



REPUBLIC OF KENYA



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Mbatiah v Hightower alias Hightower Faiza Wilbur Earl ((On behalf of the Estate of Wilbur Hightower JR)) (Environment & Land Case 149 of 2017) [2025] KEELC 310 (KLR) (30 January 2025) (Judgment)

Neutral citation: [2025] KEELC 310 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT & LAND CASE 149 OF 2017

CK YANO, J

JANUARY 30, 2025

BETWEEN

MARK KITHINJI MBATIAH PLAINTIFF

AND

**NAJAHAIT FAIZA HIGHTOWER ALIAS HIGHTOWER FAIZA WILBUR EARL
(ON BEHALF OF THE ESTATE OF WILBUR HIGHTOWER JR) ... DEFENDANT
(ON BEHALF OF THE ESTATE OF WILBUR HIGHTOWER JR)**

JUDGMENT

Introduction

1. The Plaintiff commenced this suit vide the Originating summons dated May 8, 2017 in which he sought orders that he had become entitled to and should be registered as the proprietor of land Reference No. Ntima/Igoki/1496 which is registered in the name of the Defendant by adverse possession and costs. The summons is supported by the affidavit of Mark Kithinji Mbatiah, the Plaintiff herein, sworn on 8th May, 2017 and supplementary affidavit sworn on 7th June, 2022.
2. The Defendant opposed the Originating summons by way of Replying Affidavits dated 24th January, 2022 and 17th May, 2022 and a further Affidavit dated 9th September, 2022 sworn by Faiza Hightower alias Najahait Faiza Hightower, 2nd Replying Affidavit dated 17th May, 2022 and 3rd further Replying Affidavit dated 9th September, 2022 sworn by Nathan Kinoti Itonga, 3rd further Replying affidavit dated 9th September, 2022 by Stephen Kirima Mbogori an 4th Replying affidavit dated 9th September, 2022 by Moses Ebrahim Mureithi.



Plaintiff's Case;

3. It is the Plaintiff's case that Land Reference No. Ntima/Igoki/ 1496 (hereinafter referred to as the suit property) is registered in the name of the defendant and is near the Plaintiff's land. The Plaintiff averred that the suit land was not occupied and in the year 1983, he entered the same and started using it.
4. The Plaintiffs averred that he started developing the suit land after finding that nobody was disturbing him by putting up a house, planting coffee, bananas and napier grass as well as seasonal crops such as maize and beans. That the land is now fully developed and he fenced the same to keep off other trespassers.
5. Relying on legal advice by his advocates, the plaintiff believes that the defendant's title to the suit property has been extinguished since he has been in possession adversely for over 12 years. The plaintiff prayed that the said land be registered in his name in terms with the law.
6. At the hearing, George Rombore Rwaria testified as PW 1. He adopted his witness statement dated 3rd July 2023 as his evidence-in-chief and he was cross-examined and re-examined. In his statement, PW1 stated that he was a councillor of Ntakira Ward from 2008 to 2012 and knew the parties in this case and the facts of the case.
7. PW1 stated that Edward I'Itonga called the family including him as his son-in-law and told them that he was giving Wilbur Hightower (now deceased) the entire suit land measuring 1.23 Ha, and as a family, they agreed. That at the time, the deceased was married to one Joyce Hightower and they had a daughter called Makena.
8. PW1 stated that Wilbur Hightower never built any house on the land but borrowed accommodation from the plaintiff who willingly took him in. He stated that the County Council through him bought trees with a permit and gave to the plaintiff to plant on the suit land.
9. PW1 stated that by the time Wilbur Hightower had left, no one knew his whereabouts. That the plaintiff was the one utilizing the land since 1984 to date. PW1 further stated that Nathan Kinoti Itonga had no legal claim over the land until recently when he started trespassing on the same and destroyed the property therein.
10. PW1 stated that he did not know Najahait Faiza Hightower as a wife to Wilbur Hightower nor has she been on the land. That Wilbur Hightower was not muslim to marry a muslim lady.
11. PW1 stated that Wilbur Hightower left the plaintiff on the land and that the letter purporting to leave the suit land to Nathan Kinoti Itonga and Celina is a forgery since the signature thereon does not match the signature of Wilbur Hightower as seen in the Barclays Bank of Kenya cheque deposit slip and that of Department of Business taxes.
12. When he was cross examined by Mr. Mwanzia learned counsel for the defendant, PW1 stated that the plaintiff's daughter is married to his son. That he comes from Ntima East while the plaintiff comes from Ntima West. He stated that in his statement, he stated that Edward Itonga gave the suit land to Wilbur Hightower to develop it while Wilbur Hightower was away. When he was re-examined by Mr. Mwendwa, learned counsel for the plaintiff, PW1 stated that Wilbur Hightower left the land to the plaintiff in 1979.
13. Mark Kithinji Mbatiah, the plaintiff herein testified as PW2. He adopted the contents of his supporting affidavit dated 8th May, 2017 and witness statement dated 3rd May, 2017 as his evidence-in-chief and



