



Chairperson, Secretary and Treasurer Diani Scheme Resource Centre CBO v Thiga (Environment & Land Case E008 of 2023) [2024] KEELC 6178 (KLR) (27 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6178 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E008 OF 2023**

AE DENA, J

SEPTEMBER 27, 2024

BETWEEN

**THE CHAIRPERSON, SECRETARY AND TREASURER DIANI SCHEME
RESOURCE CENTRE CBO APPLICANT**

AND

WALLACE MUNGAI THIGA RESPONDENT

JUDGMENT

1. 1 This suit was commenced by way of Originating Summons filed before court on 2/5/2023. It is brought pursuant to the provisions of sections 17,18,37 and 38 of the *Limitation of Actions Act* and Order 36 Rule 3D of the Civil Procedure Rules and all other enabling laws. The Applicant sought for the following orders; -
 1. The Applicant be declared the rightful owner of the suit property Kwale/Diani Settlement Scheme/5189 and Kwale/Diani Settlement Scheme/5190 by adverse possession of over 12 years since 1977.
 2. An order do issue to the Registrar of Land Kwale to strike out the names of the Respondent from the register and subsequently enter the names of the applicants as the sole proprietors of the suit properties Kwale/Diani Settlement Scheme/5189 and Kwale/Diani Settlement Scheme/5190.
 3. A permanent injunction do issue restraining the respondents whether by themselves, their servants, representatives, agents and/or assigns howsoever from dealing with, entering in, obstructing and any activities on, interfering with applicant's agents and or representatives subdividing, demolishing any structures on, selling, alienating, occupying and/or in any other way interfering with the suit properties.
 4. That costs of this application be provided for.



2. 2 The Originating Summons is premised on the Supporting Affidavit of the chairman to the Plaintiff herein one Mwafumbiri B Matatizo sworn on 19/4/2023. The Originating Summons is anchored on grounds set out on the face of it, and stated in the Applicant's sworn Supporting Affidavit. It is deponed that the Diani Settlement Plot Allocation Committee in its meeting held on 17/5/1977 allocated 446 plots of land to the community and specifically the squatters in Malalani Diani. That part of the plots allocated for public use were Kwale/Diani Settlement Scheme/337 and Kwale/Diani Settlement Scheme/352 the suit properties herein. That the plots were put into use where a nursery school and mosque were built and cash crop trees which are a source of income to the community.
3. That later the Applicants learnt that surveyors had developed a survey plan dated 4/2/1992 and changed the plot No 337 to plot no Kwale/Diani Settlement Scheme/466 and allocated it to Veronica Njeri Kibe who the respondent succeeded. That despite this fraudulent change of number and allocation, it is the Applicants who have been in occupation of the property from time immemorial. However, community members learnt that the Respondent herein on 1/7/2022 did a subdivision of the suit property resulting into Kwale/Diani Settlement Scheme/5189 and Kwale/Diani Settlement Scheme/5190 which has necessitated these proceedings.
4. On 24/7/2023 an application was made to serve the Respondent by substituted service. On 2/8/2023, the court directed the plaintiffs to serve summons upon the Defendant through advertisement in one local daily of nationwide circulation in a conspicuous page. Counsel for the Plaintiffs subsequently confirmed to the court that they had complied with the court's directions as evidenced by the affidavit of service dated 8/2/2024. The Defendant did not, however, enter appearance. Consequently, this suit proceeded to hearing as an undefended cause on 22/5/2024.
5. PW1 Mwafumbiri Bakari Matatizo testified that he is a community leader and chairman of the Plaintiff. That he was before court on behalf of the Plaintiffs and adopted his witness statement filed on 19/4/2023 as part of his evidence in chief. The witness further produced the documents in the Plaintiffs list of documents as PEXH 1-6. It was his testimony that the suit properties were set aside for the community with the intention of constructing a nursery school and other community projects. That the same was however yet again awarded to an individual and who subdivided the same into the current two portions. That the community has been in occupation of the land since 1977. That the Respondent has never been in occupation of the same save for what is on paper and the subdivision. The witness asked the court to allow the suit as prayed.
6. PW2 was Salim Ali Mwasema adopted his statement filed before court on 29/3/2023 as part of his evidence in chief. He reiterated the testimony of PW1. That he was present during the adjudication process. It was his evidence that he was not aware of who the owners of the land as they had been in use of the land for over 30 years. The witness added that they were not aware the surveyor would change the registration of the land and sought for help from court.
7. PW3 was Hamisi Rashidi Mwakireya. He adopted his witness statement filed on 29/3/2023 as part of his evidence in chief. That he was 55 years old and had lived within the scheme all his years. He echoed PW1 and PW2 evidence that the suit property had been set aside for purposes of community development. The same had both semi-permanent and permanent structures and that he had attended madrassa on the suit parcels. That the defendant has never had possession of the same despite the subdivision he conducted. That the scheme had about 270 members and further that through the CBO all residents got their water from the place where the suit properties are.
8. PW4 was Nicholas Sanya a land surveyor in charge of land adjudication and settlement and the Deputy Land Adjudication and Settlement officer Kwale. It was his testimony that he had prepared a ground status report dated 3/4/2023 (PEXh5) on the instructions of Masjid Luvumba members. That he



