



**Magiri v M'ikulu (Environmental and Land Originating Summons
E011 of 2023) [2025] KEELC 751 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 751 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E011 OF 2023
CK YANO, J
FEBRUARY 20, 2025**

BETWEEN

JACOB RAIBU MAGIRI PLAINTIFF

AND

M'RUKUNGA M'IKULU DEFENDANT

JUDGMENT

1. The Plaintiff instituted the instant suit vide an Originating Summons dated 14th June 2023, against the Defendant for a claim of adverse possession over suit parcel No. Kianjia/thau/525, seeking the following Orders;
 - a. That the Plaintiff has been in open, continuous, uninterrupted and exclusive occupation and use of approximately 4.75 Acres or thereabouts on land parcel No. Kianjai/thau/525 for more than twelve years.
 - b. That the Defendant's title to approx. 4.75 Acres of land parcel No. Kianjai/thau/525 has been extinguished.
 - c. That the plaintiff has acquired the title to approximately 4.75 Acres on land parcel No. Kianjai/thau/525 by way of adverse possession.
 - d. That the name of the Defendant M'Rukunga M'ikulu be cancelled from the register for the 4.75 Acres to be excised from land parcel No. Kianjai/thau/525 and the name of the Plaintiff Jacob Raibu Magiri be inserted in the register for the 4.75 Acres on land parcel No. Kianjai/thau/525 as the proprietor and a title deed be issued to the plaintiff.
 - e. That the land registrar of the relevant land registry to dispense with the production of the original title deed to land parcel No. Kianjai/thau/525 for purposes of registration of the



plaintiff as the proprietor of the 4.75 Acres to be excised from land parcel No. Kianjai/thau/525

f. That costs be provided for.

Plaintiff's Case;

2. It is the Plaintiff's claim that he has been in open, exclusive and uninterrupted occupation of the suit property for a period of over 12 years since the year 1988. The suit parcel Kianjai/thau/525 measuring approximately 5 Acres is registered in the name of the defendant.
3. He avers he entered into an agreement for the sale of the suit land with the defendant vide an agreement dated 21/5/1988 for a consideration price of Kshs. 55,000/= . A deposit of Kshs. 5,000/- was paid on execution of the agreement while the balance was paid by 2/6/1989. The defendant thereafter initiated the process of transfer, he paid for the mutation and the original parcel was subdivided to give rise to the suit land.
4. The defendant, however, refused to complete the transfer process and which necessitated the filing of Meru Civil Suit No. 197 of 1989 against the defendant seeking specific performance by compelling the defendant to transfer the purchased portion. That despite the said case being concluded in the plaintiff's favor vide a consent judgment, he has been unable to execute the decree due to frustrations on the part of the defendant and his family, hence the instant suit.
5. The plaintiff however, contends that despite the land not being registered in his name, he took actual possession of the suit land upon execution of the sale agreement and has remained in occupation for a period of over 12 years, that he has extensively utilized and developed the land by planting maize, beans, fodder, assorted trees and other crops for subsistence and commercial purposes. That during the entire period of occupation and use, the defendant has never taken any steps to evict him from the land.
6. The plaintiff maintained that as a result of his continuous and uninterrupted occupation of the suit land, save for a portion measuring 0.25 Acres occupied by the defendant's sons, who entered the land in the year 2014 and have constructed semi-permanent structures thereon, he thus claims a portion of the suit land measuring 4.75 Acres and the title thereto by virtue of adverse possession and urged the court to allow the claim and grant the orders sought.
7. The Plaintiff's case proceeded for hearing, whereby he testified as PW1 and called one witness to testify in support of his case. The plaintiff adopted his witness statement dated 14/6/2023 as his evidence in chief.
8. He also produced the documents in his list of documents dated 14/6/2023 as Pexhibits 1 – 11 as follows: - certified extract of the title to L.R. No. Kianjai/Thau/525 as pexh. 1, sale agreement dated 21/5/1988 as pexh. 2, Receipt for payment of surveyor's fees dated 13/7/1988 pexh.3, receipt for payment of the mutation for the suit land dated 17/8/1988 as pexh.4, plaint filed in Meru Civil Suit No. 197 of 1988 as pexh. 5, Decree in Meru Civil Suit No. 197 of 1988 dated 29/8/1989 as pexh. 6, Letter by the District Officer Tigania Division to court dated 3/11/1989 as pexh. 7, Application for registration of caution against the suit land dated 9/11/1989 as pexh. 8, receipt in payment for application for registration of caution against the suit land as pexh. 9, notice by County Land Registrar – Tigania West dated 26/1/2023 as pexh. 10 and Objection notice by plaintiff dated 07/02/2023 as pexh. 11.
9. On cross-examination, the plaintiff stated that he is claiming the suit land, which he had purchased from the defendant on 21/5/1988 and that he paid the agreed purchase price of Kshs. 55,000/= in full through his advocate for onward transmission to the defendant.



