



**Kubai v Kubai (Sued as the Administratrix and or Legal Representative of the Estate of the Late Kubai Baimpwi- (Deceased)) (Environmental and Land Originating Summons E004 of 2023) [2024] KEELC 6339 (KLR) (25 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6339 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E004 OF 2023  
CK NZILI, J  
SEPTEMBER 25, 2024**

**BETWEEN**

**SAMUEL KUBAI ..... PLAINTIFF**

**AND**

**MIRIAM KABIRIA KUBAI ..... DEFENDANT**

**SUED AS THE ADMINISTRATRIX AND OR LEGAL REPRESENTATIVE OF  
THE ESTATE OF THE LATE KUBAI BAIMPWI- (DECEASED)**

**JUDGMENT**

1. The plaintiff seeks to be declared owner of L.R No. Kiegoi/Kinyanka/1348, measuring 0.90 acres or thereabouts by virtue of adverse possession. The pleadings containing the facts and documents are the originating summons dated 3.3.2023. Attached to the supporting affidavit was a copy of the records for the suit land, official search, limited grant of letters of administration for the estate of the late Kubai Baimpui alias Kubai, and previous pleadings in suit, namely; Meru H.C Succession Cause No. 503 of 2012, photographs and a joint report by the court administrator and a land surveyor.
2. The defendant opposed the claim through a replying affidavit signed by Miriam Kabiria Kubai dated 24.4.2023. She denied that the plaintiff has been living on the suit land since 1984 in an open, quiet, notorious, continuous, and peaceful manner as alleged or at all. To the contrary, she averred that the entry and occupation into the land came forcefully after her late husband passed on and more so during the pendency of the High Court Succession Cause No. 533 of 2012, in respect to the estate of her deceased husband Kubai Baimpwii in 2014.
3. The defendant averred that on 19.4.2014, the High Court stopped the plaintiff's interference with her quiet possession or occupation of the land, but the plaintiff disregarded or ignored the court order and went ahead on 28.8.2014 to demolish her houses, destroy the property and fence off a portion with a barbed wire in the presence of the area assistant chief.



4. The defendant averred that she made a report at Maua Police Station and sought the assistance of the (county commissioner).
5. Therefore the defendant averred that the entry and occupation has not been peaceful or quiet due to the constant dispute since 2014. Further, the defendant averred that if the plaintiff had entered into a written agreement with her late husband in 1983, after which the deceased subdivided the land into two portions, one wonders why the transfer was not effected before his demise in 1984. She denied that her late husband was in and out of the hospital.
6. At the hearing, Ezekiel Ithanie Emunge testified as PW 1. As the Senior Assistant Chief, Itumi Sub-location Igembe sub-county told the court that the two parties before the court were known to him. Concerning the land in dispute, PW 1 told the court that the land was almost a kilometer from his land. He adopted his witness statement dated 7.3.2023 as his evidence in chief.
7. PW 1 also stated that the suit land, which is situated about 300 meters from his office. He confirmed that he started seeing the plaintiff occupying the land while he was a young boy in the 1980s, but could not ascertain the manner in which the plaintiff made entry into the land and has remained therein to date.
8. PW 1 told the court that the two families, who are neighbors, had peacefully co-existed together until five years ago when a directive was issued to him by his superior officers to resolve a boundary dispute over the land, which he successfully handled alongside the area chief.
9. Similarly, PW 1 told the court that during the succession cause, he was also summoned to testify before the High Court. He said that the plaintiff has been living on the suit land where he has made extensible developments alongside his children, who have their own homesteads, families, and grandchildren on the suit land with clear boundaries.
10. In cross-examination, PW 1 told the court that he became an assistant chief in 2006 and handled the first complaint over the suit land in 2007, which was lodged by the defendant disowning the sale agreement. He denied presiding over a forced burial of the defendant's late husband on the disputed land in April 2016. PW 1 told the court that the matter was also handled by the area Njuri Ncheke.
11. Additionally PW 1 stated that what the defendant has been disputing over is the occupation of more land by the plaintiff than was sold to the plaintiff by her late husband. During a scene visit with the assistant county commissioner to the suit land, PW 1 told the court that a land surveyor was present and took out the measurements of the land. He denied witnessing any eviction of the plaintiff from the suit land following an order from the high court since the signing of the sale agreement; otherwise, the plaintiff was taking advantage of her age and the death of her husband, to grab the land using the court process and the local administration through a claim full of falsehood to seek the court's sympathy. The replying affidavit was accompanied by witness statements, a demand letter dated 9.6.2015, O.B. reports, Njuri Ncheke summons and an affidavit sworn on 8.3.2013 to the originating summons.
12. Samuel Kubai testified as PW 2. He told the court that the husband to the defendant entered into a sale agreement dated 17.2.1984 with him to purchase 0.90 acres out of his L.R No. Kiegoi/Kinyanka/1348 and that in March 1984, they visited the land and identified the boundaries on the ground. PW 2 said that efforts to obtain a land control board consent were unsuccessful since the seller was ailing and admitted to in hospital at the time.
13. Eventually, PW 2 said that in late 1984, he moved his family into the suit land, took vacant possession after clearing the purchase price and built his first house. He further stated that the court that all his five children had been born on the land which he had extensively developed without any objection from