produced copies of the register of the suit property, a cheque, Bank statement and a letter dated 20th January, 2020 as P. Exhs 1, 2, 3 and 4 respectively. He was then cross-examined and re-examined.

14. PW2 stated that the suit land Which is registered in the name of the defendant is near his land. He stated that he entered the suit land in the year 1983 and stated using the same and developed it by putting up a house and planting crops and Napier grass after finding that nobody was disturbing him. The Plaintiff stated that the land is now fully developed and that he has fenced the same to keep off other trespassers. Relying on advise, the plaintiff believes that the defendant's title to the said land has been extinguished since he has been in possession for over 12 years and prays to be registered as the proprietor thereof.
15. PW2 testified that Wilbur Hightower was his friend and immediate neighbour. He stated that they used to work together and Wilbur Hightower could leave his tools in the plaintiff's house. The plaintiff stated that he had not seen Wilbur Hightower since 1984 and was not aware that Faiza Hightower was the wife of Wilbur Hightower. That he knew the wife of Wilbur Hightower as one Joyce Stonall Hightower as they used to come to his house before Wilbur Hightower left and never returned to the suit land. The plaintiff reiterated that he was the one using the suit land and stated that Faiza Hightower had never been on the land except in the year 2023 when she came there.
16. The plaintiff stated that Nathan Kinoti I'tonga is the son of Edward M'tonga who had sold the suit land to Wilbur Hightower. He stated that Stephen Kirima Mbogori is a member of the Land Control Board- Meru, and has never been on the suit land. PW2 further stated that he has never seen Ebrahim Muriithi.
17. When he was cross-examined by Mr. Mwanzia, PW2 stated that he knew the family of Edward I'tonga a little bit and stated that they are in the same location but he did not know whether Wilbur Hightower was given the suit land by the said family and therefore he assumed that he had bought the land.
18. PW2 stated that he lives in his father's land in Ntima/Ntakira that is next to the suit land which is in Ntima/Igoki. He further stated that he was permitted by Wilbur Hightower to use the suit land and he developed it. The plaintiff admitted that he made an application for consent to the Land Control Board for the land to be transferred to him because he was gifted the same. He stated that the said application for consent was deferred and he found out that Stephen Kirima was sitting as a member of the Land Control Board and the plaintiff never went back to the board again. PW2 stated that he did not notify the defendant of the case herein, but suspected the defendant's family became aware of the same and that is why they filed an application to set aside the exparte judgement that had been entered. That he did not notify the defendant of the case because he had given him the land. PW1 further testified that he last cultivated the land in the year 2020, though his developments and properties are still there. He stated that Nathan I'Inoti Gitonga is the one currently using the land.
19. When he was shown a letter dated 18th June, 2020 by the chief Igoki location, PW2 stated that he did not know the said chief and whether he was the one who wrote the said letter, adding that if he did, he was lying as to the contents thereof. He stated that the land is not in Ncharure sub-location where he took the documents whose chief he knew.
20. When he was re-examined by Mr. Mwendwa, PW2 reiterated that he had developed the suit land and planted trees and animal feeds. He stated that Wilbur Hightower gave him the land and permitted him to use it in the year 1984. He further stated that the application for consent to the Land Control Board was made on 2nd December, 2019 and that he made the said application in compliance with the judgment in this case. That the defendant was not required to be present when the application for consent was made and none of his family members was present.



