit land through adverse possession. He produced the Copy of Official Search for land parcel number MACHAKOS/ KIANDANI/2051 and Green Card as well as various photographs of the developments on the suit land as exhibits.

DIVISION - Submissions

4. The Applicant in his submissions reiterated his averments as per the Supporting Affidavit, oral evidence and insisted that he had acquired prescriptive rights over the suit land, through adverse possession. He sought to be issued with a Certificate of Title. He argued that since his claim was unchallenged and has been on the suit land for 28 years, he should be granted the orders as sought. To buttress his averments, he relied on the following decisions: *Pina Waithera Kamau v Shmina Mandal & Another (2021) eKLR* and *Wilson Njoroge Kamau v Nganga Mucera Kamau (2020) eKLR*.

DIVISION - Analysis and Determination

5. Upon consideration of the Originating Summons dated the 21st February, 2022 including the Supporting Affidavit, testimony of the witness, exhibits and submissions, the only issue for determination is whether the Applicant has acquired the suit land through adverse possession.
6. The doctrine of Adverse possession is governed by Section 7 and 38(1) of the [Limitation of Actions Act](#). Section 7 of the said Act stipulates that:-

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.”

7. Further, Section 38(1) of the [Limitation of Actions Act](#) provides instances when a person is entitled to apply for adverse possession and states that:-

Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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.”

8. In order for a party to succeed in a claim for adverse possession, there are various requirements he/she needs to fulfill. Further, these requirements were well articulated in the case of *Wambugu V Njuguna (1983) KLR 173* where the Court of Appeal stated that:-

Adverse possession contemplates two concepts: Possession and discontinuance of Possession. It further held that the proper way of assessing proof of Adverse Possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and



not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.”

9. Further, in the case of *Haro Yonda Juaje V Sadaka Dzengo Mbauro & Another (2014) eKLR* Judge Angote outlined the ingredients of adverse possession as follows:-

That one has made physical entry on the land and is in actual possession of the land for the statutory period; b) That the said occupation is non permissive; c) That the occupant has the clear intention of excluding the owner from the property (animus possidendi); d) The acts done by the claimant are inconsistent with the owners enjoyment of the land for the purpose which he intended to use it; and e) that the possession was continuous, uninterrupted and unbroken for the statutory period.”

10. In the current case, PW1 testified that he has been in occupation and possession of land parcel number MACHAKOS/KIANDANI/2051, which is registered in the name of the Respondent, from 1994 wherein he undertakes subsistence farming, runs a small kibanda where he sells food and operates a carwash. He produced photographs of the suit land to confirm these averments. He claimed he has been in exclusive possession where he has constructed temporary structures and rented out to the members of the public. Further, that he had no authority or consent from the Respondent and has openly remained in occupation of the suit land as he started building permanent houses in the full glare of the Respondent, the public and the same was undisputed. From the testimony of the Applicant which was uncontroverted by the Respondent, it is clear that the Applicant continued to occupy the suit land without participation and permission of the Respondent. As to whether the Applicant’s occupation was open and uninterrupted. I wish to refer to the case of *Daniel Kimani Ruchine & Others versus Swift Lothberford & Co. Ltd and Anor (1977) eKLR* where the court held that:-

The Plaintiffs have to prove that they used the land as of right, nec vi, nec clam, nec precario (no force, no secrecy, no evasion).”

11. Further, in the case of *Chevron (K) Ltd V Harrison Charo Wa Shutu (2016) eKLR* the Court of Appeal held that:-

We are equally satisfied from the evidence that, by building structures on the suit premises without obtaining permission from the appellants, as described earlier in this judgment, the respondent manifested animus possidendi, a clear mind and intention of dealing with the suit premises as if it was exclusively his and in a manner that was in clear conflict with the appellants’ rights. The appellants were, as such dispossessed of the suit premises by those acts. The respondent’s acts were nec vi, nec clam, nec precario (that is, neither by force, nor secretly and without permission).”

12. In associating myself with these decisions and applying them to the circumstances at hand, I find that the Applicant has indeed demonstrated *animus possidendi* that he has clearly dealt with the suit land as if it was exclusively his and in a manner contrary to the Respondent’s rights. Further, since the Respondent failed to make an entry to the suit land nor participate in the other developments and with the Applicant having operated thereon openly as well as continuously from 1994 to date, I opine that he had indeed discontinued his possession of the said land.
13. Based on my analysis above, I find that the Applicant’s actual date/year of entry into the suit land confirms that the Respondent’s claim to recover the suit land is statute barred. I opine that pursuant to Section 38 of the *Limitation of Actions Act*, the Applicant has indeed become entitled to claim the suit land by way of adverse possession from the year 2006 when the twelve (12) years had elapsed. I hold that from the year 2006, the Respondent was simply holding the suit land in trust for the Applicant.



14. As to who should bear the costs of the suit, since the suit was not defended, I find that the Applicant should bear his own costs.
15. It is against the foregoing that I find the Applicant has proved his case on a balance of probability and will proceed to enter Judgment against the Respondent and make the following final Orders:-
 - i. The Applicant be and is hereby declared to have become entitled by adverse possession to all that piece of land registered as MACHAKOS/KIANDANI/2051.
 - ii. The Land Registrar, Machakos be and is hereby directed to register the Applicant as the proprietor of LAND REFERENCE NO. MACHAKOS/KIANDANI/2051, in place of the Respondent herein.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 22ND DAY OF APRIL, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of;

Musyimi K. for D.M. Mutinda for Applicant

No appearance for Respondent

Court Assistant – Simon/Ashley

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