



REPUBLIC OF KENYA



Mbaja & another v Ochuka & another (Environmental and Land Originating Summons E002 of 2021) [2025] KEELC 714 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEELC 714 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2021
SO OKONG'O, J
FEBRUARY 20, 2025**

BETWEEN

CAROLINE MBAJA 1ST APPLICANT

MARY MBAJA 2ND APPLICANT

AND

JAMES OILE OCHUKA 1ST RESPONDENT

CAROLYNE ACHIENG ODINGO 2ND RESPONDENT

JUDGMENT

The Pleadings

1. The Applicants instituted this suit by way of Originating Summons dated 25th January 2021. The Applicants sought the determination of the following questions;
 1. Are land parcels known as L.R. No. Kisumu/Bar/2405 and 2406 subdivisions emanating from L.R. No. Kisumu/Bar/1209?
 2. Are the Respondents the registered proprietors of the land parcel known as L.R. No. Kisumu/Bar 2405 and 2406?
 3. Have the Applicants been in actual, factual, active possession and physical occupation of the said parcels to date?
 4. Has the said occupation and possession been peaceful, uninterrupted and has the same been known to or by the Respondents?
 5. What is the cumulative and/or total period of such occupation to date?



6. Was the entry or ingress into the suit properties without the permission, and/or at the instance of the Respondents and/or the previous registered owner?
 7. Have the Applicants fulfilled all and singular requirements for a declaration of the extinction of the registered proprietor's interest in the said parcels and the registration of the same in favour of the Applicants by virtue of the doctrine of adverse possession?
 8. Does the closure of the title and sub-division of L.R. Kisumu/Bar/1209 into L.R. No. Kisumu/Bar/2405 and 2406 in any way interfere with the running of time for a claim of adverse possession?
 9. Whether a declaration should be made that the ownership and proprietary rights and interests of the registered owners be and are hereby extinguished.
 10. Should the subdivisions which resulted in L.R. No. Kisumu/Bar/2405 and 2406 be cancelled and a restoration of the original L.R. No. Kisumu/Bar/1209 be ordered?
 11. Whether a declaration should be made that the parcel of land L.R. No. Kisumu/Bar/2406 resulting from the subdivision of land parcel L.R. No. Kisumu/Bar/1209 should be registered in the name of the Applicants.
 12. Whether the Land Registrar, Kisumu County should effect the change of ownership and proprietorship accordingly.
 13. Who is to meet costs of this suit?
2. The Originating Summons was brought on the grounds set out on the face thereof and on the affidavit of the 1st Applicant which she swore on her own behalf and on behalf of the 2nd Applicant. The Applicants averred that all that parcel of land known as L.R. No. East/Kisumu/Bar/1209 (hereinafter referred to as "the suit property") was initially registered in the name of the 1st Respondent. The Applicants averred that the 1st Respondent subdivided the suit property into two portions, L.R. No. Kisumu/Bar/2405 and L.R. No. Kisumu/Bar/2406 (hereinafter referred to only as "Plot No. 2405" and "Plot No. 2406" respectively). The Applicants averred that the 1st Respondent transferred Plot No. 2406 to the 2nd Respondent. The Applicants averred that they were the widows of Bowerz Mbaja Ndalo, deceased (hereinafter referred to only as "the deceased") who died on 21st August 2010. The Applicants averred that the deceased purchased a portion of the suit property from the 1st Respondent in 1995 and took possession of the same immediately. The Applicants averred that the portion of the suit property that was purchased by the deceased was now Plot No. 2406 which they had occupied and used since 1995. The Applicants averred that the deceased died before the 1st Respondent transferred to him the said portion of the suit property. The Applicants averred that the 1st Respondent had refused to transfer the suit property to them. The Applicants averred that after taking possession of the said portion of the suit property in 1995, the deceased planted trees and banana plants, and built a canteen and a posho mill thereon. The Applicants averred that the portion of the suit property purchased by the deceased had been transferred by the 1st Respondent to the 2nd Respondent. The Applicants averred that the 1st Respondent's act of reselling the said portion of the suit property already sold to their deceased husband meant that he had reneged on the agreement by which the deceased gained possession of the said portion of the suit property.
3. The Applicants averred that the deceased's and the Applicants' continued possession of the said portion of the suit property had been without the consent of the 1st Respondent and thus had been hostile to his interests. The Applicants averred that the sale agreement between the Respondents



