



Mwachilangu v Quadco Two Hundred and Forty Four Limited (Environmental and Land Originating Summons E002 of 2023) [2025] KEELC 615 (KLR) (19 February 2025) (Judgment)

Neutral citation: [2025] KEELC 615 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2023
SM KIBUNJA, J
FEBRUARY 19, 2025**

BETWEEN

DAVID MDZOMBA MWACHILANGU APPLICANT

AND

QUADCO TWO HUNDRED AND FORTY FOUR LIMITED RESPONDENT

JUDGMENT

1. This suit was filed through the originating summons dated 23rd November 2023 seeking for adverse possession order against the respondent over a portion of land parcel CR. 15715, measuring about 2.136 hectares or 5 acres. The originating summons is supported by the affidavit of the applicant sworn on the 23rd November 2023, in which he inter alia deposed that he had entered onto the said land without permission and has lived on it since July 2003; that he has built a permanent structure where he lived with his family peacefully without any interference for over twelve (12) years. The applicant filed a notice of motion dated 11th December 2023 seeking for substituted service in one of the daily newspapers after failing to trace the whereabouts of the respondent, that was allowed by the court on 22nd January 2024. During the hearing, the applicant testified on oath as PW1, that his father, Stanley Mwachilangu, had been employed by the respondent as a caretaker of the suit property and that he used to visit him; that his father died in 2001 and was buried in their village; that he returned to the suit property sometimes in 2003 and built a car wash and a hotel; that the respondent would visit him and would greet him and then leave. In cross-examination, PW1 told the court that he had leased the kiosk/hotel to one Wakesho at Kshs. 1,000/- p.m since 2004; that he occupies only one and a half acre and that the remaining acres are vacant; that the last time the respondent came to the land was in 2017; that his structures are built of iron sheets and that the chief's report was written at the chief's office but stamped by the village elder's stamp.



2. The applicant filed a further list of documents dated 8th August 2024, which included a surveyor's report and another chief's letter dated 11th June 2024. He also filed written submissions dated 13th November 2024 which the court has considered.
3. The issues arising for determination by the court are as follows:
 - a. Whether the applicant has satisfied the requirements for adverse possession over the suit property.
 - b. Who bears the costs?
4. The court has carefully considered the pleadings filed, affidavit and oral evidence by the applicant, submissions filed by the learned counsel, superior courts decisions cited thereon and come to the following determinations:
 - a. Adverse possession is a widely recognized legal concept for landless people to acquire idle land or land held by absentee landlords, that they have been in exclusive occupation and or possession. In the case of *Alfeen Mehdimohammed versus Basil Feroz Mohamed & 223 Others* [2016] KECA 480 (KLR) the court provided guidelines for consideration in adverse possession claims as follows:
 - i. An order for relief by way of adverse possession can only be made in favour of an applicant against a respondent if the latter is the current registered proprietor of the land which the applicant seeks to have registered in his name; see *Wasui v Musumba* (2002) KLR 396
 - ii. For an order to acquire title by the statute of limitation, the known owner of the land must have lost his right to the land, either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. See *Wambugu v Njuguna* (1983) KLR 173.
 - iii. A person who occupies another person's land with that other person's consent cannot be said to be in adverse possession because in reality he has not dispossessed the owner of his land and the possession is not illegal. See *Wanje & others v A. K. Saikwa & others* (1984) eKLR.
 - iv. Certificate of title or ownership issued under section 23 of the Registration of Titles Act and sections 27 and 28 of the Registered *Land Act* (repealed) was to be taken by all courts as conferring an absolute and indefeasible title to the property on the named proprietor, see *Mawen v Liu Ranching & Farming Coop Society Ltd, Civil Appeal No.2 of 1983*. However the *Land Registration Act*, 2012, which repealed both the Registration of Titles Act and the Registered *Land Act* provides at section 26, that the certificate of title issued to the proprietor can only "be taken by all courts as prima facie evidence that the person named as proprietor is the absolute and indefeasible owner..."
 - v. The adverse possessor may stoutly possess the land but has no slightest interest until 12 years have lapsed and emerges after this period as the



owner, and however absolute and indefeasible the owner's title is, it is lost forever.

