



**Namisi v Mung'ale (Environmental and Land Originating Summons
E002 of 2020) [2024] KEELC 4813 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4813 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2020
EC CHERONO, J
JUNE 20, 2024**

BETWEEN

ELIUD MASINDE NAMISI PLAINTIFF

AND

ANDREW NYONGESA MUNG'ALE DEFENDANT

JUDGMENT

1. The Plaintiff filed an Originating Summons under Section 4(4), 17, and 38 of the Limitations of Actions Act Cap 22; Order 37 rule 7(1) of the Civil Procedure Rules seeking determination of the following questions;
 - a. Whether the Defendant/Respondent is the registered owner of land parcel number Ndivisi/Makusela/1029.
 - b. Whether the land parcel number Ndivisi/Makusela/1029 was previously part of 617.
 - c. Whether the decree in Bungoma SPM CCC NO 359 OF 2023 between Andrew Nyongesa Mung'ale vs. Eliud Masinde Namisi & Another is time barred and whether the same is culpable of being enforced by the Defendant/Respondent.
 - d. Whether the Plaintiff has had possession of one (1) acre out of land parcel number Ndivisi/Makusela/1029 for over twelve (12) years.
 - e. Whether the Plaintiff has been in possession, the same has been open, continuous, peaceful and uninterrupted for over the said period.
 - f. Whether the Plaintiff has acquired ownership of land parcel number Ndivisi/Makusela/1029 by way of adverse possession.



- g. Whether the Plaintiff should be declared owner of land parcel number Ndivisi/Makusela/1029.
 - h. Whether the registration of the Defendant/Respondent as the proprietor of land parcel number Ndivisi/Makusela/1029 should be cancelled and the Plaintiff accordingly registered as owner of the same.
 - i. Who bears the costs of this suit.
 2. The summons are premised on the grounds cited in the application and particularly in the Supporting Affidavit of the Plaintiff dated 4th November, 2020.
 3. It is deposed by the Plaintiff that land parcel no. Ndivisi/Makusela/1029 (the 'suit land') is registered in the name of the defendant and that he has occupied and fenced off a portion thereof where he has established a home and planted trees and yearly crops. He stated that he has been in peaceful, open, continuous and uninterrupted occupation of one acre of the suit land since 1983. The Plaintiff further stated that despite the Defendant obtaining judgment in Bungoma SPMCC NO. 359 of 2003 Andrew Nyongesa Mung'ale vs. Eliud Masinde Namisi & Another for eviction, he has remained in occupation of the land without interference of the Defendant. It was his argument that the Defendant cannot now purport to enforce the order of eviction 12 years after it was rendered. He sought to be registered as the owner of one acre of the suit land.
 4. Upon being served with Summons, the Respondent filed a replying affidavit sworn on 20th July, 2022 where he deposed that he purchased the suit land from one Joseph Wanyama Ngosia and was registered as the absolute owner and was issued with a title deed on 8th June, 1999. He testified that in the year 2012 he sued the Plaintiff/applicant and one Charles Wamalwa Ngosia in Bungoma HCC Suit No. 123 of 2002 which was subsequently transferred to the Chief Magistrate's Court and registered as Bungoma SPM CC No. 359 of 2003. In the former suit, the plaintiff was seeking for orders of eviction against them from the suit land and judgment was rendered in his favour with a decree and eviction order being issued against the plaintiff and the said Charles Wamalwa. He further, deposed that the plaintiff was evicted in the year 2009 and does not occupy the suit land since he (the defendant) has been in occupation having planted maize. He asked the court to dismiss the originating summons with costs.
 5. After pre-trial directions were taken the parties agreed with the hearing of this case by way of viva voce evidence. The case was fixed for hearing and proceeded on various days. In support of his case, the applicant called one witnesses while the respondent called two witnesses

Plaintiff/Applicants Case

6. PW1 Eliud Masinde Namisi referred on his supporting affidavit sworn on 4th November, 2020 and sought to adopt as his testimony-in-chief. He also referred to his list of documents containing a title deed, judgment in Bungoma SPM CC No. 359 of 2003 and a letter requesting for proceedings dated 4th October, 2020 which he produced in evidence as P-Exhibit 1, 2 and 3. On cross examined, he stated that he is still in the suit land and has lived therein for over 40 years. It was his evidence that the defendant's brother has been ploughing on a section of the suit land for 2 years now. It was his testimony that he has constructed a house on the land despite the area chief writing a letter to the effect that there is no house in the suit land. On re-examination, he reiterated his earlier testimony.