visited the site on 21/3/2023 and discovered that the suit plot was parcel No 337 earmarked for public utility developments during the schemes allocation. Further that the developments on the land were about 3 to 4 years old but the land had mature coconut trees which were old about 7-10 years. That there was also a building on parcel 466. According to records parcel 466 was allocated to one Gidraph Mwaniki while 337 was allocated for a nursery school. That the land had a community borehole. The Plaintiffs case was marked as closed.

Submissions

9. The Applicants addressed the court on the threshold for grant of orders for adverse possession. The court was referred to the provisions of Sections 7, 9, 10, 11, 12, 37 and 38 of the Limitation of Actions Act on the principles of adverse possession and the format for bringing a claim. It was submitted that a claim for adverse possession is attached to land and not title and it matters not that the land was owned by either the Applicant or the Respondent, reference is made to *Maweu v Liu Ranching & Farming Cooperative Society* [1985] eKLR as quoted in *Civil Appeal No 164 of 2011 Gachuma Gacheru v Maina Kabuchwa* [2016] eKLR where the Court held “Adverse possession is a fact to be observed upon the land. It is not to be seen in a title”
10. It is submitted that in order to effectively determine whether the threshold was met, it is important to answer the following questions in light of what courts have deciphered on the same: -
 - a. How and when did the Applicant take possession of the suit property?
 - b. What was the nature of possession and occupation and for how long?
11. On the first question, the applicant submitted that the community activities on the suit property commenced in 1977 which activities included building madrasa and doing small agricultural activities. That was confirmed by Mr. Sanya the District Settlement Officers who states that the said suit property according to the PDP and their records was number 337 and was initially allocated for community development like a nursery school. He confirms that it in 1992 that said parcel was reissued with number 466 and the said number allocated to the Respondent and their predecessors. Therefore, it was clear that the occupation and or entry of the Applicant was non- permissive from the Respondent.
12. That the subsequent act of the Respondents of changing the plot numbers to 466 and allocating it to themselves and their predecessors or even their act of subdividing the same has never affected the occupation of the Applicant. The court was referred to the decision in *Kisumu Civil Appeal No. 27 of 2013; - Samuel Kihamba v Mary Mbaisi* [2015] eKLR where the court held that for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, and without license or permission of the land owner, with the intention to have the land. The Applicants was further referred to the decision in *Malindi App No. 56 of 2014 Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR.
13. It was further submitted that based on Mr. Sanya’s Ground report, the Applicants’ occupation of the land is no secret, the developments have been undertaken by the Applicants and some were still underway. As of now, a nursery school, a mosque and madrasa classes have been erected on the land. Not to mention, there are boreholes serving the members of the community and its neighbours including several planted mango, cashew nuts and coconut trees on the suit property. That the applicants have been in occupation of the suit property for a cumulative period of 46 years.
14. On the other issue of the subdivision on the suit property on 1st July 2022 almost thirty years later, giving rise to Kwale/Diani Settlement Scheme 5189 and 5190 it was urged as held in *Githu v Ndeete* [1984] KLR 776 that “Assertion of right occurs when the owner takes legal proceedings or makes an