the defendant, who shared a boundary with him, occupying the immediate portion or subdivision of L.R No. Kiegoi/Kinyanka/950.

14. PW 2 told the court that the seller died on 10.3.1985, leaving him occupying the land where the two families had co-existed very harmoniously until 2010, when the defendant complained to D.C, who sent the area D.O chief and assistant chief to resolve a boundary dispute. PW 2 said that after successfully resolving the boundary dispute the D.O. recommended the filing of a succession cause to resolve the ownership dispute. Again PW 2 told the court that the defendant secretly filed a succession cause to distribute the estate in Maua CM Succession Cause No. 110 of 2011, prompting an objection from him after learning of the same.
15. PW 2 told the court that the file was subsequently transferred to Meru High Court, after which his objection was dismissed for lack of jurisdiction on 15.12.2022, paving the way for this suit. Further PW 2 said that after his objection was dismissed, the defendant started harassing his family and demanding that they vacate the land, including attempting to use a gang of goons who threatened to remove or destroy his houses on 28.2.2023 physically.
16. Similarly PW 2 stated that his four sons were born in 1984, 1986, 1993 & 2000 on the land and have since grown there. Similarly, he told the court that his unmarried daughter, born in 1993, has two of her children living on the land. In total, PW 2 told the court that he has a family of 23 living on the suit land.
17. Miriam Kabiria Kubai testified as DW 1 and relied on her replying affidavit and witness statements dated 24.4.2023 and 12.10.2023 as her evidence in chief. As a legal representative and wife of the late Kubai Baimpwii, the legal owner of L.R No. Kiegoi/Kinyanka/1348, DW 1 denied that the plaintiff has been living on the suit land since 1984 as alleged or at all.
18. On the contrary, D.W. 1 told the court that forceful entry into the land occurred after her husband passed on in 2014, when the plaintiff made an allegation of a purported sale of 0.90 acres of the land to him by her deceased husband. She termed the case and allegations as an attempt to disinherit the land by the plaintiff during the pendency of the High Court Succession Cause No. 503 of 2012, where the plaintiff unsuccessfully objected.
19. DW 1 said that the plaintiff was taking advantage of her old age and use of court processes to be declared a bonafide purchaser using a forged sale agreement, yet she held the land in trust for herself and the children of her deceased husband.
20. DW 1 told the court that the dispute was resolved in her husband's favor by Njuri Ncheke in 1985. He also told the court that her late husband could not dispose of the family land without her knowledge or that of any family member. D.W. 1 produced a demand letter dated 9.6.2015, Njuri Ncheke letter dated 16.9.2011, replying affidavit in Meru H.C Succession Cause No. 503 of 2012 and replying affidavit sworn on 24.4.2023 D. Exh No's. 1-4.
21. Again, DW 1 denied consenting to the forceful entry and occupation of her land by the plaintiff. She denied that the possession or occupation by the plaintiff was peaceful or open since the parties have consistently been wrangling over the land in various forums, including in court. She termed the occupation as violent.
22. In cross-examination, DW 1 told the court that the violent entry occurred after her husband passed on. She termed the testimony of the assistant chief unreliable after he mishandled her complaint leading to a report at the district commissioner's office.



