



**Mwambire & 10 others v Sadiq & another (Environment & Land Case 3 of 2023) [2024] KEELC 5918 (KLR) (18 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 5918 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 3 OF 2023  
EK MAKORI, J  
SEPTEMBER 18, 2024**

**BETWEEN**

**SAFARI KAZUNGU MWAMBIRE ..... 1<sup>ST</sup> APPLICANT  
DAVID UNDA RUWA ..... 2<sup>ND</sup> APPLICANT  
GEDION THOMAS MUZUNGU ..... 3<sup>RD</sup> APPLICANT  
MAURIZE KAZUNGU MUSAJI ..... 4<sup>TH</sup> APPLICANT  
EUNICE DAMA SHARIFU ..... 5<sup>TH</sup> APPLICANT  
GONA MENZA LUGO ..... 6<sup>TH</sup> APPLICANT  
MANYESO KENGA MCHAWA ..... 7<sup>TH</sup> APPLICANT  
DAVID MZUNGU MWAKIPONDA ..... 8<sup>TH</sup> APPLICANT  
STEPHEN KAZUNGU MWAMBIRE ..... 9<sup>TH</sup> APPLICANT  
DAMA CHARO MZUNGU ..... 10<sup>TH</sup> APPLICANT  
KATSAK MWADENA ..... 11<sup>TH</sup> APPLICANT**

**AND**

**ABDUL WAHID MOHAMED SADIQ ..... 1<sup>ST</sup> RESPONDENT  
MOHAMED FAROOQ AZIZ KARAMDIN ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Originating Summons herein dated 17<sup>th</sup> February 2023, filed by the applicants who seek a declaration that they are proprietors of Parcel No. 52 Mambrui Title Number CR. 5535 having acquired the same by way of adverse possession.



2. Despite service, the respondents did not enter appearance nor mount a defence. Consequently, the matter proceeded to a hearing through formal proof on 22<sup>nd</sup> February 2024.
3. Four witnesses testified: Safari Kazungu -PW1, David Ruwa - PW2, Gedieon Muzungu – PW3, and Manyeso Kenga - PW4. Their statements were adopted as evidence in chief. The documents dated 15<sup>th</sup> February 2023 and 12<sup>th</sup> May 2023 were also produced as listed and adopted as the applicants' evidence.
4. They testified that they, along with the other applicants, have lived and occupied land parcel No. 52 Mambrui Title Number CR. 5535, owned by the respondents, for an uninterrupted period ranging between 15 and 28 years.
5. The applicant's Exhibit 1 is the official search demonstrating that the property is indeed registered in the names of the Respondents. Exhibit 2 shows photographs of permanent houses built on the property to show human habitation and farming activities. Exhibit 3 is the Survey Report demonstrating human habitation and farming activities ongoing on the property. The applicants testified that they have peacefully lived on the suit property without let or hindrance for over 20 years, achieving the twelve (12) years threshold for adverse possession. The respondents have never threatened to take legal action against or evict them.
6. Mr. Makworo, learned counsel for the applicants, in his written submissions, argues that for the Court to be satisfied that the applicants have acquired the suit property by way of adverse possession, they must demonstrate that they have been in an open and notorious, continuous, exclusive and actual possession and use of the property for over 12 years. To this end, reliance was placed on the case of *Tabitha Waitherero Kimani v Joshua Ng'ang'a* [2017] eKLR, where the Court enumerated the above ingredients.
7. The issues that fall for the determination of this Court is whether the applicants have proved a case on a balance of probabilities that they have acquired the suit property by way of adverse possession. And who should bear the costs of these proceedings?
8. As correctly submitted by Mr Makworo, learned counsel for the applicants, for adverse possession to attach, the applicant(s) has/have to demonstrate that he/they have been in occupation of the suit property for over an uninterrupted 12 years. In *Kimani Ruchure v Swift Rutherfords & Co. Ltd* [1980], KLR 10 Kneller J. held that:
 

“ the Plaintiffs have 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 persuasion)
9. The doctrine of adverse possession is well laid under the *Limitation of Actions Act*. Section 7 of the said Act places a bar on actions to recover land after 12 years from the date on which the right accrued. Further, Section 13 of the same Act provides that adverse possession is the exception to this limitation:
 

“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.



- (2) Where a right of action to recover land has accrued and thereafter before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- (3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.”

Section 38 of the Act provides 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.”

10. In the case of *Gabriel Mbui v Mukindia Maranya* [1993], eKLR adverse possession was defined as:

“..the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owner’s enjoyment of land for purposes for which the owner intended to use it.”

11. In *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR, the Court of Appeal defined adverse possession as:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or in action of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity, and in extent to show that possession is adverse to the title owner.”

12. Therefore, for one to claim ownership rights to land by way of adverse possession, one must demonstrate:

- i. Continuous possession of the property - there must be no interruption in possession of the suit property.
- ii. The possession of property encroaches on the valid owner’s rights. This may not be the case if the possessor has been rented or received permission from the owner to use it. If either is true, the possession of the land is not truly “adverse.”
- iii. The adverse possessor must not have attempted to hide their possession claim. It must be open and notorious (*kadamnasi* or *kwa uwazi*) in the Swahili language. The possessor must use the property as the owner would without hiding it.



- iv. The property in question must be in the actual possession of the adverse possessor, not the valid owner, for not less than 12 years.
  - v. The adverse possessor must solely and exclusively control the property himself. If the possessor acts as the valid owner in excluding others from possessing the land, the requirements for adverse possession are achieved.
13. The applicants' claim to the suit property by way of adverse possession has not been negated or challenged since the respondents, as stated, did not enter an appearance or place defence.
14. Consequently, the applicants' claim in the Originating Summons dated 17<sup>th</sup> February 2023 succeeds and is hereby upheld as prayed with no order as to costs since the claim was not defended.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 18<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**E. K. MAKORI**

**JUDGE**

**In the Presence of:**

Mr. Makworo, for the Applicants

Happy: Court Assistant

N/A for the Respondent

