



Mutune & 48 others v Numerical Machining Complex Ltd & another (Environmental and Land Originating Summons E025 of 2022) [2024] KEELC 7094 (KLR) (28 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7094 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E025 OF 2022
CA OCHIENG, J
OCTOBER 28, 2024**

BETWEEN

JANE NDULULU MUTUNE & 48 OTHERS & 48 OTHERS & 48 OTHERS & 48 OTHERS & 48 OTHERS APPLICANT

AND

**NUMERICAL MACHINING COMPLEX LTD 1ST RESPONDENT
FELLOW LIMITED 2ND RESPONDENT**

JUDGMENT

1. Through an Originating Summons dated the 31st October, 2022, the Applicants seek the following Orders against the Respondents:-
 - a. Whether the Applicants have acquired title to and are entitled to be registered as proprietors of various land sizes as captioned in the Supporting Affidavit of this Originating Summons in land LR No 26700 situated in Mavoko Municipality in Machakos County and or any subsequent sub- division thereto situated in land LR No 26700 situated in Mavoko Municipality in Machakos County by way of adverse possession.
 - b. Whether the Applicants are entitled to a declaration that they have acquired titles to LR No 26700 situated in Mavoko Municipality in Machakos County by adverse possession and to an order that a Certificate of Title be issued in the name of each Applicant in terms of acreage each Applicant is occupying as the proprietor of LR No 26700 situated in Mavoko Municipality in Machakos County and or any subsequent subdivision thereto.
 - c. Whether the Applicants are entitled to the costs of this suit.
2. The Originating Summons was supported by the Affidavit of the 1st Applicant Jane Ndululu Mutune who swore it on behalf of the other Applicants. She confirms that the Respondent is the owner of land



- parcel LR No 26700 hereinafter referred to as the 'suit land'. She claims they moved and settled on the suit land and constructed houses including other facilities thereon and lived as owners. Further, that this was done purely without the authority or consent of the Respondent. She explains that during the period of their occupation, the Respondent has never done any acts that would disrupt and or interfere with their quiet use and enjoyment of the suit land. She contends that in the course of time, they have exercised ownership over the suit land adversely by carrying out the following activities: constructing both permanent and semi-permanent houses; building schools and churches; constructing roads; rearing livestock; and burying the deceased members of their families.
3. She insists that consequently they are the presumptive owners and have been living peacefully on the suit land and in obedience of the law. She states that the Respondent has now purportedly attempted to initiate mechanism for their removal from the suit land to defeat the claim of ownership and has harassed their members and attempted to viciously eject them, therefrom. She reiterates that the intended eviction and demolition was illegal as they had not been served with any notices as contemplated by law. Further, that the intended and unlawful interference is solely being executed to scare them from advancing their claim of ownership through adverse possession. She reaffirms that their rights of ownership of the suit land has adversely crystallized against the Respondent and the Respondent's unlawful actions of attempting to evict them is in breach of their rights.
 4. The 1st Respondent opposed the Originating Summons by filing a Replying Affidavit sworn by its Managing Director Eng. David Mwadali where he deposes that the said Originating Summons is fundamentally incurable and defective, bad in law, an abuse of the court process, misconceived and ought to be struck out or dismissed. He confirms that the 1st Respondent is a government corporation under the Ministry of Industrialization, Trade and Enterprise Development. Further, that the 1st Respondent applied for and was allotted LR No 11895/20 for the purposes of setting up an Industrial Plan for the Nyayo Pioneer Industry and the permitted user of the same still remains for Industrial purposes. He avers that the 1st Respondent is the legal owner of LR No 11895/20 (I.R No 63767) as delineated on Land Survey Plan Number 190862 measuring approximately 703.59, from 1st May, 1992. He explains that the suit land emanated from LR No 11895/20 (I.R No 63767). Further, that the subdivision of LR No 26700/1 resulted into numerous subdivisions to wit: - LR No 26700/4; LR No 26700/24; LR No 26700/25; LR 26700/26 among others. Further, that LR No 26700/4 was issued with a Deed Plan No 269096 and a title IR No 117308.
 5. He contends that the sale and transfer of LR No 26700/4 to Brenos Limited vide Sale Agreement dated the 1st April, 2003, was authorized by the Company board. Further, a Transfer Instrument was executed by the parties on 10th November, 2009 and lodged at the Lands Registry on 11th November, 2009. He states that vide a letter dated the 20th August, 2021, the 1st Respondent learnt from the Ag. Director of Surveys that the said land parcel LR No 26700/4 was transferred by Brenos Limited to the 2nd Respondent on the very same date it transferred to Brenos Limited. He reiterates that the 1st Respondent's proprietary rights having been extinguished by virtue of the transfer to Brenos Limited, it is procedurally wrong for the Applicants to enjoin it, as a Respondent in this matter.
 6. He avers that the Applicants have never been squatters as they are known individuals with their rural/ ancestral homes. He made reference to the findings of the Taskforce on Irregular Appropriation of public land and the squatter problem in Athi River District which revealed how certain self-help groups invaded its parcels of land being LR No 11895/20 (I.R No 63767) in Mavoko Area culminating in the 1st Respondent obtaining restraining orders on 22nd December, 2010 against the said invaders, vide Machakos HCCC No 252 of 2010. Further, that in the years 2018 and 2019, the then Cabinet Secretary for Lands & Physical Planning Hon. Farida Karoney, OGW vide Gazette Notice No 126623 of 7th December, 2018 and its attendant Gazette Notice No 2924 of 29th March, 2019 respectively, also



