



**Thomas v Ngugi (Environment & Land Case E003 of 2021)
[2024] KEELC 5857 (KLR) (26 August 2024) (Judgment)**

Neutral citation: [2024] KEELC 5857 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E003 OF 2021
LN GACHERU, J
AUGUST 26, 2024
IN THE MATTER OF SECTION 38 OF THE LIMITATION
OF ACTIONS ACT CAP 22 LAWS OF KENYA**

BETWEEN

STEPHEN NYAMOTI THOMAS PLAINTIFF

AND

FELIS NJERI NGUGI DEFENDANT

JUDGMENT

1. The Plaintiff herein Stephen Nyamoti Thomas, brought this Originating Summons dated 22nd February, 2021, and sought for the following Orders:
 1. That the Plaintiff Stephen Nyamoti Thomas is entitled to be registered as proprietor of the whole of the land reference number Kakuzi/Kirimiri/Block 8/489, in place of the current registered owner namely Felis Njeri Ngugi, pursuant to the provisions of Section 38 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya, on the ground that since the year 1994, the Plaintiff has had exclusive possession and/or occupation of the above-mentioned piece of land openly, peacefully and uninterrupted to date, that is to say for a period exceeding twelve (12) years preceding the presentation of this summons.
 2. That an order does issue registering the Plaintiff as the proprietor of the said parcel of land in place of the Defendant and/or her successors in title thereof, and the land registrar Thika District registry be directed to effect the registration of the said order.
 3. That the costs of this Originating Summons be borne by the defendant.”
2. The said Originating Summons is supported by the annexed Affidavit of the Plaintiff, Stephen Nyamoti Thomas, sworn on 22nd February, 2021, who averred that he was employed by Delmonte



Kenya Limited in year 1992, in the role of security guard. That the said Company's pineapple plantations are located in the vicinity of land parcel No. Kakuzi/Kirimiri/Block 8/489, (the suit property). He annexed a copy of his Letter of Employment marked "SNC1".

3. It was his further averments that the Defendant is the registered owner of the suit land as per a copy of a certificate of official search dated 27th January, 2021, annexed to the Originating Summons marked "SNC2" wherein, the Defendant is named as the owner of the suit land.
4. The Plaintiff contended that he entered into the suit land in year 1994, and started cultivating various crops thereon, to supplement his family's income. Further, that in year 2005, the Defendant paid a visit to the suit land and informed the Plaintiff that she had gone to check the beacons marking the boundaries of the said property as she was engaged in procuring a title deed in respect of the suit land. That the Defendant did not question his occupation of the suit property during her said visit in 2005.
5. Further, the Plaintiff averred that he occupies the suit property together with his family, has carried out extensive developments thereon by putting up residential buildings and cattle sheds in addition to farming activities which he engages in on the property as attested to by the photographs annexed to the present summons marked "SCC3 (a) – (d)".
6. The Plaintiff urged the Court to allow his claim and declare him the owner of the suit land in accordance with the provisions of Section 38 of the [Limitation of Actions Act](#) CAP 22, Laws of Kenya.
7. The Defendant did not Enter Appearance and/ or file Defence, and therefore, the suit proceeded by way of formal proof. The Plaintiff annexed a Return of Service dated 25th May, 2022, enclosing a copy of a Newspaper Advertisement dated 5th January, 2022, published by Nation Newspapers notifying the Defendant of the instant proceedings pursuant to the provisions of Order 5, Rules 17 and 32; Order 48, Rule 5 (1) (b) (ii) of the Civil Procedure Rules, as read together with Section 3A of the [Civil Procedure Act](#).
8. At the close of the Plaintiff's case, the Court directed the parties to file written submissions. There are no written submissions on record by any of the parties herein. Therefore, the Court will rely on the Plaintiff's averments as contained in the Originating Summons and Supporting Affidavit dated 22nd February, 2021, and the evidence adduced in court on 25th July 2023, which was only adoption of the witness statement and production of exhibits.
9. The court has considered the pleadings herein, and the available evidence and finds the single issue for determination is; whether the Plaintiff is entitled to the Orders sought?
10. The Plaintiff Originating Summons is brought under Section 38 of the [Limitation of Actions Act](#) Cap 22, which provides 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 of this Act,... he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land”.
11. The Court of Appeal in *Wambugu v Njuguna* (1983) KLR 172 held that adverse possession contemplates two concepts: dispossession and discontinuance of possession. Further, the said court held that the proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed of, or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that that he or she has been in possession for the requisite number of years.



12. As stated above, the Defendant did not enter appearance in the proceedings and the matter proceeded as a formal proof. In the case of *Samson S. Maitai & Anor v African Safari Club Ltd & Anor* [2010] eKLR, the Court observed thus;

“...I have not seen judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption.”

13. Further, in the case of *Gnn & another v Geoffrey Gichohi Njeri* [2019] eKLR, the Court drew comparisons between a suit that has proceeded by formal proof versus a full hearing as follows:

“...in a formal hearing, all rules of evidence and procedure are observed and the party to a suit has to adduce evidence sufficient to sustain the suit. In adducing this evidence, the party has to raise a presumption that whatever is claimed is true and this therefore goes to the merits of the case. The Court considering a full hearing, to determine the matter based on the evidence that is presented before it by parties. In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits.”

14. The onus of adducing evidence in support of any claim advanced in a suit falls on the party making the claim. In the case of *Hellen Wangari Wangechi Vs Carumera Muthini Gathua* [2005] eKLR, the Court held as follows:

“It is a well-established fact that whoever asserts a fact is under an obligation to prove it in order to succeed.”