10. That upon the purchase, he took immediate possession of the suit parcel and planted crops such as beans and maize and used the land from 1988 to 2022. When shown the photographs, he confirmed that there is a house constructed on the suit land.
11. PW1 denied a refund of Kshs. 10,000/= through a cheque by the defendant. He conceded that he had never asked for the title deed to the suit land since 1989 till 2023. It was his claim that despite the judgment being in his favor in the earlier case he filed case No. 179 of 1988 but the defendant's children declined and/or refused to have the land transferred to him and thus the said judgment has never been executed.
12. He testified that even though the suit land is 5 Acres, he has been using between 2 to 4.5 Acres depending on the availability of rain. That the defendant does not live on the suit land but there's a third-party, Alphonse, who constructed on a portion of about ¼ Acre in the year 2014. He maintained that the defendant has never deployed anyone to take care of the land on his behalf since 1989.
13. On re-examination, PW1 clarified that had he not paid the entire agreed purchase price, the defendant would not enter into a consent in the previous case No. 179 of 1988.
14. PW2 (David Mutembei) adopted his witness statement dated 14/6/2023 as his evidence in chief. On cross-examination, he stated that he has been working as the plaintiff's farm worker since the year 2007 until the year 2022.
15. He stated that in the year 2014, they found some structures put up on a portion of the suit land but they however continued working on the remaining part. He further stated that there were some trees on the suit land along the boundary.
16. The Plaintiff thereafter closed his case.

Defendants' Case;

17. In response to the averments made in the Originating Summons, the Defendant filed a Replying Affidavit sworn on 3rd November, 2023, denying all the claims by the plaintiff.
18. He denied the claims of occupation and use of the suit land by the plaintiff and stated that the plaintiff has never entered nor stayed on the suit land. That no proof of developments of the land has been adduced by the plaintiff.
19. In response to the sale claims, he confirmed that he wanted to sell the land to the plaintiff but his family objected the said sale and he consequently refunded the amounts paid by the plaintiff vide a cheque on 22/11/1989. He thus dismissed the plaintiff's claim as amounting to self-enrichment.
20. It was further his claim that he sold the suit land to one Alphonse Gitonga sometimes in the year 1989, who took possession and has been residing on the land with his family. He avers that the plaintiff has never bothered him or the said Alphonse Gitonga.
21. He dismissed the plaintiff's claim founded on the sale agreement of the year 1989 as being time barred by dint of the Limitations of Actions Act and urged the court to dismiss the suit with costs.
22. The Defence case proceeded for hearing on 29/7/2024. The defendant testified as DW1 and called 3 witnesses in support of his case. DW1 adopted his witness statement dated 2/10/2023 and his Reply to the Originated Summons dated 3/11/2023 as his evidence in chief.
23. He produced the documents in his list of documents as exhibits Dexh.1 – 6 in support of his case being chief's letter dated 4/6/2023 as dexh. 1, cheque dated 22/11/1989 as dexh. 2, Agreement dated