23. D.W. 1 told the court that there was a time when the plaintiff assaulted her together with her son, leading to a police report; instead of taking action, he arrested and locked them in the cells. Further, DW 1 stated that all the alleged developments on the land, as claimed by the plaintiff, came up during the pendency of the succession cause at the high court. DW 1 denied that the plaintiff's entry into the land occurred during the lifetime of her late husband. She equally denied that her late husband subdivided the initial land into two portions before he passed on; otherwise, the 2<sup>nd</sup> portion ought to belong to her son.
24. Asked about a sale agreement, DW 1 said that she was aware that the late B.G Kariuki advocate produced the same during the hearing of the Succession Cause. Further, D.W. 1 clarified that the dispute in 1985 was before the illegal entry occurred in 2014. Further, DW 1 said that the visit to the land by the district commissioners occurred in 2007. D.W. 1 denied knowledge of any subdivision of the initial parcel of land by the late husband in favor of the plaintiff.
25. Zachary Mutua testified as DW 2. He adopted his witness statement dated 12.10.2023 as his evidence in chief. DW 2 told the court that in 2011, the defendant filed a land dispute with the Njuri Ncheke panel of elders, Kiegoi House, over L.R No. 1348, where the plaintiff was claiming to have bought the land from her late husband, yet the claim had not been lodged during the lifetime of her husband. DW 2 said that before the complaint was lodged with them, DW 1 had already made a report to the area chief, who intervened by stopping the plaintiff from taking possession of the land.
26. Further, DW 2 told the court that initially, DW 1 had made a report at Auki Njuri Ncheke elders who refused to assist her, hence the reason that she came to Kiegoi House, who summoned the plaintiff for a meeting, but he declined to attend and the dispute was heard exparte.
27. DW 2 told the court that according to their findings, there was no sale agreement between the plaintiff and the late Kubai Baimpwii. Similarly, DW 2 said that when elders were sent to the ground, they only found the defendant and her children occupying the land and not the plaintiff, save for the presence of a house that the defendant was constructing on the land at the time with no one in occupation of the disputed portion. DW 2 told the court that later in 2017 DW 1 made another complaint with the elders that the plaintiff had allegedly completed the building and started occupying it. D.W. 2 relied on D. Exh No. (2).
28. In cross-examination, D.W. 2 told the court that Auki House, where the defendant's relatives belong, and the land is situated, was unable to entertain the dispute. She termed the entry and occupation of the land by the plaintiff as forceful and violent.
29. DW 2 told the court that when the elders visited the land, they saw newly constructed houses on the disputed land. Even though the land was titled, DW 2 said that the panel of elders recommended that the title deed to the land be issued to the defendant as beneficial owner based on the evidence tendered before them. DW 2 told the court that even though a land surveyor did not accompany them, DW 1 told them that the land was 1.9 ha, shown photograph attached to paragraph 18 of the plaintiff's supplementary affidavit to the originating summons.
30. Again, DW 2 denied witnessing such buildings on the suit land during the Njuri Ncheke elder's visit for such buildings were not in existence in 2011. D.W. 2 told the court it was allowed for a panel of Njuri Ncheke to listen to a land dispute outside their "House." According to D.W. 2, the land initially belonged to the defendant's late husband, hence the reason the panel of elders recommended that she be issued with the title deed, which the plaintiff was withholding from her.
31. Further, DW 2 clarified that the houses that were being erected on the suit land were incomplete and vacant in 2011. Following the closure of the defence case parties were directed to file and exchange



written submissions by 25.9.2024. After the close of defense testimony, parties were directed to file and exchange written submissions.

32. The defence relies on written submissions dated 21.8.2024 that the plaintiff has failed to prove the claim based on adverse possession. Reliance was placed on *Ruth Wangari Kanyagia vs Josphine Muthoni Kinyanjui* 2017 (eKLR) and *Joseph Chebaya Chesoli vs Paul Khakina Musungu & another* Civil Appeal No. 58 of 2013.
33. The issues calling for my determination are:
  - i. If the plaintiff has proved the ingredients of adverse possession.
  - ii. If the defendant has proved her defense that the alleged adverse possession has not been open, notorious, peaceful, uninterrupted, and or hostile to her title.
  - iii. Whether the plaintiff is entitled to the reliefs sought.
  - iv. What is the order as to costs?
34. Adverse possession occurs when an actual owner of land neglects or omits to take action against an intruder to his land, who undertakes inconsistent acts to the purpose for which the valid owner intended to use the soil, with the intention of owning the land, for a period of 12 years. Adverse possession is a matter of fact that is generally proved through interrogation of evidence in a particular case. See *Maclom Bell vs Toroitich Arap Moi* (2013) eKLR. In *Mtana Lewa vs Kahindi Ngala Mwangandi* (2015) eKLR, the court held that the doctrine of adverse possession was neither arbitrary nor an unconstitutional limitation of the right to property to the land occupied. The court observed that adverse possession occurs where an actual owner of land neglects or omits to drive out an intruder to his land, who occupies the same for a requisite 12 years by committing acts inconsistent with the purpose for which the true owner intended to use the land.
35. In *Samuel Miki Waweru vs Jane Njeri Richu* (2007) eKLR, the court held that where a purchaser occupies land that is subject to a sale agreement, but with the consent of the vendor, time does not start running for purposes of adverse possession until the agreement is terminated.
36. As to a sale agreement subject to the *Land Control Act* the court said that time starts running from the moment the transaction becomes void by virtue of Section 6 (1) of the said Act for lack of consent from the land control board.
37. In *Chevron (K) Ltd vs Harrison Charo wa Shutu* (2016) eKLR, the court observed that the burden was on the person claiming to be entitled to the land by adverse possession to prove not only the period but also his possession was without the valid 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 true owner's enjoyment of the soil for the purpose for which he intended to use it. The court cited *Sophie Wanjiku John vs Jane Mwhaki Kimani* NRB ELC No. 490 of 2010, that adverse possession can only be maintained against a registered owner and that there cannot be a claim of adverse possession against public land. Further, the court held that evidence of building structures on the suit land without obtaining permission from the actual owners was a clear manifestation of a clear mind and intention for dealing with the suit premises as if it was exclusively his and in a manner that was in apparent conflict with the appellant's rights. The court termed such acts as dispossessing the suit premises from the appellant in a manner that the acts were neither by force nor secrecy and without permission.
38. In *Maweu vs Liu Ranching and Farming Co-operative Society* (1985) KLR 430, the court observed that adverse possession was a fact to be observed upon the land and was not seen in a title. In *Peter*