21. Julius Mutuma testified as PW3 and adopted his statement dated 17th February, 2020 as his evidence-in-chief. He was also cross-examined and re-examined.
22. PW3 stated that he is a neighbour to the plaintiff herein. He stated that he also knew Wilbur Earl Hightower JR. who used to stay in the plaintiff's place. That in 1984, the defendant left the country and left the suit land to the plaintiff to use. That the plaintiff planted trees on the said land and has remained thereon since.
23. PW3 testified that Edward Itonga who is the father of Nathan Itonga sold the land to the defendant. He stated that the plaintiff was using the land until Nathan Itonga and his family entered the land by force and are currently using the land.
24. PW3 stated that the plaintiff is his cousin since their fathers are brothers. PW3 further stated that the suit land and the plaintiff's land are adjacent to each other.
25. PW4 was Ishumael Ndengwa who adopted his witness statement dated 20th February, 2020 as his evidence-in-chief and was cross-examined. He stated that he is the immediate neighbour to the plaintiff and knew the defendant very well as he used to teach at Kirigi Secondary school and used to stay with the plaintiff. PW4 stated that when the defendant left the country in the year 1984, he left the suit land to the plaintiff who planted trees. He stated that he purchased trees from the plaintiff for his own use. According to PW4, the plaintiff is the owner of the suit land since the defendant left the country. PW4 stated that the land was not sold to the plaintiff, but he was given the same to use.

Defendant's Case:

26. The original defendant, Wilbur Earl Hightower JR. (Deceased) passed on 21.2.2021 before he could defend the suit. Through an application dated 26.10.2021, Najahait Faiza Hightower alias Hightower Faiza Wilbur Earl who is a wife of the deceased defendant sought to substitute the deceased as his legal representative and by a Ruling of the court dated 15.12.2021, the substitution was allowed. Further, through an application dated 24.1.2022, the court set aside the default judgement made on 17.10.2020 and all consequential orders and granted the defendant leave to defend the suit on merits.
27. The defendant opposed the originating summons herein by way of nine Replying affidavits and another Replying affidavit by Faiza Hightower, Nathan Kinoti, Stephen Kirima Mborogi, Moses Ebrahim and Augustino Kinyua Ngeera. The defendant averred that she knew the plaintiff very well as he is a neighbour and his extended family's land and the defendant's land border one another and share a common boundary on one side. The defendant stated that her deceased husband was adopted by Edward Itonga Mborogi and were great friends. That the said Edward Itonga who is the defendant's father-in-law gifted and transferred the suit land to the deceased defendant on 8.11.1977. That the two lived together from 1975 to 1984 when the deceased defendant left Kenya to the United states of America to seek specialized treatment following his failing health, and when he left, Edward Itonga continued to utilize the land by way of farming food crops and planting trees until he died on 25.6.2011.
28. Faiza Hightower deposed that her late husband authorized Nathan Itonga and his wife Celina to take possession and the use of land until his return to Kenya and have been utilizing it since. The defendant stated that upon her return to the country with her brother Mohammed in the year 2018, they visited the land, re-fenced it and all was well. That she even fell some gravelia and eucalyptus trees without any resistance from anyone.
29. The defendant averred that in the year 2019, her brother-in-law Nathan Itonga called and informed them that someone at the Land Control Board informed him that somebody was at the Land Control



Board trying to register something by making an application for consent. That the deceased defendant instructed an advocate, but he was unable to depone an affidavit as he was incapacitated by ill health. The defendant contended that they have been utilizing the land and denied that the plaintiff was ever in possession, occupation and user of the land. That the plaintiff only took advantage of the knowledge that the defendant and their family reside in the United States of America and that is why he did not even serve Nathan Kinoti with the summons to enter appearance. The defendant annexed a copy of the green card and a copy of a letter dated 4th September, 2012.