- appointed a Taskforce on Current State of Ownership of Land in Mavoko, Machakos County and invasion of squatters, whose report delivered in May, 2019 captures the state of organized land invaders in the said area. He reaffirms that the nature of the structures in the photographs the Applicants have presented in their supporting affidavit reveal individuals who are well organized and are doing well economically/ financially and are illegally as well as irregularly deriving economic benefits from privately owned including government land.
7. The 2nd Respondent opposed the Originating Summons by filing a Replying Affidavit sworn by its director Ramji Devji Varsani where he deposes that the said Originating Summons is a classical example of a fraudulent attempt by unscrupulous land grabbers to illegally and unlawfully steal property from bona fide proprietors. He confirms that the 2nd Respondent is the registered owner of LR No 26700/4 situate in Machakos, measuring approximately 20.24 hectares (suit land). Further, that upon successful registration of the transfer documents, the 2nd Respondent was issued with a Certificate of Title dated the 11th November, 2009. He avers that before purchasing the suit land, the 2nd Respondent conducted due diligence whereupon satisfaction that no third party claims were in subsistence, took vacant possession of the said suit land and has effectively managed it.
 8. He contends that the Applicants have not indicated the date they allegedly took possession of the suit land and merely state that they have been thereon ‘in excess of 25 years’. He insists that as at 1st May, 1992 to 11th November, 2009, the suit land belonged to the 1st Respondent which is a public company incorporated under the Ministry of Industry, Trade and Cooperatives and the Applicants claim of adverse possession must fail as Section 41 of the *Limitation of Actions Act* excludes Public land from such a claim. Further, that the 2nd Respondent has remained in active and peaceful enjoyment and possession of the suit land since 2009 when they purchased it. He states that the 2nd Respondent upon purchasing the suit land in 2009, erected a perimeter wall around it, sunk a borehole and employed a security guard as caretaker of the said property. He confirms that prior to drilling the borehole in the suit land, they applied for hydrogeological survey, obtained all necessary approvals from Mavoko Water & Sewerage Company as well as National Environment Management Authority in 2012. Further, in 2012, they applied for installation of power on the suit land, which was done by Kenya Power and Lighting Company. He reiterates that the suit land remains undeveloped and the annexures JNM/4 in the supporting affidavit do not exist but are mere fabrications of the Applicants’, made with the intention to manipulate the court.
 9. He further confirms that the suit land neighbours Sabaki Police Post, whose officers can confirm that it is vacant. He explains that sometime on 10th October, 2022 some unknown persons in the company of raucous youths invaded the suit land, attempted to subdivide it and make inroads therein, which prompted the 2nd Respondent to file Petition No E014 of 2022 before this court. Further, the 2nd Respondent reported the matter to Athi River Police Station under OB No 51, which matter is still under investigation.
 10. He reaffirms that the 2nd Respondent with the aid of the Area Police, beefed up security on the suit land by having two policemen on site at all times but the Applicants’ have continually attempted to intimidate them, with threats to have them transferred. He further insists that the 2nd Respondent has been in possession of the suit land and at no time has it abandoned it, as alleged by the Applicants.
 11. The Originating Summons was canvassed by way of written submissions.