Defence Case

7. DW1 Andrew Nyongesa Mung'ale relied on his replying affidavit dated 20th July, 2022 as his evidence in chief. He denied the allegation that the Plaintiff is utilizing the suit land. In cross examination he testified that he was only farming maize in the suit land but not living therein. He testified that he sued the plaintiff in the year 2003 and the court rendered its judgment in the year 2008. It was his evidence that the eviction orders against the Plaintiff were enforced by the OCPD Webuye. DW1 testified that when he purchased the suit land, he found that the Plaintiff was living in the land and that is why he sought to have him evicted
8. DW2 Silas Sifuna Basakila adopted his witness statement dated 17th December, 2022 as his evidence in chief. In cross examination he testified that he was the caretaker of the suit land. It was his evidence that the Plaintiff was evicted by the Defendant and police officers from Webuye Police Station in the year 2009. He testified that he plants maize and beans on the suit land on behalf of the Defendant.
9. Parties closed their respective cases and took directions to file submissions.
10. The Plaintiff filed submissions dated 3rd May, 2024 where he submitted that the decree in Bungoma SPM CC No. 359 of 2003 between the parties is time barred and not capable of being enforced by the Defendant. Reliance was placed in the case of Koinange Investment and Development Company Ltd vs. Ian Kahi Ngethe & 3 Others (2015). It was their argument that the Plaintiff has been in possession of 1 acre of the suit land for over twelve years and that his occupation has been open, peaceful, uninterrupted and continuous. He quoted the case of Maweu vs. Liu Ranching & Farming Cooperative Society 1985 KLR 430. The plaintiff urged the court to find that the originating summons were merited.
11. The defendant on his part filed submissions dated 16th May, 2024 Where he submitted that the Plaintiff was evicted from the suit land in the year 2009 and has not been in occupation of the land as per the report of the Chief of Namarambi Location and as such the Plaintiffs claim for adverse possession does not meet the threshold for the grant of the orders sought. It was also submitted that the judgment in Bungoma SPM CC No. 359 of 2003 is not time barred and after all the same was already executed. He quoted the case of M'ikiara M'rinkanya & Anor vs. Gilbert Kabeere M'mbijewe (2007) eKLR. The defendant urged the court to dismiss the plaintiff's case.

Legal Analysis and Decision

12. I have considered the pleadings, documentary evidence, submissions and authorities cited by both parties; The issue that commend for determination in my view are as follows;
 - a. whether or not the Plaintiff has met the threshold for grant of orders for adverse possession and
 - b. whether the Plaintiff is entitled to one (1) acres of the suit land and
 - c. who bears the costs of this suit.

It is not in contention that there was a case between the parties herein where upon hearing both parties, the court ordered for the eviction of the plaintiff and another not a party to this suit on 11th August, 2008. The disputed fact in the current suit is whether the said judgment was enforced or not. The Plaintiff on his part avers that the said judgment was not enforced and that he is still in occupation of the suit land. The Defendant on the other hand claims that the resultant order was enforced in the year 2009 with the assistance of police officers from Webuye



Police Station and that he reclaimed his entire piece of land where he now plants maize and other crops.

- d. The Plaintiff in this matter has sought the court to make a determination on whether the above mentioned order is enforceable. It is my view that this being a case where the Plaintiff asserts ownership rights over one acre of the suit land acquired by way of adverse possession, it is best that this court directs itself on the requirements of proving such a claim without digressing to the validity of the judgment of the decree in Bungoma SPM CC No. 359 of 2003.
- e. The law on adverse possession is provided for under the *Limitation of Actions Act*. Section 7 of the Act provides:

“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. Section 13 “(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land

- (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land”.

- f. Section 17 extinguishes the rights of a registered owner where there is a successful claim for adverse possession. Section 38 on the other hand provides as follows;

“(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.”