30. In his Replying affidavit, Nathan Kinoti Itonga stated that the defendant herein is the wife of his adopted brother, Wilbur Earl Hightower JR (deceased) who was adopted by his father, one Edward M'Itonga back in the 1970's. That the said Edward M'Itonga transferred the suit land to the deceased defendant who took exclusive possession and occupation of the same and developed it by planting trees and cultivating some subsistence crops.
31. Nathan Kinoti Itonga averred that Wilbur Earl Hightower JR left the country in the year 1984 due to failing health and went to seek specialized treatment. However, he ensured that the land was not left unattended and Edward M'Itonga took over cultivation of the same and continued to cultivate until his demise in June 2011. The deponent averred that upon the demise of his father, Wilbur Hightower JR authorized him and his wife Celina to move in and re-fence it and cultivate the same until he comes back. That they did exactly that and having done so to date and that whenever Faiza visits the country, they sent her farm produce. It was his contention that the land had been on their constant use exclusively and denied the plaintiff's allegations. That the plaintiff who is a neighbour has never been in occupation and use of the defendant's land.
32. The deponent was surprised that the plaintiff chose not to serve them with the summons as they were on the land so that they could notify the defendant to defend the plaintiff's claim at the beginning. He stated that a member of the Land Control Board at Miriga Mieru West called him and informed him that the plaintiff had gone to seek consent to have the land transferred to him as a gift. The deponent accused the plaintiff for being discreet about the case so as to get the land fraudulently transferred in his names. Copies of the green card, a letter dated 4th September, 2012 and application for consent of Land Control Board are annexed.
33. Stephen Kirima Mbogori averred that his home is about 300 metres away from the suit land. That he settled in the area in 1992 and knows the family of Nathan Kinoti has been cultivating the suit land which belonged to the deceased. He stated that on 7.1.2020 he was sitting in the Land Control Board at Miriga Mieru West when the plaintiff came with an application for consent to transfer the land as a gift from Wilbur Earl Hightower JR to himself. That since the application was over a parcel of land that he knew, the board scrutinized and he called Nathan Kinoti who was utilizing the land and informed him about the issue.
34. That Mr. Kinoti had no idea of what was happening and the board deferred the application. That when asked, the plaintiff claimed that he had been given the land by the court and on further inquiry, the plaintiff got annoyed and left never to return. According to Stephen Kirima Mbogori the plaintiff wanted to swindle the defendant family of their land. He stated that the plaintiff does not occupy or use the land but the same is utilized by the family of Nathan Kinoti Itonga. The deponent also attached a copy of the application for consent. Augustino Kinyua Ngeera stated that he has been an administrator in the civil service for a long time and became assistant chief Muringombugi sub-location in the year 1979 to 2016 and was promoted to the chief Igoki location in 2016 and retired in June 2022. He stated that he knows the parties very well and that the plaintiff is from Ncaure sub-location while the suit land is in Muringombugi sub-location, Igoki location and not in Ncaure sub-location. He wondered