- was void since the portion of the suit property sold to the 2nd Respondent had already been sold to their deceased husband who had acquired an interest in the same. The Applicants averred that the 1st Respondent never demanded possession of the suit property from them.
4. The Applicants averred that time started to run against the Respondents in 1995 after their deceased husband took possession of the suit property and continued running even after the death of the deceased in 2010 and was still running at the time they brought the suit. The Applicants averred that from 1995, the Applicants and their deceased husband had peacefully occupied and possessed the suit property without any interruption from the Respondents who had been fully aware of their possession.
 5. The Originating Summons was opposed by the 2nd Respondent through a replying affidavit sworn 11th March 2021. The 2nd Respondent averred she was the registered proprietor of the parcel of land known as Kisumu/Bar/2406 (Plot No. 2406) which she acquired from the 1st Respondent on 14th October 2019 in good faith. She stated that Plot No. 2406 was a subdivision of land parcel Kisumu/Bar/1209 (the suit property) which was also owned by the 1st Respondent.
 6. The 2nd Respondent averred that she acquired Plot No. 2406 for valuable consideration without actual or constructive notice of any dispute over the property and was not a party to any fraud as alleged by the Applicants. The 2nd Respondent averred that at the time of purchasing Plot No. 2406, the 1st Respondent had a valid title in respect thereof. The 2nd Respondent averred that before the execution of the sale agreement on 14th October 2019, she conducted an official search on the suit property at the lands office in Kisumu which confirmed that the 1st Respondent was the registered owner thereof.
 7. The 2nd Respondent averred that since she was purchasing a portion of the suit property, a government surveyor demarcated and indicated her portion of the suit property in the presence of the Applicants since the suit property was near the Applicants' home and the Applicants never raised any issue and complaint. The 2nd Respondent averred that upon successful subdivision of the suit property, she did another search which confirmed the 1st Respondent as the registered owner of the portion of the suit property (Plot No. 2406) which she purchased.
 8. The 2nd Respondent averred that Plot No. 2406 was lawfully transferred to her name after which she was issued with a title deed in respect thereof. The 2nd Respondent further averred that upon being served with the pleadings filed herein by the Applicants, she visited the property and realised that the Applicants were tilling the same and reported the matter at Dago Police Station on 8th March 2021 as a case of trespass.

The evidence

9. At the trial, the 1st Applicant, Caroline Mbaja Ndalo gave evidence as PW1. PW1 adopted her witness statement and affidavit in support of the Originating Summons as her evidence in chief. She produced the documents attached to the list of documents she filed together with the Originating Summons as a bundle as P.EXH.1. She stated that she was still occupying the suit property and had been occupying the same since 1995 and that her occupation had been peaceful.
10. After the close of the Applicants' case on 29th May 2023, the hearing of the suit was adjourned to 11th October 2023 for the hearing of the 2nd Respondent's case. On 11th October 2023, the 2nd Respondent asked for an adjournment and the hearing of the suit was adjourned again to 9th April 2024. On 9th April 2024, the 2nd Respondent and her advocate never appeared in court and the Respondents' case was closed without them calling any witness. The court thereafter directed the parties to make



closing submissions in writing. The Applicants filed submissions dated 14th May 2024 while the 2nd Respondent failed to file submissions.