Submissions

12. The Applicants in their submissions, reiterated their averments as per the Supporting Affidavit, strongly relied on the Site Visit report made by the Deputy Registrar and insisted that the report indeed



confirmed that there were structures on the suit land. Further, that the Respondents had not been on the suit land. They further relied on Sections 7, 13 and 38 of the *Limitation of Actions Act* as well as Order 38 of the *Civil Procedure Rules*. To buttress their averments, they relied on the following decisions: *Kimani Ruchide v Swift Rutherford & Co. Ltd* (1980) KLR; *Gabriel Mbui v Mukindia Maranya* (1993) KLR; *Samuel Miki Waweru v Jane Njeru Richu*, Civil Appeal No 122 of 2001; and *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another* (2015) eKLR.

13. The 1st Respondent in its submissions relied on the averments in their Replying Affidavit including the annexures thereon and contended that it was wrongly enjoined in these proceedings since they did not have any proprietary interest on the suit land. It further submitted that the land held by government was exempted from the operation of adverse possession. Further, that the Applicants had not proved their claim for adverse possession as photographs are not adequate proof of this claim. To support its arguments, it relied on the following decisions: *Kingori v Chege & 3 others* (2002) 2 KLR 243; *Ongwen & another v Keya & Anor* (ELC No E 027 of 2021) (2023) KEELC 279 (KLR) (26 January 2023) (Judgement); *Kasuve v Mwaani Investments Ltd & 4 others* (2004) 1KLR 184; *Civ. App. No 110 of 2016 Richard Wefwafwa Songoi v Ben M. Songoi* (2020) eKLR; *Kio & another* (Suing on behalf of the estate of Mwangi Kioi (Deceased) v Mukolwe (sued as Administrators of the estate of David Nyambu Jonathan Kituri (deceased) & Anor (Application No E010 of 2023) (2023) KESC 53 (KLR) (16th June 2023) Ruling; *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* (2014) eKLR and *Joseph Macharia Kairu v Kenneth Kimani Muiruri* (2021) eKLR.
14. The 2nd Respondent in its submissions provided a background on ownership of the suit land and relied on the averments in its Replying Affidavit. It contended that the Applicants had not proved their claim on adverse possession. Further, that they had not demonstrated how they took possession of the suit land and for how long they had been in possession thereon. It made reference to the findings from the Site Visit and contended that this made the Applicants' alleged occupation in doubt. It further submitted that the Applicants had neither been in possession of the suit land nor had they openly or notoriously used it. It argued that the structures seen during the site visit were hurriedly erected so as to hoodwink the court that the Applicants were in possession of the suit land. Further, that the structures thereon were not able to sustain the families of the forty nine (49) Applicants nor was there evidence of the supporting infrastructure as claimed. It insisted that the Applicants were not entitled to the orders as sought. It sought for the suit to be dismissed with costs. It further sought for the Court to grant orders of vacant possession as against the Applicants or in the alternative for the OCS or OCPD Athi River Police Station to evict them from the suit land. To buttress its averments, it relied on Sections 7, 13, and 38 of the *Limitation of Actions Act* as well as the following decisions: *Mtana Lewa v Kahindi Ngala Mwangandi* (2015) eKLR; *Karnataka Board of Wakf v Government of India & others* (2004) 10 SCC 179; *Ongwen & another v Keya & Anor* (ELC No E 027 of 2021) (2023) KEELC 279 (KLR) (26 January 2023) (Judgement); *Kimani Ruchide v Swift Rutherford & Co. Ltd* (1980) KLR; *Tabitha Waitherero Kimani v Joshua Nganga* (2017) eKLR; *Jasbir Singh Rai & others v Tarlochan Singh Rai & others* (2014) eKLR; *Haraf Traders Limited v Narok County Government* (2022) eKLR; *Charles Langat v Mukesh Kumar Kanthilal* (2021) eKLR and *Ernest Wesonga Kweyu v Kweyo Omuto CA Civil Appeal No 8 of 1990*.