- vi. Adverse possession is a fact to be observed upon the land. It is not to be seen in a title and any person who buys land without knowing who is in possession of it risks his title, just as he does, if he fails to inspect his land for 12 years after acquiring it. See Maweu case (supra).
 - vii. The 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 *Kasuve v Mwaani Investments Ltd & 4 others* (2004)IKLR 184.
 - viii. The identification of the land in exact possession of an adverse possessor is an important and integral part of the process of proving adverse possession see *Kasuve* case (supra)
 - ix. A person seeking to acquire title to land by of adverse possession for the applicable statutory period, must prove non-permissive or non-consensual, actual open, notorious, exclusive and adverse use by him, expressed in the Latin maxim, *nec vi nec clam nec precario*. See *Jandu v Kirplal & Another* (1975) EA 225. This denotes complete and exclusive physical control over the land in dispute and to have *animus possidendi*, or simply put, the intention to have the land. See *Eliva Nyongesa and another v Nathan Wekesa Omacha* Civil Appeal No.134 of 1993.
 - x. Time which has begun to run in favour of the adverse possessor will stop when the owner of the land asserts his right by taking legal proceedings or by making effective entry into the land. See *Njuguna Ndatho v Masai Itumo & 2 others*, Civil Appeal No.231 of 1999.
 - xi. Although in the past the courts, for instance in *Njuguna Ndatho* (supra) insisted, by dint of Order XXXVI rule 3 D of the Civil Procedure Rules, that a claim for adverse possession could only be brought by originating summon, that thinking has since changed and the courts do not take issue if the claim is pleaded in the defence or even in the counter-claim. See [*Gulam Miriam Noordin vs Julius Charo Karisa Civil Appeal No.26 of 2015*](#).
 - xii. The doctrine of adverse possession is not unconstitutional (*Mtana Lewa v Kahindi Ngala Mwangandi* Civil Appeal No.56 of 2014.”
- b. Considering the foregoing guidelines to the discernible facts in this matter, the applicant's claim that he entered, and has remained on the suit property without the consent or permission of the registered owner, is doubtful. This is because he told the court the respondent through its agent would regularly visit the land and greet him before leaving. That the latest visit was in 2017, and it would be absurd for the respondent to make visits to the land, greet the applicant, a squatter, and leave without questioning his occupation if it had not given him consent/permission to be on the suit property. A registered owner/proprietor of a land who frequently visits the property cannot be said to have been dispossessed of the land. The respondent herein was content to make visits to the suit property, greet the applicant, a squatter, thereon and then



go on their way. In the words of the applicant, the last visit was in 2017, and the court can only conclude the applicant was occupying the portion of the suit property he now claims with the respondent's implied consent/permission.

- c. That even if the court was to take the applicant's occupation to have become adverse after the last visit to the land by the respondent in 2017, the period that has lapsed from 2017 to 2023 when this suit, was filed was only six (6) years, which falls short of the period required before adverse possession can kick in. From the testimony of the applicant, PW1, the respondent's visit to the suit property were warm and cordial, as shown through the greetings exchanges, and connotes acceptance of the applicant's presence on the land. It was also the evidence of the applicant that he used to visit his father, an employee of the respondent as a caretaker, on the suit property until his death in 2001 and was therefore familiar with the respondent.
 - d. Though the respondent did not enter appearance or defend the suit despite being served, through substituted service on 26th January 2024 through the Standard Newspaper, it is trite law that unopposed cases are decided on merits. The applicant still bears the duty of proving his claim on a balance of probabilities. The ground report dated 3rd June 2024 by Patrick Opiyo Adero, licensed surveyor, confirmed that the suit land is in its right ground position, that 0.6 hectares is utilized and the remaining 1.536 hectares was unutilized. However, the report does not give details on the use of utilized portion to help the court confirm whether it corresponds to that described by the applicant. The applicant had in ground 6 of the originating summons and paragraph 11 of the supporting affidavit claimed to have built permanent structures on the suit land, but when testifying in court, he stated that his houses are of iron sheets on the walls and roof and that the permanent house in the attached photograph is on a neighbouring land. He also stated that though he had claimed the whole suit land in the originating summons, he was only in occupation of only one acre.
 - e. In law, a person basing their claim on adverse possession must accept the title rests with the registered proprietor, whose title they are essentially challenging and seeking to be cancelled, and it be registered in their favour. In this suit, the applicant at ground 3 of the originating summons alleged that "the respondent was registered as the proprietor of the said land through misrepresentation, fraud and or deceit." He has however not set out the particulars of misrepresentation, fraud or deceit that he attributed to the respondent, nor presented any evidence to the court through affidavit or orally in support thereof. In any case, a civil claim of land based on misrepresentation, fraud or deceit is best presented to the court through a plaint and not originating summons. In view of the foregoing inconsistencies and findings, the applicant has failed to discharge his burden of proof, and the suit is for dismissal.
 - f. Under section 27 of the *Civil Procedure Act*, chapter 21 of Laws of Kenya, costs follow the event unless where otherwise directed otherwise. In this case, as the applicant has failed in his claim, and as there was no appearance by the respondent, the applicant will meet his own costs.
5. From the foregoing conclusions, the court finds the applicant has failed to prove his claim to the standard required of balance of probabilities. The court therefore orders as follows:
- a. The applicant's claim through the originating summons dated 23rd November 2023 is dismissed in its entirety.
 - b. The applicant to meet his own costs.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 19TH DAY OF FEBRUARY 2025.



S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Applicant : Ms Otieno

Respondent : No Appearance

Shitemi – Court Assistant.