- why a letter was purportedly endorsed by an administrator from different location. He stated that he knew the land well since it was owned by an alien who is since deceased.
35. Augustino Kinyua Ngeera stated that the deceased defendant left the country before his death and the family of Nathan Kinoti Itonga took exclusive user of the land to date, and not the plaintiff. He attached a letter dated 18.6.2020 that he wrote.
 36. At the hearing, Najahat Faiza Hightower testified as DW1. She stated that she used to take care of her late husband Wilbur Hightower JR in the United States of America until he passed on 21.1.2021 and she was substituted as the legal representative of the estate of the deceased. DW1 reiterated the averments in her affidavits. She stated that her late husband was a black American and a teacher and when he came to Meru, he met Edward Itonga Mborogi and they became close friends and the latter adopted him as his son. That Edward Itonga was the registered owner of the suit land, but transferred it to the deceased defendant on 8.11.1977. The defendant stated that from then, they started utilizing the land until 1984 when the deceased fell ill and returned to the United States of America to seek treatment. That the deceased left Edward Itonga to take care of the land which he did and used to keep them updated on what was happening.
 37. DW1 stated that in 1991, Edward Itonga called her husband and told them that the plaintiff who is a neighbour was trying to enter the land. That the deceased instructed a lawyer who wrote a letter asking the plaintiff to leave and he left. That Edward Itonga continued utilizing the land until the year 2011 when he died and upon his demise Nathan Kinoti and his wife Celina with the defendant's permission took care of the land and are still doing so. That later, Nathan Kinoti called the defendant's family and told them that the plaintiff was again trying to take over the land using an ex-parte judgement/ decree as he had not served the defendant with summons. That the said ex-parte judgement issued in 2018 was later set aside. DW1 produce copies of the green card and certificate for the suit land, chief's letter dated 18.6.2020, letter dated 4.9.2012, Grant Ad Litem In-Meru CM Misc. Succ cause No. E142 of 2021 application for consent to Land Control Board by the plaintiffs as D.Exh 1- 6 respectively. DW1 was then cross-examined and re-examined.
 38. DW1 stated that she was born on 7.1.1961 and was married to her late husband in 1982 and have a marriage certificate. She stated that she used to go to and from the United states. She reiterated that her husband was adopted by Edward Itonga, though they had no official documents. That her husband was given the suit land in 1977. She denied that the plaintiff entered the land in 1983.
 39. DW2 was Nathan Kinoti Itonga who adopted the contents of his replying affidavits dated 17.5.2022, 9.9.2022, 29.5.2023 and 6.7.2023 together with the annexures as his evidence-in-chief and was cross-examined and re-examined. He testified that he was the one currently in possession and use of the suit land. DW2 stated that in December, 2019 he received a call from an officer at the lands office who informed him that the plaintiff had gone there with documents intending to transfer the land. That the plaintiff had conducted this suit secretly and obtained an ex-parte judgement which was later set aside.
 40. DW2 stated that his father had adopted Wilbur Hightower as his son and after the adoption, he leased a house where he lived. . . . That the plaintiff is their immediate neighbour. That Wilbur Hightower was given the land which he intended to develop, but he left and never returned though used to communicate with the witness and his father. DW2 stated that Wilbur Hightower even sent him money to fence suit land. The witness accused the plaintiff of having been eyeing the land. That in 1991, the plaintiff tried to enter the land but the defendant was informed by the father of DW2 who was then using the land and a lawyer was instructed to write a demand letter. DW2 stated that the plaintiff has never entered the said land.



41. Stephen Kirima Mbogori testified as DW3. He adopted the contents of his affidavit dated 9.9.2022 together with the annexures as his evidence-in-chief and was cross-examined and re-examined. He reiterated that he was a neighbour to all the parties and knew the suit land belongs to the defendant. He stated that he was in the Land Control Board when the plaintiff came wanting to transfer the land to himself using a court order, though in the transfer, he stated that he was gifted the land. That Wilbur Hightower was not there but the family of Edward Itonga was using the land that is why the witness called them and informed them of the Plaintiff's action. DW3 stated that the plaintiff has never used the suit land.
42. DW4 was Augustino Kinyua Ngeera, a retired chief of the area where the land is. He adopted his affidavit dated 29.5.2023 as his evidence-in-chief and was cross-examined and re-examined. DW4 reiterated the contents of his affidavit. He stated that the plaintiff has a home in his land which borders the suit land. He further stated that Nathan Kinoti is the one using the land. That the land initially belonged to Edward M'Itonga, father to Nathan Kinoti, but he gifted it to the deceased defendant. He stated that the plaintiff has never used the suit land.
43. DW6 was Moses Ebrahim Mureithi who adopted his affidavit dated 9.9.2023 as his evidence-in-chief and was cross examined. He stated that he is 53 years old and had worked on the suit land since around 1983/1984. That the land has crops and trees for Itonga. He stated that the plaintiff is a neighbour to the suit land.

