



**Kamichar v Mutua & another (Environmental and Land Originating
Summons 33 of 2020) [2024] KEELC 4405 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4405 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 33 OF 2020**

JG KEMEI, J

MAY 23, 2024

BETWEEN

ELIZABETH WAMBUI KAMICHAR PLAINTIFF

AND

AGNES MBINYA MUTUA 1ST DEFENDANT

THE LAND REGISTRAR, THIKA 2ND DEFENDANT

JUDGMENT

1. Vide Originating Summons dated 4/6/2020 and filed on even date the Plaintiff moved the Court for determination of the following issues:-
 - a. That the Plaintiff Elizabeth Wambui Kamichar is entitled to be the registered owner as proprietor of the whole of the land reference number Kakuzi/Kirmiri/Block 8/464 (suit land) in the place of the current registered owner namely, Agnes Mbinya Mutua pursuant to the provisions of Section 38d of the Limitations of Actions act Chapter 22 of the Laws of Kenya on the ground that since 1998 the Plaintiff has had exclusive possession and/or occupation the above mentioned piece of land openly, peacefully and uninterrupted to date that it to say for a period exceeding twelve (12) years preceding the presentation of this Summons.
 - b. That an order do issue registering the Plaintiff as the proprietor of the said parcel of land in place of the Defendant and/or her successors in title thereof and the 2nd Defendant be directed to effect the registration of the said order.
 - c. That the cost of this Originating Summons be borne by the Defendant.
2. The Summons are supported by the Affidavit of Elizabeth Wambui Kamichar sworn on 8/6/2020. She deponed that she has been in occupation of the suit land since 1998 without any interruption or discontinuance.



3. The Applicant deponed that she is the proprietor of parcel No. Kakuzi/Kirimiri/480 having inherited it from her late father Gibson Kamichar Wairire. That the 1st Defendant is registered as owner of the suit land adjacent to parcel No. 480 for which the two properties share a common boundary. That in 1998 she and her children entered the suit land and have continued to occupy peacefully, uninterrupted and exclusively to date. She averred that she has carried out extensive developments on the suit land such as drilling a borehole and erecting buildings. She has also fenced the property and carries out extensive farming which include macadamia and avocados.
4. That she has occupied and utilised the suit land as her own and accordingly is entitled to title under Section 38 of *Limitation of Actions Act*.
5. The 1st Respondent was served by substituted service by advertisement in the Daily Nation pursuant to the leave of the Court sought and obtained on 14/7/2020.
6. At the hearing of the suit, Elizabeth Wambui Kamichar testified as PW1. She informed the Court that she is a farmer carrying out various activities on the suit land. That she lives on her own land parcel No. 480 and farms on the suit land (parcel No. 464). She relied on her Supporting Affidavit to the Originating Summons dated 4/6/2020 in evidence in chief. She produced documents in support of her claim marked “EWK1”. She informed the Court that she has occupied the land for the last 25 years and urged the Court to grant her prayers.
7. I have considered the Originating Summons, the evidence adduced during the trial, the written submissions of the Applicant dated 4/3/2024 and all the material placed before me and I find the key issue for determination is whether the Plaintiff has proven her case.
8. The Legal provisions on adverse possession are contained in the *Limitation of Actions Act* Cap 22 Laws of Kenya and relevant to this case are inter alia Sections 7 and 38 that;

“7. Actions to recover land

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.

38. Registration of title to land or easement acquired under Act

- (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.”

9. The Court of Appeal in the case of *Benjamin Kamau Murma & Others v Gladys Njeri*, CA No. 213 of 1996 held that:

“The combined effect of the relevant provisions of Sections 7, 13 and 17 of the *Limitation of Actions Act*}}, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of Adverse Possession of that land.”



10. The Court of Appeal in the case of *Mtana Lewa Vs Kabindi Ngala Mwagandi* [2015]eKLR, defined the concept as follows;

“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 nor 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.”

11. The Court cited with approval the case of *Kimani Ruchire v. Swift Rutherford & Co. Ltd.* [1980] KLR. 10 at page 16 Letter B, Kneller J (as he then was) said: -

“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 permission). So the plaintiffs 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 or by way of recurrent consideration.”

9. For one to succeed in a claim for adverse possession he must demonstrate that adversity is adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.