15. Further, Section 107 (1) and (2) of the *Evidence Act* (CAP. 80) provides as follows:

“(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 facts it is said that the burden of proof lies on that person.”

16. Again, sections 109 and 112 of the *Evidence Act*, state as follows:

S.109. “The burden of proof as to any particular fact lies on the person who wishes the court to believe in the existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

S.112 “In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”.



17. For a claimant to be entitled to land by adverse possession, he/she must prove that he has been in exclusive possession of the said land openly and as of right, without interruption for a period of 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition. See the case of *Kasuve Vs Mwaani Investments Ltd & 4 Others* (2004) eKLR 184, where it was held that:

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right without interruption for a period of 12 years after dispossession the owner or by discontinuation by the owner of his own violation.”

18. However, the right to adverse possession does not accrue automatically, unless the person in whose right has accrued takes action. This action is taken by filing a claim to Court as provided by Section 38 of the *Limitation of Actions Act*. The Applicant has thus filed this claim to assert his claim. In the case of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR the Court declared 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.”

19. For a claim of adverse possession to crystalize, dispossession of the owner of land must be apparent. This aspect is found in the Latin maxim of *nec vi, nec clam, nec precario*: that is without secrecy, without force and without permission. See the case of *Munyaka Kuna Company Limited -Vs- Bernado Vicezo De Masi (The Administrator of the Estate of Domenico De Masi (Deceased))* (2018) eKLR, where the Court declared as follows:

“To establish adverse possession, a litigant must prove that he has both the factual possession of the land and the requisite intention to possess the land (*animus possidendi*). Secondly, one must prove that he has used the suit land without force, without secrecy, and without persuasion (*nec vi nec clam nec precario*), for the prescribed limitation period of twelve years.

Third, he must demonstrate that the registered owner had knowledge (or the actual knowing) that the adverse possessor was in possession of the suit property. Fourth, the possession must be continuous; it must not be broken or interrupted.”

20. In the current suit, the Plaintiff claimed that the Defendant visited the suit land in year 2005, and communicated to him that she was pursuing the title deed in respect of the suit land. The Plaintiff further testified that during her visit of 2005, the Defendant also indicated that she wanted to establish the boundaries of the suit property by tracing its beacons/boundary markers.

21. The Court of Appeal in the case of *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR stated as follows:

“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.”

22. The Certificate of Official Search produced by the Plaintiff herein as an exhibits, shows that, the Defendant is the owner of the suit land, and is dated 27th January, 2021. From the said certificate of official search tendered as exhibit by the Plaintiff, it shows that the Defendant became the registered proprietor of the property on 5th May 1989, and the title deed was issued on the even date. However, the Plaintiff did not produce the extract of the said certificate of title as provided by Order 37 of the *Civil Procedure Act*. See also the case of *Joseph Dennis Odondo v Meshack Juma Omollo & another* [2019] eKLR, where the court held;

“the issue before court was whether the original summons was incurably defective for failure to annex an extract to title as mandatorily required by Order 37 Rule 7 (2) of the Civil Procedure Code Cap 21 Laws of Kenya. Court held that the failure to attach the extract to the title rendered the suit incurably defective.”

23. Further, the Plaintiff did not produce the Green Card in respect of the suit land, which would have indicated the true state on the ownership of the suit land as at the time of filing the suit. The information found on the Green Card would have aided the Court in calculating the length of time of the Plaintiff's occupation/possession of the suit land to determine whether such occupation/possession did become adverse to the Defendant.
24. In the instant proceedings, the Plaintiff has failed to produce a very crucial exhibit to support his claim of adverse possession, and though there is a certificate of official search, that is not the ownership document, and it is not clear whether the Defendant is the registered proprietor of the suit land, so that the court can find and hold that the Plaintiff has held the suit land for a period of not less than twelve (12) years prior to the filing of the current suit.
25. Consequently, this Court holds and finds that the Plaintiff has not produced sufficient evidence to establish the starting point from which it would be in a position to calculate the twelve (12) year period in accordance with the provisions of Section 38 of the *Limitation of Actions Act*.
26. Further, it is the holding of this Court, that without the production of the certificate of title, a claim for adverse possession cannot be said to be adequately proved. It is also not evident whether the Plaintiff has been in occupation of the suit land from 1994. The Plaintiff ought to have called sufficient evidence such as his neighbors or area administration to confirm that the Plaintiff has occupied the suit land since 1994. He should also have produced a Valuation Report to confirm that indeed the suit land is occupied and developed.
27. Without that further evidence, the court finds and holds that the Plaintiff's pleadings and evidence are mere allegations, which allegations are not sufficient to prove this case on the required standard of balance of probabilities.
28. For the above reasons, this court cannot find and hold that the Plaintiff's alleged occupation and possession of the suit land has become adverse to the Defendant's ownership of the suit property.



29. Having addressed the issue set out for determination as above, the court finds and holds that the Plaintiff has failed to prove his case on the required standard of balance of probabilities, and therefore, it is apparent and evident that the instant suit is not merited.
30. Accordingly, the instant Originating Summons dated 22nd February, 2021, be and is hereby dismissed entirely with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 26TH DAY OF AUGUST 2024.

L. GACHERU

JUDGE

26/8/2024

Delivered online in the presence of:

Joel Njonjo – Court Assistant

N/A for the Plaintiff (Though Judgment Notice was served)

N/A for the Defendant (did not enter Appearance)

L. GACHERU

JUDGE

26/8/2024