Plaintiff's Submissions:

44. The plaintiff filed submissions dated 17th November, 2024 through the firm of Maitai Rimita & Company Advocates who gave a brief introduction of the matter. The plaintiff's counsel relied on the case of Ng'ati Farmer's Co-Operative Society Ltd –V- Councillor John Ledidi & 15 others (Civil Appeal 64 of 2004) (2009) KECA 424 (KLR) (23rd July, 2009) (Judgement) to show that all the ingredients of a claim of adverse possession have been met in the present case. Learned counsel for the plaintiff also cited section 17 and 38 of the *Limitation of Actions Act*.
45. It was submitted on behalf of the plaintiff that the defendant is the registered owner of the suit land. That in the year 1984, the defendant left the land to unknown location leaving the same vacant. That the plaintiff entered the said land, took possession and started utilizing the same to date. That his occupation and possession is open and quiet for more than 40 years.
46. It was submitted that in the year 1991, the defendant through the firm of Mukira Mbaya & Co. Advocates wrote a demand letter dated 22/06/1991 demanding the plaintiff to vacate the defendant's land, but the plaintiff remained on the land to this day. That this is a confirmation that the defendant was aware of the plaintiff being on his land and that the possession of the plaintiff was open and continuous for more than 12 years.
47. It was further submitted that in support of the plaintiff's openness of possession and utilization of the said land, he planted trees and cultivated crops over time. That the farm has been a source of trees and timber to various people and institutions such as schools and churches. That in the year 2015, Miti Industries Limited purchased trees from the said farm for purposes of making electricity poles and the purchase was approved by the area chief and the Kenya Forest Service issued a certificate of origin of farm produce and the plaintiff was paid Kshs. 195,000/= by cheque No. 000458 dated 06/01/2015. That this evidence was never controverted by the defendant's testimonies or any documentation. The plaintiff's counsel relied on the case of Chevron (K) Ltd v Harrison Cahro Wa Shatu (2016) eKLR and cited sections 7, 13, 37 and 38 of the *Limitation of Actions Act*. The Plaintiffs' counsel also relied on the case of Mtana Lewa v Kahindi Ngala Mwangandi (2015) eKLR and submitted that the plaintiff



has proved his case to the required standard and that the threshold of the claim of adverse possession has been met and urged the court to enter judgement for the plaintiff as prayed.

Defendant's Submissions;

48. The defendant filed submissions dated 28th November, 2024 through the firm of Muia Mwanzia & Co. Advocates who summarized the pleadings and evidence adduced. It was submitted that it is common ground that the defendant who resides in the United states of America was not informed of this suit when it was filed and the plaintiff obtained judgement in default of appearance. That when the plaintiff went to the Land Control Board for the necessary consent to transfer on 7.1.2020 on the pretext that the transfer was by way of a gift from the owner of the land, that caught the attention of a member of the board who knew the land in issue and the persons in cultivation thereof and he called the person who was in utilization of the land one Nathan Kinoti Itonga (DW2) and the defendant was notified. That the defendant then began the legal process of wresting the ex parte judgement before the plaintiff was able to execute it and get into the land. That the defendant succeeded and the ex parte judgment was set aside and the matter was heard afresh.
49. It was submitted on behalf of the defendant that from the evidence on record the plaintiff is not in possession of the suit land and has neither put up any structures thereon. That the plaintiff tried to gain entry of the land at one time in the year 1991 but he was repulsed by a demand letter from Mukira Mbaya & Co. Advocates at the behest of the defendant and did not try to enter the land ever. It was submitted that the defendant utilizes the land and has put Nathan Itonga and his family in complete utilization and control of the land which includes farming the same.
50. The defendant's counsel submitted that the plaintiff has failed to demonstrate and prove the ingredients of adverse possession as stated by the Court of Appeal in the decision of Kweyu vs Omuto (1990) KLR 709. That applying the case law, the defendant has demonstrated that the plaintiff has never been in actual, open and continuous possession of the land for more than 12 years. That the plaintiff failed to place himself within the ingredients of the doctrine of adverse possession and that there is no iota of evidence to support the plaintiff's claim. That on the contrary, the defendant and the family of Nathan Kinoti Itonga have shown that they are in exclusive use of the land and not the plaintiff. It was pointed out that the certificate of farm produce that the plaintiff tried to bring in was not produced and it has no probative value and was a forgery as stated by the defendant. It was therefore submitted that the plaintiff's claim is without merit and ought to be dismissed with costs.