The Applicants' submissions

11. The Applicants submitted that time began to run in their favour as against the 1st Respondent 6 months after the date of the agreement of sale since the 1st Respondent failed to obtain the requisite consent to transfer the portion of the suit property sold to the deceased from the local District Land Control Board as required under the *Land Control Act*, Chapter 302 Laws of Kenya. The Applicants averred that the 1st Respondent relinquished his interest in the said portion of the suit property upon the expiry of 12 years from the date of the agreement of sale, which in this case was 2007. The Applicants submitted that after the 1st Respondent's interest in the suit property was extinguished by operation of law, he held the portion thereof sold to the deceased, Bowerz Mbaja Ndalo in trust for the deceased.
12. The Applicants submitted that at the time of the sale of Plot No. 2406 by the 1st Respondent to the 2nd Respondent, the 1st Respondent did not have ownership rights over the said portion of the suit property since the same had long been extinguished in 2007 when the Applicants acquired ownership of the said portion of the suit property by adverse possession.

Analysis and determination

13. I have considered the Applicants' Originating Summons and the response thereto by the 2nd Respondent. I have also considered the evidence adduced by the Applicants and the submissions by the Applicants' advocates. In my view, the issues arising for determination in this suit which I will consider together are the following;
 1. Whether the Applicants have proved their adverse possession claim over Plot No. 2406; and
 2. Who is liable for the costs of the suit?

In *Gabriel Mbui v. Mukindia Maranya*[1993] eKLR, the court stated that a person claiming land by adverse possession must establish on a balance of probabilities the following;

1. He must make physical entry and be in actual possession or occupancy of the land for the statutory period.
2. The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
3. The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupied.
4. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable animus possidendi, that is to say occupation with clear intention of excluding the owner as well as other people.
5. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.



6. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land.
7. The possession must be continuous uninterrupted, unbroken for the necessary statutory period.
8. The rightful owner or paper title holder against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period.
9. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.
10. The land, or portion of the land adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. The absence of a plot or title number need not present any difficulty, nor should it be a bar to establishing a claim of adverse possession.

In *Mombasa Teachers Co-operative Savings & Credit Society Limited v. Robert Muhambi Katana & 15 others* [2018] eKLR, the Court of Appeal stated as follows:

- “ 18. Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, *nec vi nec clam nec precario*. See *Jandu vs. Kirplal & Another* (1975) EA 225. In other words, a party relying on the doctrine bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. See this Court’s decision in *Wambugu vs. Njuguna* [1983] KLR 173. Did the respondents discharge this burden?...”
19. In computing the requisite statutory time, the date on which a party entered possession without consent of the title holder is of significance. It is from that date that the requisite time frame begins to run. In this case, the respondents claim was that they had entered into possession of the suit property and their rights thereon had crystalized prior to the purchase of the suit property by the appellant. It is without doubt that mere change of ownership of the land which is occupied by another under adverse possession does not interrupt time from running in that other person’s favour. See *Titus Mutuku Kasuve vs. Mwaani Investments Limited & 4 Others* (*supra*)...”



14. In *Mwangi Githu v. Livingstone Ndeete* [1980] eKLR, Potter J. quoted volume 24 of Halsbury's Laws of England, 3rd edition, page 252 where the authors stated as follows:

“To constitute dispossession, acts must have been done inconsistent with the enjoyment of the soil by the person entitled for the purpose for which he had a right to use it (q). Fencing off is the best evidence of possession of surface land; but cultivation of the surface without fencing off has been held sufficient to prove possession.”

15. In *Githu v. Ndeete* [1984] KLR 776 it was held that:

1.

“Time ceases to run under the *Limitation of Actions Act* either when the owner takes or asserts his rights or when his right is admitted by the adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into the land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the *Limitation of Actions Act*.”

2. A title by adverse possession can be acquired under the *Limitation of Actions Act* to a part of the parcel of land to which the owner holds title.”

16. The Applicants have claimed that their deceased husband bought a portion of the suit property from the 1st Respondent in 1995. After purchasing the said portion of the suit property, they took possession of the same and had lived thereon peacefully. The Applicants have averred that their deceased husband put up a posho mill and a canteen on the said portion of the suit property. The Applicants have averred further that their deceased husband also planted trees and banana plants on the property. The Applicants have averred that after the death of their husband on 21st August 2010, they remained in possession of the said portion of the suit property. The Applicants have averred that upon the subdivision of the suit property, the portion thereof which was sold to their deceased husband and which they had continued to occupy became Plot No. 2406 which the 1st Respondent sold again and transferred to the 2nd Respondent. On her part, the 2nd Respondent has averred that she was the registered owner of Plot No. 2406 which she acquired lawfully from the 1st Respondent for valuable consideration without notice of the Applicants' interest therein.