effective entry into the land; see Cheshire’s Modern Law of Real Property, 11th edition at p 894”). That subdivision did not amount to any assertion of rights or interruption as to the Applicants possession or occupation. That time continued running despite the subdivision in 2022.

15. On identification of the property as a required the court was referred to Wilson Kazungu Katana & 101 Others v Salim Abdalla Bakshwein & Another [2015] eKLR to buttress the point that the property must properly be identified. That the Ground report confirmed that the suit property where the Majid Luvumba Mosque erected by the Applicants is indeed erected in Kwale/Diani Settlement Scheme 466. Furthermore, the copy of the green card produced in court provides the demarcation of the land as to approximation of area to be 1.9 Ha thus meeting the threshold for identification. The court is urged to grant the orders of adverse possession as prayed in the originating summon.

Analysis And Determination

16. The main issue for determination is whether the Applicant has met the threshold for grant of orders for adverse possession.
17. It is noted that the Defendant did not participate in the suit despite service being effected on him. However, the Applicants do not escape the burden and standard of proof which they have to satisfy and discharge in accordance with the law in order for his claim to succeed. This Court has a duty to interrogate and evaluate uncontroverted evidence in order to determine whether the applicant is entitled to the prayers sought.

Section 107(1) of the Evidence Act provides that

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

18. In the case of Charter House Bank Limited (Under Statutory management v Frank N. Kamau [2016] eKLR, the Court of Appeal when discussing the burden of proof upon the Plaintiff in a situation where the Defendant failed to adduce evidence stated thus:

“we would therefore venture to suggest that before the trial court can conclude that the Plaintiff’s case is not controverted or is proved on a balance of probability by reason of the Defendant’s failure to call evidence, the court must be satisfied that the Plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence from the Defendant.... The Plaintiff must adduce evidence, which in the absence of rebutted evidence by the Defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgement merely because the Defendant has not testified”

19. The doctrine of adverse possession in Kenya is embodied in Sections 7, 13, 38 of the Limitation of Actions Act, (Cap 22)

Section 7 provides as follows:

“An action 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 is first accrued to some person through whom he claims, to that person”.

20. Section 13 states that; -



- (1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession.”
21. Section 38 is to the effect that:
- “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, 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 proprietor of the land.”
22. The Court of Appeal in the case of Benjamin Kamau Murma & Others v Gladys Njeri, C A No. 213 of 1996 observed that:
- “The combined effect of the relevant provisions of sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.”
- The onus is on the person or persons claiming adverse possession:
- “.. to prove that they have used this land which they claim as of right: Nec vi, Nec clam, Nec precario (No force, no secrecy, no evasion). So the Applicants must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavors to interrupt it or by any recurrent consideration”
23. In the case of Tabitha Waitherero Kimani v Joshua Ng’ang’a [2017] eKLR Ombwayo J in articulated the requirements as follows; -
- ‘Adverse Possession requires at a minimum five basic conditions being met to perfect the title of the adverse party. These are namely: -
- (A) Open And Notorious use of The Property For this condition to be met the adverse party use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim. The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about.
- (B) Continuous use of The Property The adverse party must, for statute of limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor’s time on the land, not how long true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned.
- (C) Exclusive use of The Property The adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a barn on the owner’s property, and the owner then uses the



barn, the adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (i.e. owners) in common, so long as the other elements are met.