Analysis & Determination:

51. The court has carefully considered the pleadings, the evidence and the submissions filed by the parties to support their respective positions. I have also considered the legal authorities cited by the parties. The issues for determination are whether the plaintiff has proved his claim for adverse possession to the required standards and whether he is entitled to the reliefs sought.
52. Section 7 of the [Limitation of Actions Act](#) provides as follows:-
 - “(a) an action to recover land 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.”



53. After the expiration of 12 years, a party may approach the court under section 38 of the *Limitation of Actions Act* for a declaration that the property has devolved to him in accordance with the doctrine of adverse possession. Section 38(1) of the Act states as follows:-

“ where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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 a proprietor of the land.”

54. The Court of Appeal in the case of *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshswein & Another* (2015) eKLR sought to define what constitutes adverse possession and stated as follows: -

“From all these provisions, what amounts to adverse possession? 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. This concept of adverse possession has been the subject of many discourses and decisions of this court. Suffice to mention but two, *Kasuve v Mwaani Investments Limited & 4 others* (2004) 1KLR 184 and *Wanje v Saikwa (2)* (Supra). In the first decision, the court was emphatic that 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 twelve years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition. In the *Wanje* case, the court went further and took the view that in order to acquire by statute of limitation a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for purpose for which he intended to use. Further, the court opined that a person who occupies another person’s land with that person’s consent cannot be said to be in adverse possession as in reality he has not dispossessed the owner of the land and the possession is not illegal.

What these authorities are emphasizing is that for one to stake a claim on a parcel of land on the basis of adverse possession, he must show that he entered the parcel of land more or less as a trespasser as opposed to by consent of the owner. In other words, his entry must be adverse to the title of the owner of the land. It is also possible to enter the land with the consent of the owner, but the owner at some point terminates the consent and the applicant does not leave but continues to occupy the land and the owner takes no steps to effectuate the termination of the consent for a period of twelve years after then, such applicant would be perfectly entitled to sue on account of adverse possession. Besides adversal entry into the land, the applicant must also demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner. The occupation must be open, uninterrupted, adverse to the title of the owner, adequate, continuous and exclusive as already stated. The burden of proving all these is on the person asserting adverse possession. So that a claim of adverse possession would not succeed if the entry to the land was with the permission of the owner and remains that way throughout, or before the permission is terminated or if before the expiry of the period, the owner of the land takes steps to assert



his title to the land. In the case of *Samuel Miki Waweru v Jane Njeri Richu, Civil Appeal No. 122 of 2001*, UR), this court delivered the following dictum:

“... it is trite law that a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise.

Further as the High Court correctly held in *Jandu v Kirpal* (1975) EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted...”

55. The doctrine of adverse possession was also aptly stated in *Mtana Lewa vs Kahindi Ngala Mwangandi* (2015) where the Court of Appeal held that:-

“... 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.”