17. I am satisfied from the evidence on record that the Applicants' deceased husband purchased a portion of the suit property from the 1st Respondent in 1995 which he paid for in full. The Applicants produced in evidence the agreements for sale that their deceased husband entered into with the 1st Respondent in respect of the said portion of the suit property. The Applicants produced photographs in evidence showing the developments that they had carried out on the said portion of the suit property. This was in support of their claim that they took possession of the property in 1995 and had remained in possession as at the time the 1st Respondent purported to sell and transfer the said portion of the suit property to the 2nd Respondent. The Applicants told the court that the portion of the suit property namely, Plot No. 2406 which the 1st Respondent sold to the 2nd Respondent was the portion of the suit property which the 1st Respondent sold to their deceased husband and which was in their possession.

18. As mentioned earlier, the 1st Respondent never defended the suit while the 2nd Respondent never gave evidence at the trial. The evidence adduced by the Applicants was therefore not rebutted. The averments in the Applicants' affidavit in support of the Originating Summons and witness statements as to the circumstances under which the Applicants and their deceased husband entered the suit property and the developments they had undertaken on the disputed portion of the suit property



from the date of such entry were not controverted by the Respondents. The averments that the Applicants' deceased husband entered into an agreement of sale with the 1st Respondent in respect of the portion of the suit property in dispute and that the 1st Respondent gave the Applicant's deceased husband possession of the property were not rebutted either. The averment that the Applicants and their deceased husband took possession of the disputed portion of the suit property in 1995 and had remained in possession since then was also not rebutted. It was also not rebutted that the Applicants' occupation of the disputed portion of the suit property had been open, peaceful and uninterrupted. Finally, it was not denied that the Applicants and their deceased husband were occupying the said portion of the suit property without the permission of the 1st Respondent.

19. I agree with the Applicants that at the time the 1st Respondent purported to sell to the 2nd Respondent in 2019 the portion of the suit property that he had earlier sold to the Applicant's deceased husband in 1995, his title to that portion of the suit property had been extinguished and he held the same in trust for the Applicants who were in occupation thereof. At the trial, the court heard that the 1st Respondent was deceased. The particulars of his death were however not supplied to the court. It is not clear whether he died after or before the filing of the suit. It is my finding from the foregoing that the Applicants have proved their adverse possession claim against the 2nd Respondent on a balance of probabilities.
20. On the issue of costs, Section 27 of the Civil Procedure Act, Chapter 21 Laws of Kenya provides that costs of and incidental to a suit are at the discretion of the court. The Applicants have proved their claim against the 2nd Respondent and are therefore entitled to the costs of the suit. I will however spare the 2nd Respondent from paying the costs of the suit as there is no evidence that she was aware that the land that was sold to her by the 1st Respondent had already been sold to the Applicants' deceased husband.

Conclusion

21. Due to the foregoing, I find merit in the Applicants' Originating Summons dated 25th January 2021. I therefore enter judgment for the Applicants as follows;
 1. I declare that the Applicants have acquired all that parcel of land known as Kisumu/Bar/2406 by adverse possession.
 2. The 2nd Respondent shall transfer to the Applicants all that parcel of land known as Kisumu/Bar/2406 within thirty (30) days from the date hereof failure to which the Deputy Registrar of this court shall be at liberty to execute on behalf of the 2nd Respondent all documents necessary for the transfer of the said property to the Applicants.
 3. The Applicants shall meet all the expenses and costs associated with the transfer of all that parcel of land known as Kisumu/Bar/2406 into their name.
 4. Each party shall bear its costs of the suit.

DELIVERED AND DATED AT KISUMU ON THIS 20TH DAY OF FEBRUARY 2025

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Ariho h/b for Mr. Ogonda for the Applicants

N/A for the 2nd Respondent



Ms. J. Omondi-Court Assistant