(D) Actual Possession Of The Property The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession.

24. In *Wambugu v Njuguna* [1983] KLR 172, the Court held that:

“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”

25. 22 Applying the foregoing provisions of the law and principles outlined in the authorities cited to the facts of this case I will proceed to analyse the Plaintiffs claim. It is imperative at the outset to define and or ensure the land the subject of the claim for adverse possession is clearly identified. In this regard I’m guided by *Wilson Kazungu Katana & 101 Others v Salim Abdalla Bakshwein & Another* [2015] eKLR where the court emphasised thus; -

The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession.

26. The history of the property in this case goes back to the year 1977. It is the Applicants case that the suit property was allocated to them in the said year following land adjudication. In this regard minutes of a meeting held on 17/5/1977 by the Diani Settlement Plot Allocation Committee were produced in evidence demonstrating how plots within the scheme were allocated. During the testimony of PW2, the court sought further clarification on his presence during the adjudication process. The witness testified that he was currently 96 years old and was present during the adjudication.

27. My understanding of the Applicants claim is that it is limited to the plots that were dedicated for social amenities for community use, the community being members of the Applicant. The land is specifically identified to be the one where a mosque is built being Kwale/Diani Settlement Scheme/337 but was changed to 446. This is corroborated by the Ground Status Report dated 3/4/2023, prepared and produced by PW4 Nicholas Sanya land surveyor in charge of land adjudication and settlement and the Deputy Land Adjudication and Settlement officer Kwale. The report confirms thus ‘ ..after picking the claimed site and plotting on the georeferenced map of Diani Settlement Scheme the parcel was confirmed to be 466 in Diani Settlement Scheme. It was his evidence that he visited the site on 21/3/2023 and discovered that the suit plot was parcel No 337 earmarked for public utility developments during the schemes allocation.

28. The Applicants case is that the said plot 337 was later allocated to Veronica Njeri Kibe who the Respondent succeeded. The above plot is said to have been further subdivided into Kwale/Diani Settlement Scheme 5189 and 5190 in July 2022. There was produced a green card corroborating this information. Upto to this point the court was satisfied that suit property had been properly identified by the applicants by establishing the nexus between plot 466, 337 and the resultant subdivisions as the land allocated for social amenities.

29. The Applicants were further required to establish the property is registered in the name of a third person other than the Applicant. The history and chronology of the registration of the suit property was evidenced in the green card from the time it was first registered under the Settlement Trust Fund. Consequently, the land was registered under Veronica Njeri Kibe on 25/10/1993 and the Respondent



on 15/8/2012 and which registration was later cancelled. A caution was placed over the land on 8/7/2013 by Salim Ali Nyawa but the next entry on the land shows the registration of the same under the respondent's name on 19/2/2014 where title was issued. On 2/10/2014 the caution was withdrawn and on 1/7/2022 the title deed was closed on subdivision of the suit property into two portions being Kwale/Diani SS/5189 and 5190.