- 20/9/1989 as dexh.3, photos showing development on the land as dexh. 4, letter to Tigania Land Registrar dated 25/1/2023 as dexh. 5, letters from District Officer Tigania Division as dexh. 6.
24. On cross-examination, he stated that sometimes in the 1980's, he discussed with the plaintiff the sale of the suit land but he maintained that he never sold the same to him. That no money was ever paid to him by the plaintiff as purchase price. That the cheque of Kshs. 10,000/= was for money owed to the plaintiff and not a refund of purchase price of the suit land.
 25. He also maintained that he has never had a case previously with the plaintiff. Even though he acknowledged the existence of PMCC No. 197 of 1989, he denied knowledge of the consent agreement signed in the said case. It was his testimony that he sold part of the suit land to one Alphonse Gitonga, who has constructed on the said portion. That at the time of the said sale, there was no caution on the land. He however confirmed that he has never transferred the sold portion to the said Alphonse Gitonga.
 26. When shown dexh. 5, it was his testimony that the plaintiff sued him over a debt of Kshs. 10,000/= and as a result of the said debt, the plaintiff cautioned his land in the year 1989.
 27. On re-examination, DW1 clarified that the sale between himself and Alphonse was reduced into writing and the agreement has been produced as dexh. 3. However, there is no such agreement in the court record and the same has not been included in the defendant's list of documents.
 28. DW2 (Alphonse Gitonga Bundi) testified as DW2 and adopted his witness statement dated 1/10/2023 as his evidence in chief. On cross-examination, he stated that he has developed approximately 1/3 of an acre of the suit land.
 29. DW3 (James Mutwiri Mailutha) adopted his witness statement dated 1/10/2023 as his evidence in chief. On cross-examination, he stated that Alphonse Gitonga purchased the suit land and has built on a portion of it and uses the rest of the land for farming. He confirmed that he was not aware whether the defendant had sold any portion of the suit land to the plaintiff.
 30. DW4 (Lucy King'anga) is a Senior Chief of Thau Location in Meru County. She adopted her witness statement dated 1/10/2023 as her evidence in chief. On cross-examination, she stated that she had never written any letter concerning the suit land neither was she a witness to any of the sale agreements.
 31. It was also her testimony that she is not aware how the plaintiff purchased the suit land as she was not the Area Chief at the time.
 32. The defence thereafter closed their case and the parties filed and exchanged written submissions.

Analysis and Determination;

33. I have critically considered and reviewed the Originating Summons and the response thereto, the respective exhibits and rival submissions in totality and in my view the following issues arise for determination: -
 - a. Whether the Plaintiff has proved his claim of Adverse Possession?
 - b. Whether the Plaintiff is entitled to the reliefs sought?
34. The legal framework for adverse possession is provided in sections 7, 13, 17 and 38 (1) and (2) of the [Limitation of Actions Act](#) as read with section 28 (h) of the [Land Registration Act](#).
 1. The law on Adverse Possession is now well settled and the governing principles have been established by a long line of authorities. A party claiming Adverse Possession must prove that



his possession of the subject land has been peaceful, open and uninterrupted for a statutory period of 12 years and the said possession has been adverse with the intention to dispossess the true owner thereof. Makhandia, JA in *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR in describing the doctrine of adverse possession held 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 or 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. This doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act...*”

36. Guided by the Court of Appeal decision above, the essential elements to be proved in a claim for Adverse possession are; that the land in question must be registered in the name of a person other than the plaintiff, the plaintiff must demonstrate that he took possession of the suit land, asserted his rights thereto in an adverse manner and the title holder did not take any precipitate action against the plaintiff for a period of 12 years.
37. The plaintiff must demonstrate that his possession and occupation of the suit land was not by force or under the licence of the land owner and that the said possession was open, continuous and uninterrupted for a period of over 12 years. Courts have however held that where the possession and occupation is permissive, the onus is on the plaintiff to demonstrate when his possession ceased to be permissive and became adverse.
38. The plaintiff is also under a duty to establish the date he took possession, the nature of its possession, the duration of possession and whether the said possession was open and uninterrupted for the 12 years' statutory period. See Court of Appeal decision in *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR).
39. The first element to be proved is the registration of the suit parcel in the name of a person other than the plaintiff. The plaintiff produced a copy of the Green Card as pexh. 1 and which showed that the suit land is registered in the name of the defendant. The same was registered on 18/8/1988 and a Title Deed issued. This fact was also confirmed by the testimony of PW1 and DW1. The registration is therefore not in dispute.
40. The next element to be proved is on possession, occupation and use and whether the plaintiff acquired prescriptive and overriding interests capable of registration. As pointed hereinbefore, the onus is on the plaintiff to demonstrate the duration and nature of his possession and use.
41. It is the Plaintiff's case that he has been in occupation, possession and use of the suit land since the year 1988, having purchased the same from the defendant vide a sale agreement dated 21/5/1988 and paid the entire purchase price around 2/6/1989. The defendant denied any sale between the plaintiff and himself or the claims of possession and occupation by the plaintiff.
42. It is trite that in a claim for adverse possession, possession must not be consensual or permissive or by the licence of the land owner. Pexh. 2 therefore signifies that the plaintiff's entry into the suit land was by the consent and permission of the land owner hence the sale agreement dated 21/5/1988.



