



**Wakhisi v Lwiki (Sued as the legal representative of Jestimore Lwiki Walunywa) & another
(Environment & Land Case E009 of 2023) [2024] KEELC 4358 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4358 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE E009 OF 2023
EC CHERONO, J
MAY 30, 2024
IN THE MATTER OF LAND PARCEL NO. BKKOLI/BOKOLI/785
AND
IN THE MATTER OF THE LIMITATION OF ACTIONS ACT
IN THE MATTER OF ORDER 37 OF THE CIVIL PROCEDURE
RULES**

BETWEEN

JOHN WAMBUA WAKHISI APPLICANT

AND

**ALICE NEKESA LWIKI (SUED AS THE LEGAL REPRESENTATIVE OF
JESTIMORE LWIKI WALUNYWA) 1ST RESPONDENT**

DAVID SIMIYU LWIKI 2ND RESPONDENT

JUDGMENT

1. The Applicant filed an Originating Summons under Section 38 of the Limitations of Actions Act Cap 22; Order 37 rule 7 of the Civil Procedure Rules seeking determination of the following questions;
 - a. That John Wambua Wakhisi be declared the owner through adverse possession of land measuring 2 acres exercised from Land Parcel No. Bokoli/Bokoli/785 which he has occupied uninterrupted from the year 2012 to date.
 - b. That the court do order that the applicant be registered as the owner and proprietor of the portion from the said parcel of land No. Bokoli/Bokoli/785 and the registration of David Simiyu Lwiki the 2nd respondent to the said whole portion measuring 2.71 acres of land be cancelled.



- c. That the court to order sub-division of a portion measuring 2.71 acres allocated to the 2nd respondent from that land parcel no. Bokoli/Bokoli/785 into two portions with 2 acres to be transferred to the applicant and 0.71 acres to David Simiyu Lwiki-the 2nd respondent herein.
2. The summons are premised on the grounds cited in the application and particularly in the Supporting Affidavit of the Applicant which is undated.
 3. It is the applicant's case that he is a bona fide purchaser for value of a portion of land then under the estate of Jestimore Lwiki Walunywa(deceased)comprising of that land parcel no. Bokoli/Bokoli/785 (hereinafter the 'suit land') where one Alice Nekesa Lwiki-the 2st respondent is the legal representative vide Bungoma CMC Succession Cause No. 223 of 2021.
 4. It was deposed that sometime in the year 2012, the applicant was approached by the 2nd respondent and his wife who were selling 2 acres to be exercised from land parcel no. Bokoli/Bokoli/785 at a consideration of Kshs. 600,000/=. Upon successful negotiations the applicant and the 2nd respondent entered into an agreement witnessed before the area chief, Miendo Location for the same and he (the applicant) took possession immediately and started tilling and utilising the land. The applicant averred that he was surprised to see the respondents demarcating and encroaching into his property without any legal cause thus prompting him to file this suit.
 5. The respondent despite being served with the originating summons neither entered appearance nor filed defence. Directions were taken to have the court matter proceed ex-parte.
 6. During the hearing, the applicant testified as PW1 and adopted his witness statement dated 8th June, 2023 and produced into evidence documents contained in his list of documents of even date as PExhibit 1-8. In his sworn testimony, the applicant reiterated the contents of his witness statement and sought for orders in the Originating Summons.
 7. I have considered the pleadings, annexures, submissions and authorities cited by the Applicant and in my view, the following are the probable issues for determination;
 - i. Whether the Applicant's occupation of the Suit Land is adverse to that of the Respondent
 - ii. Who should bear costs
 8. As earlier stated, the respondent failed to enter appearance or file defence despite service of Summons and the Originating Summons and the supporting affidavit and annexures thereto. In instances such as this, the Court has a duty to interrogate and evaluate uncontroverted evidence in order to determine whether the applicant is entitled to the orders sought. In the case of Murang'a ELCA No. 16 of 2017 Gichinga Kibutha v Caroline Nduku [2018] eKLR while discussing the consideration of uncontroverted evidence the court pronounced itself to the strength that;-

It is not automatic that in instances where the evidence is not controverted, the claimant's claim shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.