12. Equally in the case of *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another* [2015] eKLR the Learned Judges highlighted the requirements for proving adverse possession as thus;

“First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.”

13. Similarly in the case of *Benson Mukuna Wachira v Assumption Sisters of Nairobi Registered Trustees* [2016] eKLR, this Court held that:

“A claim for adverse possession arises where land owned by a person is claimed by a trespasser on the basis that the trespasser, with the knowledge of the owner, has occupied it adversely to the title of the owner continuously for an uninterrupted period of not less than 12 years.”

14. In this case the Plaintiff led evidence that she has occupied the suit land for a period of over 25 years peacefully, uninterrupted and exclusively. She led evidence that she has developed the land by drilling a borehole and construction of structures as well as farming long term crops such as Avocados and Macadamia.

15. It is the Plaintiff's case that she occupied the land since 1998. The Plaintiff is mum on how she entered the suit land. In the case of *Kimani Ruchire* (supra), the onus was on the plaintiff to show that she has used the land Nec vi, nec clam, nec precario (No force, no secrecy, no permission). It would appear that the Plaintiff has over the years stealthily occupied the land.

16. It is not in dispute that the Plaintiff has occupied the suit land for a period of over 12 years and therefore has passed muster with respect to the statutory period of 12 years. However going by the decision in



Kimani Ruchire (*supra*), her entry appears to have been stealth seeing the evidence she led that she lives on her own land parcel 480 which shares a boundary with the suit land. She led evidence that she and her children begun occupying the suit land since 1998 without the knowledge or awareness of the paper owner. A key ingredient in a claim of adverse possession is that the knowledge of the paper owner of the occupation is important so much so that the paper owner elects not to remove the trespasser from the land for the period to the tune of 12 years.

17. In this case it is the averment of the Plaintiff that she does not know the whereabouts of the owner; she does not know the owner; the owner is not aware that she is occupying the suit land; the owner has not been dispossessed of the land by the Plaintiff neither is there evidence that the owner has relinquished possession to the Plaintiff; the owner has not been seen on the land. All these go to show that the absence of possession sufficient in publicity notoriety, adversity and knowledge of the paper owner.
18. In the case of *Kweyu v Omutut* [1990] KLR 709, the court emphasised the need for possession to be hostile to found a claim in adverse possession. The court stated as follows:

“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (Colour of title is that which is a title in appearance, but in reality). Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford Colour, and, second such possession under it as will be adverse to the right of a true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms (“claim or colour of title”) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. {{A mere adverse claim to the land or the period required to form the bar is not sufficient}}. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant’s use done publicly and notoriously.” (emphasis is mine)

19. The fact of possession must be accompanied with the unequivocal evidence of intention to dislodge the paper owner. Intention is a state of mind which ought to be proved. If mere trespassers are allowed to get away with another’s land lightly as prepositioned by the Plaintiff then trespassers will run amok and the validity of title would be put at considerable stake and risk.
20. In the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR (*supra*) held that ;

“.... it has always been the holding of Courts in the common law world, that acts of user are not enough to take the title out of the true owner unless they are inconsistent with the enjoyment of the soil for the purpose for which he intended to use it; and that acts of user committed upon land which do not interfere and are consistent with the purpose to which the owner intends to devote it, do not amount to adverse possession, and are not evidence of dispossession or discontinuance of possession. Accordingly, when the true owner of land intends to use it for a particular purpose in the future, but meanwhile has no immediate use for it, and so leaves it unoccupied, he does not lose his title to it simply because some other person enters on it and uses it for some purpose; not even if this purpose continues year



after year for twelve years or more (see *Leigh v Jack* [1879] 5 Ex D 264; *Williams Brothers Direct Supply Stores Ltd v Raftery* [1957] 3 All ER 593; *Hayward and Another v Chaloner* [1967] 3 WLR 10 68).”

21. In the end I find that the Plaintiff has failed to prove adversity in her occupation of the suit land; failed to show adversity to the title of the paper owner; the paper owner has no knowledge of her occupation of the land; no evidence of dispossession or relinquishment of possession of the paper owner; her occupation is devoid of hostility thus not adverse.
22. The suit be and is hereby dismissed.
23. I make no orders as to costs.
12. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 23RD DAY OF MAY, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of:

Plaintiff – present in person

1st and 2nd Defendant - Absent

Court Assistants – Phyllis & Oliver