43. Permissive possession is inconsistent with adverse possession, therefore, the plaintiff is under a duty to demonstrate how and when his possession ceased to be permissive and became adverse. The court in the case of *Jandu v Kirpal* [1975] EA 225 held that possession does not become adverse before the end of the period for which permission to occupy has been granted.
44. Courts have also held that a permissive possession may become adverse upon the payment of the purchase price in full or upon payment of the last instalment of the purchase price, after which time will start running for purposes of adverse possession. However, in the instant suit, it is not clear when the said purchase price was paid in full. Even though the plaintiff claims to have paid the balance of the purchase price sometime around 2/6/1989 through his advocate, no proof of the said payment was adduced in court. No acknowledgment of receipt of the funds by the defendant was produced. Further, the defendant denied receipt of any money as balance of the purchase price from the plaintiff. It cannot therefore be held with certainty that the balance was paid on 2/6/1989 for purposes of computing time for adverse possession.
45. Thus, guided by the decision above, I am of the considered view that even though the plaintiff's entry into the suit land was by consent and with the permission of the land owner, time for adverse possession started to run upon the expiry of the 6-year license/ contract period, that is the year 1994, and the same crystallized in the year 2006. Therefore, at the time of filing the suit in the year 2023, the plaintiff had been in possession of the suit land in an adverse manner for a period of 29 years.
46. It is also evident from the pleadings and testimony that there was a previous suit filed between the same parties herein, being Meru Civil Suit No. 197 of 1988. I have carefully looked at the plaint in the said suit and the decree therein produced as pexh. 5 and 6.
47. It is imperative to point out that the claims in the two cases, that is, the instant suit and the Meru CM Civil Suit No. 197 of 1988 are significantly different. While the claim in this suit is purely on adverse possession, from pexh. 5 and 6, the previous suit was on specific performance, compelling the defendant herein to transfer the suit land within a specific timeline. It is however clear that the Decree issued in favor of the plaintiff was never executed within the statutory timelines of 12 years. That however, is not an issue for determination in the instant suit. Be that as it may, the existence of the previous suit is not a bar to the filing of the instant suit. Despite being over the same subject matter, the cause of action in the two suit are separate and independent.
48. The plaintiff avers that he has been occupying and using the suit land openly, peacefully, exclusively and uninterruptedly with the intention to dispossess the Defendant, that he has extensively utilized the land by planting maize, beans, fodder, assorted trees and other crops for subsistence and commercial purposes. He reiterated the same in his testimony, stating that even though he does not live on the suit land, he uses the land for farming. He also called PW2, his farm worker, who stated in his testimony that he has been working on the land from 2007 until the year 2022.
49. What amounts to dispossession in a claim for adverse possession has been held to be acts done by the adverse possessor which are inconsistent with the true owner's enjoyment of the soil for the purpose for which he intended to use the same. See Court of Appeal decision in *Wilson Kazungu Katana & 101 others v. Salim Abdalla Bakshwein & another* [2015] eKLR).
50. The defendant denied the plaintiff's usage of the suit land and maintained that he sold the land to one Alphonse who has developed the same, constructed semi-permanent structures and has been in occupation of the suit land with his family since the year 2014. Alphonse testified as DW2 and stated that he has developed on a portion of the suit land only measuring approximately 1/3 of the land. DW1 in his testimony also stated that he sold part of the suit land to DW2. The testimony of DW3



is contradictory to that of DW1 and DW2 2 and is not backed up by any proof. It is his claim that the entire land was sold to DW2 and while he has developed on a portion of the suit land, he uses the remainder for farming.

