



**Masha v Ndumbu (Environmental and Land Originating Summons
E017 of 2023) [2024] KEELC 6161 (KLR) (25 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6161 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E017 OF 2023
FM NJOROGE, J
SEPTEMBER 25, 2024**

BETWEEN

CHARO KITSAO MASHA APPLICANT

AND

ABEL NDUMBU RESPONDENT

JUDGMENT

1. The applicant filed originating summons dated 26/6/2023, seeking the following orders:-
 1. That the Respondent's title over all that parcel of land known as L.R No. Kilifi/Mtondia/89 be and is hereby extinguished and cancelled and the same be vested in the name of the Applicant;
 2. Costs be provided for.
2. The summons are premised on the grounds cited in the application and particularly in the Supporting Affidavit of the Applicant dated 26/6/2023. The Applicant deposed that sometime in the year 1973, he moved into Land Title No. Kilifi/Mtondia/89 measuring approximately 12 acres located in Mtondia area within Kilifi County (the suit property); that he has since put up permanent structures thereon in which he lives with his family and have over the years undertaken subsistence farming thereon and other economic activities including harvesting stones.
3. He added that the suit property is currently registered under the Respondent's name. He stated that at some point, the suit property was subject to land adjudication to which there was no information regarding the registered owner at that point. The Applicant asserted that he has been in open, continuous and peaceful occupation of the suit property since 1973 and hence entitled to the same by virtue of the doctrine of adverse possession.
4. The summons were ordered by court to be served by way of substituted service vide an advertisement in the Daily Nation Newspaper of 17/10/2023, as evidenced in an affidavit of service sworn on



10/11/2023 and 5/3/2024 by the Applicant's counsel, Mr. Stephen Kibunja. Despite service, the Respondent failed to enter appearance or file any response to the summons. As a result, the Applicant filed a request for judgment on 14/11/2023. The hearing occurred on 6/6/2024 by way of viva voce evidence.

Evidence

5. At the hearing, the Applicant was the sole witness in his case. He adopted his evidence as contained in the supporting affidavit. He adopted the summons, supporting affidavit and annexures thereto as part of his evidence-in-chief. He testified that he has lived on the suit property since the year 1973 and that he bore all his children while living thereon; that his children mine stones on the suit property as seen in the photographs he exhibited.
6. The Applicant's evidence was uncontroverted and marked the close of the hearing.

Analysis And Determination

7. The issue for determination in this suit is whether or not the Applicant has established entitlement to be declared owner of the suit land by virtue of the doctrine of adverse possession. The doctrine of adverse possession is underpinned in Sections 7, 13 and 38 of the *Limitation of Actions Act*.
8. Section 7 of the Limitations of Actions Act (the Act) provides as follows: -

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.”
9. Section 13 of the Act further provides: -
 - (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.....)”
9. Section 38 (1) is set out in the following terms: -

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.”
10. The concept of adverse possession was defined by the Court of Appeal in the case of *Mtana Lewa v Kahindi Ngala Mwangandi Civil Appeal No. 56 of 2014 [2015] eKLR* as follows: -

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 or 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.”



11. 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.”

12. In the instant case, the Applicant's uncontroverted evidence is that he has been in open, continuous and uninterrupted possession and occupation of the suit property since the year 1973 without any interruption from the registered proprietor. This period is evidently beyond the statutory period of 12 years envisaged in the Act. The activities he has carried out on the suit land include extensive mining. It is therefore evident that the Applicant's occupation of the suit property is adverse to the Respondent's title.
13. In view of the foregoing, I am satisfied that the Applicant has proved his case on a balance of probabilities. Accordingly, I enter judgment for the Applicant and make the following final orders:
- a) A declaration is hereby issued that the Applicant has acquired the title for the whole of land parcel No. Kilifi/Mtondia/89 by way of adverse possession;
 - b) The Respondent is hereby ordered to transfer the whole of the said land parcel No. Kilifi/Mtondia/89 to the Applicant within 30 days from the date of this judgment, in default of which the Deputy Registrar of this Honourable Court shall transfer the same to the Applicant on behalf of the said Respondent;
 - c) Each party shall bear its own costs of the suit.

JUDGMENT DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 25TH DAY OF SEPTEMBER 2024.

MWANGI NJOROGE

JUDGE, ELC MALINDI