30. I find it that the ownership of the suit property has been established as being in the name of the Respondent who clearly is the 3rd party.
31. I must address the matter of possession, its nature and user and permission thereof. From the authorities cited the adverse party must physically use the land as a property owner would. PW1, PW2 PW3 who are community members all testified as to the existence of the mosque and I had no problem with believing the testimony of PW2 who was aged 96 years. The ground status report also confirms there was occupation in terms of buildings and several mature mango, cashewnuts and coconut trees planted by the community. The evidence of PW1 the Chairman to the Applicants is that together with several other members of the community as per the list of members produced before court, they have been in use of the property since 1977. This evidence is corroborated by PW2 who testified that PW1 was known to him as the chairman to the Plaintiff. That the CBO concerned itself with issues of development for residents of Diani Scheme in Umoja. The Certificate of registration under Ministry of Labour Social Security Services was produced in evidence in the name of Diani Scheme Resource Centre CBO.
32. It was the evidence of the Applicants that the Respondent has never been in use and occupation of the suit property. That he is unknown to them and neither was the person in whose names the property was initially registered under. This meant that the CBO has never interacted with the registered owner not even for purposes of obtaining his consent to occupy the property. The occupation was physical with activities on the ground. This was evidenced by the photographs showing developments on the land. A certificate dated 19/4/23 was filed on 2/5/23 pursuant to the requirements of Section 65(5) (6) of the *Evidence Act* is a pertinent. From this evidence it is confirmed that the Applicants occupation of the suit property has been to the exclusion of all others including the true owner of possession of that land.
33. I must however say something on whether the occupation has met the limitation period requirement of 12 uninterrupted years. It is noteworthy that time starts to run from the time the land is registered under statute. From the green card the parcel file was opened on 10/3/1992 under the Registered *Land Act* (now repealed). Veronica Njeri Kibe was registered proprietor in 1993. Wallace Mungai in 2014 who the subdivided the property into two. Can the subdivision be deemed an interruption for purposes of a claim for adverse possession and whose effect would be to stop time from running?
34. Counsel for the Plaintiff must have anticipated the above inquisition and urged that the act of subdivision of the property did not change possession of the property and that adverse possession runs with the land and not the title. The court in *Githu v Ndeete* [1984] KLR 776 stated thus; -

Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land; see *Cheshire's Modern Law of Real Property*, 11th edition at p 894").



35. The Court of Appeal in Civil Appeal No. 121 of 2006; - Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees [2016] eKLR affirmed the sentiments of the Court in Amos Weru Murigu v Marata Wangari Kambi & Another where the Court held:

“...as regards assertion of title, it is not enough for a proprietor of land to merely write to the trespasser (to vacate). A letter by the proprietor, even if it be through an advocate or the chief of the area does not amount to assertion of title in law and cannot therefore interrupt the passage of time for the purpose of computing the period of adverse possession. For there to be interruption, the proprietor must evict or eject the trespasser but because eviction is not always possible without breach of peace, institution of suit against a trespasser does interrupt and stop the time from running.”

36. Applying the above it is apparent that the interference the law looks at is interrupted or un-interrupted possession. Where the owner does not retake or regain possession to interrupt the adverse possessor it will not be considered as interference. The only non-possessionary interference the law therefore recognises is where the owner files suit for taking of possession. There has been no indication that the occupation and use was at any given point interrupted by any party and specifically the Respondent. No evidence has been tendered before court suggesting in any way that the Applicants occupation of the suit property was ever contested by the Respondent in court.

37. In my view, the Applicants herein have been able to prove that they have been in open and continuous use of the suit property.

38. The upshot of the forgoing discussions is, the sole issue for determination is answered in the positive. This court finds that the Applicant has proved its case on a balance of probabilities and enters judgement for the Applicant against the Respondent as follows; -

- a. The Applicant is declared the rightful owner of the suit property Kwale/Diani Settlement Scheme/5189 and Kwale/Diani Settlement Scheme/5190 by adverse possession.
- b. The Registrar of Land Kwale is hereby ordered to strike out the names of the Respondent from the register and subsequently enter the names of the Applicant as the sole proprietor of the suit properties Kwale/Diani Settlement Scheme/5189 and Kwale/Diani Settlement Scheme/5190.
- c. A permanent injunction is hereby issued restraining the Respondents whether by themselves, their servants, representatives, agents and/or assigns howsoever from dealing with, entering in, obstructing and any activities on, interfering with applicant's agents and or representatives subdividing, demolishing any structures on, selling, alienating, occupying and/or in any other way interfering with the suit properties.
- d. No orders as to costs

Orders accordingly.

JUDGEMENT DATED SIGNED AND DELIVERED THIS 27TH DAY OF SEPTEMBER 2024

A E DENA

JUDGE

Mr. Makowade for the Applicants

No appearance for the Respondents

Mr. Daniel Disii – Court Assistant