- Mbiri Michuki vs Samuel Mugo Michuki (2014) eKLR, the court observed that where a party relies on an agreement and subsequent adverse possession, the possession becomes adverse from the date of payment of the last installment.
39. In *Wambugu vs Njuguna* (1983) KLR 172, the court observed that dispossession and discontinuance of possession are the two critical elements in adverse possession. Discontinuance of possession, therefore, takes place when the owner goes out and another takes possession. See *Public Trustee vs Wanduru* (1984) KLR 314. Elements of possession or occupation include cultivation and similar activities, fencing or putting buildings. See *Githu vs Ndeete* (1984) KLR 776, *Virginia Wanjiku Mwangi vs David Mwangi Jotham Kamau* (2013) eKLR.
  40. Possession need not be actual but can also be constructive. See *Michuki vs Michuki* (supra). Interruption occurs through the assertion of title or an effective entry. Giving the notice to vacate is not a sufficient assertion of title. None use of the land after the dispute has erupted may now affect the taking effect to extinguish the title.
  41. A person claiming adverse possession must prove actual or constructive knowledge of the adverse possession by the registered owner. See *Titus Kigoro Munyi vs Peter Mburu Kimani* (2015) eKLR. Without knowledge of the intruder's presence in the suit property, there can be no adverse possession. See *Benson Mukuwa Wachira vs Assumption Sisters of Nairobi Registered Trustees* (2016) eKLR.
  42. Possession is a question of facts, depending on the circumstances of each case. See *Kimani Ruchine vs Swift Rutherfords Co. Ltd* (1980) KLR 1500. Evidence must be stringent and straightforward for adverse possession because a property owner should be deprived of his title only in the clearest of cases, as held in *Peter Njau Kairu vs Stephen Ndung'u Njenga & another* C.A 57 of 1997.
  43. In *Kazungu & another vs Omar* (civil appeal) E042 of 2021 (2024) KECA (412) KLR (26<sup>th</sup> April 2024) (Judgment). Adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it. See *Alfred Welimo vs Mulaa Sumba Barasa* C.A No. 186 of 2011. In *Ndolo vs Kituku and 8 others* Civil Appeal No. 294 of 2018 (2022) KECA 1289 (KLR) 18<sup>th</sup> November 2022 (judgment), the court said that the physical acts of exclusive possession and the animus possidendi to hold as owner to the exclusion of the actual owner were essential factors in a claim for adverse possession. The court said that where the entry into the land was as a licensee, there must be evidence of the point at which the license was terminated, and his continued possession became adverse to that of the owner, and where entry was based on a tenancy, there must be evidence showing the point at which payment of rent came to an end and after that occupation became adverse.
  44. In *Wakio & 101 others vs Mombasa* Civil Appeal E061 of 2021 (2024) KECA (316) (KLR) 22<sup>nd</sup> March 2024 judgment, the court cited *Wines and Spirits (K) Ltd vs George Machira Mwangi* (2018) eKLR that time does not start running until a registered owner becomes aware there is a trespasser to his land and does nothing to assert his title. Further, in *Wambui Gikwa vs Paul Kimani Muraba* (2016) eKLR, the court said that time stops running in favor of an adverse possessor either when the title holder asserts his right to the land in question or when the adverse possessor admits the title holder's right.
  45. Assertion of title can be through the institution of legal proceedings to regain possession whether or not it succeeds. In *Peter Kamau Njau vs Emanuel Charo Tinga* (2016) eKLR, the court observed that the respondents did not merely stand by but took positive steps to assert their title in judicial proceedings or by making an effective entry into the land. So, without such acts, the court observed that the expiration of 12 years from the date in which the cause of action accrued the owner's title will be extinguished by operation of the law and the intruder under Section 38 of the *Limitation of Actions Act*, can apply to be registered as its owner. The court cited *Mombasa Teachers Cooperative Savings & Credit Ltd vs*