51. The fact that a portion of the suit land is occupied and used by DW2 is not in dispute. In fact the plaintiff confirms that sometimes in the year 2014, the defendant made an effective entry into the portion thereof, through DW2, and put up semi-permanent structures and other developments. His claim is therefore in respect to the remaining portion measuring 4.75 Acres. DW2 occupation was proved by dexh. 4.
52. What is in dispute is the portion measuring 4.75 Acres. Although the plaintiff did not adduce any bundle of photographs to prove his use of the land, PW1 and PW2 in their testimony in court confirmed that they have been farming the land until the year 2022. The defence did not adduce any evidence to the contrary or support his assertion that DW2 has been using the entire land. The alleged sale agreement between DW1 and DW2 was not availed in court to ascertain what portion had been sold to DW2. No survey report was adduced to confirm the area used by DW2.
53. It is trite that he who alleges must prove. By the testimony of PW2, the plaintiff proved that he has been using the suit land save for the portion sold to DW2. Both DW1 and DW2 also confirmed that DW2 is only using a portion of the suit land, thereby supporting the plaintiff's assertions.
54. Other than denying the existence of any sale between the plaintiff and himself and again stating that his family objected to the said sale and subsequent transfer of the land in favour of the plaintiff as evidenced by dexh.5, the defendant has not sufficiently demonstrated any steps taken to evict the plaintiff from the suit land. No eviction order was produced in evidence.
55. It is well settled that time for adverse possession will only be interrupted either by the title owner's re-entry/ repossession of the land or where there is an order of eviction or suit filed; see Malindi Court of Appeal decision in Peter Kamau Njau VS Emmanuel Charo Tinga [2016] eKLR. The interruption of the plaintiff's use was only in regard to the 1/3 portion of the suit land sold to DW2 and which has duly been acknowledged and who made effective entry into the land and built structures thereon.
56. In view of the foregoing, I find that the plaintiff has proved his claim on adverse possession to the required threshold and is therefore entitled to the reliefs sought.

Costs:

57. Costs generally follow the event. In this case, having held that the Plaintiff has proved his case against the Defendant, I find that he is entitled to costs of the suit.

Conclusion:

58. The upshot of the above is that the Plaintiff has proved his claim on adverse possession and I accordingly allow the Originating Summons dated 14th June, 2023 on the following terms;
 - i. A declaration is hereby made that the Plaintiff has been in open, continuous, uninterrupted and exclusive occupation and use of approximately 4.75 Acres or thereabouts on land parcel No. Kianjai/thau/525 for more than twelve years.
 - ii. A declaration is hereby made that the Defendant's title to approx. 4.75 Acres of land parcel No. Kianjai/thau/525 has been extinguished.
 - iii. A declaration is hereby made that the plaintiff has acquired the title to approximately 4.75 Acres on land parcel No. Kianjai/thau/525 by virtue of adverse possession.



- iv. The Defendant, M'Rukunga M'Ikulu, is hereby ordered to transfer a portion measuring 4.75 Acres to be excised from Land Parcel No. Kianjai/thau/525 to the Plaintiff Jacob Raibu Magiri, and a title deed issued to the Plaintiff.
- v. In default of (iv) above, the Deputy Registrar is hereby directed to execute the necessary documents to facilitate the transfer of the said 4.75 Acres in favor of the plaintiff, and the Land Registrar to dispense with the production of the Original title deed to parcel No. Kianjai/thau/525 for purposes of registration of the plaintiff as proprietor of the said 4.75 acres to be excised from the said parcel of land.
- vi. Costs of the suit to be borne by the Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON 20TH DAY OF FEBRUARY, 2025.

C.K. YANO

JUDGE

In presence of; -

No appearance for the Plaintiff.

Mr. Ouma for the Defendant.

Court Assistant – Laban