- g. The elements of adverse possession were summarized in the case of *Kasuve v Mwaani Investments Ltd & 4 others* [2004] 1KLR 184 as follows:

“...and in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, *Wanja v Sakwa No 2* [1984] KLR 284. A title by adverse possession can be acquired under the *Limitation of Actions Act* for part of the land...”



- h. Similarly, in the case of *Chevron (K) Limited v Harrison Charo Wa Shutu* [2016] eKLR it was held, inter alia, that:

“At the expiration of the twelve-year period the proprietor’s title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land. Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner’s permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner’s enjoyment of the soil for the purpose for which he intended to use it. See *Littledale v Liverpool College* [1900]1 Ch.19, 21.”

- i. The Plaintiff claims that he has been in occupation of one acre of the suit land since 1983. To determine the nature of possession, this Court is guided by the decision in *Kisumu Civil Appeal No. 27 of 2013 Samuel Kihamba v Mary Mbaisi* [2015] eKLR, where the court held:

“Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land”

- j. On examination of the materials placed before me, it is my view that the Plaintiff has not led any evidence as to the nature of his occupation. it is not enough for the Applicant to simply state that he has been in open, continuous and uninterrupted occupation. He ought to prove the said allegation. This Court associates with the sentiments of Justice Kuloba J, (as he then was,) in *Nairobi Civ No. 283 of 1990 Gabriel Mbui v Mukindia Maranya* [1993] eKLR, where the Court held:

“The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition there must be facts showing a clear intention to hold adversely, and under a claim of right. *De facto use*, and *de facto occupation* must be shown”

- k. The Plaintiff in this case has not furnished the court with evidence that he is indeed in occupation of the land. In rebuttal to the Plaintiffs claim, the Defendant testified that upon obtaining an eviction order against the plaintiff in the year 2009, he enforced the said order and the Plaintiff ceased being in occupation of the suit land. The Plaintiff in his evidence merely states that the above-mentioned order was not effected. He simply states that he has constructed a house but has not gone a step further to prove that he has dispossessed the Defendant from the claimed portion. He however admitted that the Defendant is indeed cultivating maize on the suit land.



- l. The Defendant on the other hand rebutted the claim that the Plaintiff is in occupation of the suit land by producing a letter by the area chief. The said letter by the Chief of Namarambi Location was produced into evidence and no objection was made by the Plaintiff to its production. In the said letter, the chief confirmed that he has visited the suit land and notes that the Plaintiff is not in occupation, that there is no house constructed thereon and that the Defendant is in occupation and has in fact grown maize thereon.
- m. From the foregoing, it emerges that the Plaintiff is not in occupation of the land ostensibly following the enforcement of the eviction order issued in Bungoma SPM CC No. 359 of 2003. It appears that the plaintiff's occupation was discontinued by the Defendant who asserted his rights. It is my finding that the Plaintiff has not proved his claim for adverse possession.
- n. The burden of proof for a claim of adverse possession is upon the person claiming, as provided by sections 107, 108 and 109 of the Evidence Act. Since the claim is to extinguish the title of a proprietor, such burden is high, and such claim is proved by way of facts, through calling of sufficient evidence. It is not just enough to say that one has been on the suit land for a period of 12 years. The burden of proof is on he who alleges. Sections 107 and 108 of the Evidence Act provides as follows:

107

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108 The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

”See Alice Wanjiru Ruhui Vs Messiac Assembly of Yahweh [2021] eKLR.

- o. In the upshot, I find that the Plaintiff has not discharged his burden of proof. And his claim must therefore fail.
- On costs, under section 27 of the Civil Procedure Act, costs of any action, cause or other matter ordinarily follow the event.
- q. Consequently, I find and hold that the Plaintiff's claim as contained in the Originating Summons is devoid of merit and the same is hereby dismissed in its entirety with costs to the Defendants.
- r. Orders accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 20TH DAY OF JUNE, 2024.

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HON.E.C CHERONO
JUDGE

In the presence of;

1. Plaintiff/Advocate-absent



2. Defendant/Advocate-absent

3. Bett C/A