- Robert Muhambi Katana & others (2018) eKLR, that on proof of discontinuation and dispossession to be entitled to adverse possession.
46. Applying the case law cited, the plaintiff pleaded that the land he bought was 0.90 acres out of L.R No. Kiegoi/Kinyanka/1348. The land came under the name of the late Kubai Baimpwii on 30.11.1984, as per the copy of records attached to the supporting affidavit to the originating summons. Samuel Kubai lodged a caution as a purchaser on 8.4.2009. As per a copy of the search dated 2.3.2023 attached to the supporting affidavit, the caution had not been removed or lifted by 2.3.2023. The defendant became the legal representative on 8.6.2012 as per the letters of grant for the estate of her late husband.
  47. Evidence of the sale agreement, details of its contents, consideration, and the date of the last payment by the plaintiff for time to start running for adverse possession was not tendered.
  48. In *Wefwafwa Songoi vs Wefwafwa Songoi* (2020) eKLR, the court observed that the time when a party came into possession was vital. When, how and for what period the adverse possession has taken place has to be proved through tangible and cogent evidence. The caution was placed in 2009. The plaintiff talks of a sale agreement in 1983/1984. Even though the law did not require a written sale agreement in 1983/1984, an acknowledgment note or evidence of being put into possession at the time would have sufficed. The plaintiff has not availed any acknowledgment note of final payment to the vendor.
  49. Whoever asserts a fact must prove it in order to succeed before a court of law. See *Wangari Wangechi vs Carumera Muthini Gathua* (2005) eKLR. There is no evidence that the late Kubai Baimpwii knew of the presence of the plaintiff on his land in 1983/1984 and failed to assert his title or make an effective entry by the time he passed on 10.3.1983. In any event, the deceased became the registered owner on 30.11.1984. So it means he could not sell and transfer any land to the plaintiff in 1983.
  50. Adverse possession must be devoid of violence. In *Kiberetu vs Kibiti* (2024) KEELC 1108 (KLR) (28<sup>th</sup> February 2024) (Judgement), the court cited *Songoi vs Songoi* (supra) that a claimant must prove the date of entry length of possession, if it was open and undisturbed for 12 years. The court held that the meeting by the clan elders to resolve the dispute between the parties in 1992 had challenged the appellant's peaceful and uninterrupted possession and was further evidence that the respondent had not acquiesced to the appellant's possession of the land.
  51. In this suit, there is evidence of Njuri Ncheke's intervention in the land dispute in 2011. The evidence of DW 2 confirmed the site visit by the elders to the land, where they found no occupation by the plaintiff, save for an upcoming construction, which the defendant was opposed to. There was also evidence that the defendant and her son were arrested and arraigned before the court for crop destruction in Maua Chief Magistrates Criminal Case No. 278 of 2013. The entry and occupation of the plaintiff cannot, therefore, be termed as peaceful or uninterrupted by the defendant.
  52. Exclusive possession means dominion over the land. The disseized owner must not share the land. See *Mbui vs Maranya* (1993) eKLR. In this suit, there is evidence that the defendant has been interrupting the alleged occupation by the plaintiff and asserting her rights. Evidence of exclusive dispossession and exclusive discontinuance of possession by the valid owner is lacking. See *Wambugu vs Njuguna* (supra).
  53. Looking at the totality of the evidence, I am therefore of the considered view that the plaintiff has failed to discharge the burden on a balance of probability to be entitled to the reliefs of adverse possession. The suit is dismissed with costs.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 25<sup>TH</sup> DAY OF SEPTEMBER, 2024**

In presence of



C.A Kananu

Parties

Ondieki for defendant

**HON. C K NZILI**

**JUDGE**