56. In this case, the plaintiff's claim is predicated on his own evidence that the suit land which is registered in the name of the defendant is bordering his land. The plaintiff stated that the said land was not occupied and in the year 1983, he entered the land and started using the same for farming. That after a few years, he built on the land and planted coffee, bananas, napier grass and seasonal crops. He further stated that he fenced the land and considers it to be his since there was no disturbances from the owner or anyone else. When he was cross-examined, the plaintiff testified that he was permitted by Wilbur Hightower to use the land. He also admitted that he lives in his father's land that is next to the suit land. The plaintiff further admitted that he made an application for consent to the Land Control Board to have the land transferred to him since the same was gifted to him by the registered owner Wilbur Hightower Jr. (Now deceased).

57. On the other hand, the defendant's evidence is that the plaintiff has never been in possession and use of the suit land. That the defendant was the one utilizing the land and had put the family of Edward M'ltonga and his son Nathan Kinoti Itonga in complete utilization and control of the land which includes farming the same. The defendant's case was that the plaintiff tried to gain entry of the land in 1991 but was repulsed through a letter from Mukira Mbaya & Co. Advocates pursuant to the instructions from the defendant. DW3 also testified that he was sitting as a member of the Land Control Board when the plaintiff made an application for consent to transfer the land by way of a gift, but his application was deferred since the witness knew the owner of the land and the people who were using it and whom he notified.

58. It is a principle of law that whoever lays a claim before court against another has the burden of proof. This is provided for under sections 107 and 108 of the *Evidence Act*. In this case, it was the legal obligation of the plaintiff to provide evidence to support his claim for adverse possession. From the decisions referred to hereinabove, the Court of Appeal was emphatic that in order to be entitled to land by adverse possession, the plaintiff 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 dispossessing the owner or by discontinuance of possession by the owner on his own volition. The Court of Appeal



further held that a person who occupies another person's land with that person's consent or permission cannot be said to be in adverse possession.

59. From the facts of this case, the plaintiff in my view did not adduce sufficient evidence to show that he was in exclusive possession and occupation and use of the suit land. Indeed, the plaintiff was not able to prove that he entered the suit land and used it adversely for 12 years or more. There was no evidence given by the plaintiff that show the alleged developments on the suit land. The defendant's evidence was categorical, they are the ones utilizing the land and have full control and that the plaintiff has never been in possession and use thereof. That the plaintiff's attempt to gain entry was unsuccessful. In this case, it was the word of the plaintiff against that of the defendant. The plaintiff only produced copies of the register of the suit land, a cheque, bank statement and a letter dated 20th January, 2020 as exhibits. There were no photographs to even show the house he alleged he put up in the suit land or to show any other developments by him. Furthermore, the plaintiff also admitted that his entry, if any, was with the permission of the registered owner of the land. Adverse possession can only arise out of non-permissive possession yet from the plaintiff's own evidence, he alludes that he entered the land with the permission of the defendant. If one is in possession of land as a result of permission given to him by the owner, he is not in adverse possession.
60. In addition, evidence adduced in this case indicates that the plaintiff went to the Land Control Board for consent to transfer the suit land to himself on the pretext that the same was gifted to him by the deceased defendant. Of course that caught the attention of DW3 who alerted the defendant through DW2 and that application was scuttled. The question that arises is why did the plaintiff wait to have the land transferred to him by way of a gift and not through adverse possession? Why these contradictions? The only plausible answer to this is that the plaintiff's claim for adverse possession was an afterthought and has no merit and must fail.
61. Based on the law and the evidence on record, it is my finding that the plaintiff has not proved his case on a balance of probabilities. It is my finding that the plaintiff has failed to bring himself within the limits of the doctrine of adverse possession.
62. Consequently, the plaintiff's claim is without merit and is dismissed with costs to the defendant.
63. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 30TH DAY OF JANUARY, 2025 VIDE MICROSOFT TEAMS IN THE PRESENCE/ABSENCE OF;

Court Assistant - Laban

Advocate Mrs. Muia for the defendant - present

Advocate Maitai Rimita for the plaintiff – absent.

HON. C. YANO

ELC, JUDGE

This Judgment has been delivered via Microsoft Teams online platform. A signed copy will be availed to each party upon the payment of the applicable court fee.