9. Under Section 108 & 109 of the [Evidence Act](#) Cap 80, the law is clear that the burden of proof in civil claims is placed on the person who alleges and where there is no evidence to challenge the allegations, the standard of proof automatically is higher. Undoubtedly, owing to the nature and extent of orders for adverse possession to wit extinction of right to property, the burden is higher. The burden of proof squarely lies on the Applicant to demonstrate that he has met the requirements for the grant of an order of adverse possession. The Applicant is the one who has alleged and must therefore proof. (See Nairobi CoA App No. 95 of 2014 Ruth Wangari Kanyagia vs Josephine Muthoni Kinyanjui [2017] eKLR)



10. The applicant seeks ownership of the suit land by operation of law based on *Limitation of Actions Act* and in particular on the doctrine of adverse possession. What is adverse possession? The doctrine of adverse possession in Kenya is embodied in Section 7 of the *Limitation of Actions Act*, CAP 22 Laws of Kenya, which provides 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.”
11. The concept of adverse possession and its essential elements have been explored and laid down by the superior courts in numerous decisions. In particular, the principles for adverse possession were set out in the case of *Mbira –v- Gachuhi* (2002) IEALR 137 in which the court held as follows:

“..... 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....”
12. 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”.
13. 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.”
14. Guided by the foregoing authorities which are persuasive and binding, it is now settled that party claiming title to land under the doctrine of 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.
15. The first element to consider in determining this matter is whether the applicant is in actual possession of the portion (2 Acres) of the suit land claimed. It is the applicant’s contention that he purchased 2 Acres of the suit land and has since been in occupation of the same having cultivated thereon as evidenced by PExhibit 8 which are copies of photographs showing crops grown thereon. No evidence was tendered before this Honourable Court in rebuttal of this position.
16. The second element to consider is whether applicant’s possession of the suit property was without permission, peaceful, notorious and uninterrupted for at least twelve (12) years. The appellant averred that he purchased the 2 acres on 23rd October, 2012 vide a sale agreement of even date between himself



and the 2nd respondent for a consideration of Kshs. 600,000/=. According to the agreement produced as PExhibit 1 the applicant paid the full consideration on the date of the sale and took immediate occupation of the land.

17. In the case of Public Trustee vs. Wanduru, Madan J A stated as follows; -

“... 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”.

18. From the foregoing caselaw, time therefore started running from the 23rd October, 2012 to 12th May, 2023 when the applicant claims the respondents encroached into the land. The period between the purported purchase and the purported encroachment makes it 11 years and 8 months. As earlier mentioned in this judgment, Section 7 of the Limitation of Actions Act, CAP 22 Laws of Kenya provides for a period of 12 year. The in-between period as mentioned above is 4 months shy of the required statutory period of 12 years.

19. I have also considered the testimony of the applicant as well as the Sale agreement entered between the applicant and one David Simiyu Lwiki who is also the 2nd Respondent on 23/10/2012. The said purported agreement indicates that the suit property LR NO. Bokoli/Bokoli/785 was registered in the of one Jestimore Lwiki (deceased) who was father to David Simiyu Lwiki. It is trite law that since the suit property was registered in the name of a deceased person, the Seller, David Simiyu Lwiki had no capacity to transact on the property of a deceased person. Section 45 of the Law of Succession Act provides as follows;

“No intermeddling with property of deceased person

- i. Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
- ii. Any person who contravenes the provisions of this section shall-
 - a. Be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment and
 - b. Be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

I find that the purported sale by the 2nd Respondent to the applicant is tantamount to intermeddling with the free property of a deceased person which is not only actionable in law but a criminal offence punishable by imprisonment.

20. In the foregoing, I find that the suit herein is not only a nullity but was filed prematurely. First, the applicant does not succeed in adverse possession as 12 years had not lapsed at the time of filing the suit from the date he took occupation of the 2 acres. Secondly, the actions by the applicant and the 2nd respondent in purporting to transact in the suit property LR Bokoli/Bokoli/785 is tantamount



to intermeddling with the free property of a deceased person. To that extent, I hold that the plaintiff has not proved the ingredients for adverse possession to the requisite standard and therefore his claim must fail.

21. Accordingly, the current suit is devoid of merit and the same is hereby dismissed.

22. Since the suit is undefended, I make no order as to costs.

DATED SIGNED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF MAY, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Juma Waswa H/B for Paul Juma for Applicant
2. Applicant in person-present
3. Bett C/A