Analysis and Determination

15. Upon consideration of the Originating Summons including the respective Affidavits, annexures as well as rivaling submissions, the following are the issues for determination:-
 - a. Whether the Applicants have acquired the suit land through adverse possession.
 - b. Whether the Originating Summons is merited.



c. Who should bear the costs of the suit.

I will deal with all these issues jointly.

16. In Kenya, the doctrine of adverse possession, is governed by Sections 13 and 38 of the *Limitation of Actions Act*. Section 13 stipulates that:-

“(1) (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 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 afresh 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), the land in reversion is taken to be adverse possession of the land.”

17. While, Section 38 (1) and (2) Limitation of the Actions Act stipulates thus:-

“(1) 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. (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”

18. In the case of *Haro Yonda Juaje V Sadaka Dzeno Mbauro & another* (2014) eKLR, Justice Angote aptly outlined the ingredients of adverse possession and summarized them as follows:-

“a) That one has made physical entry on the land and is in actual possession of the land for the statutory period; b) That the said occupation is non permissive; c) That the occupant has the clear intention of excluding the owner from the property (animus possidendi) ; d) The acts done by the claimant are inconsistent with the owners enjoyment of the land for the purpose which he intended to use it; and e) that the possession was continuous, uninterrupted and unbroken for the statutory period.”

19. While in the case of *Sisto Wambugu v Kamau Njuguna* (1982-888)1KAR Chesoni Ag JA (as he then was) at page 226 favourably cited Lindley MR in *Littledale v Liverpool college* [1900] 1 CH 19, 21 as follows:-

“The same point was made by Bramwell LJ in Leigh v Jack [1879]5 Ex D 264,272, where he said referring to the Statute of Limitation; “Two things appear to be contemplated by that enactment, dispossession and discontinuance of possession. “If this is the right way



to approach the problem, the question becomes “has the claimant proved that the title holder has been dispossessed, or has discontinued his possession, of the land in question for the statutory period?” rather than “Has the claimant proved that he (through himself or others on whose possession he can rely) has been in possession for the requisite number of years?” it certainly makes it easier to understand the authorities if one adopts the first formulation.” (Emphasis added)

20. It is clear that for a party to be successful in a claim for adverse possession, it has to prove the date it entered the disputed land to enable the court to determine when time started running. Further, it has to prove that, it entered the disputed land without permission of its owner, who was aware of their presence on the said land but failed to act. The said possession has been open, continuous, notorious and uninterrupted for a period of 12 years.
21. On when time starts running, the Court of Appeal in the case of *Wines & Spirits Kenya Limited & another v George Mwachiru Mwangi* [2018] eKLR, held inter alia:-

“The law is clear on when time starts running for purposes of adverse possession. The possession or occupation must be with the knowledge of the registered owner (See *Kimani Ruchine & another vs. Swift Rutherford & Co. Ltd* (1980) supra. Time cannot therefore start running until the registered owner becomes aware that there is a trespasser occupying his/her property and does nothing to assert his rights on the property for at least 12 years. That being so, time in this case only started running in 2012. Immediately thereafter, the appellants had the respondent evicted from the suit premises. Even as at the time they filed their claim before the High Court, they had already been evicted. It was evident therefore that the respondent was not in actual possession for over 12 years as alleged.”

22. In this instance, the Applicants have claimed that they moved and settled on the suit land without the authority of the Respondents and had been in quiet use and enjoyment of the said suit land. They insisted that in the course of time, they have exercised ownership over the suit land adversely by constructing both permanent and semi-permanent houses; building schools and churches; constructing roads; rearing livestock; and burying the deceased members of their families.
23. It was their further claim that the Respondent had attempted to unlawfully evict them without ample notice. The Respondents have opposed the Originating Summons and insisted that the Applicants had not been in possession or occupation of the suit land for a period to enable them qualify to be owners of the said suit land through adverse possession. Further, that the photographs attached to the Supporting Affidavit were meant to hoodwink the court. I note this court had directed the Deputy Registrar of this Court who undertook a site visit on 4th July, 2023 in the presence of the Counsels for the Applicants and Respondents and prepared a report dated the 6th July, 2023 to that effect. Both the Applicants and Respondents have sought to rely on the report which excerpt I wish to reproduce hereunder:-

“The property has a perimeter wall....there was a small church christened Upendo Mission Centre within the property. The church known as Nazareth Church as per the photos contained in the Defendant’s documents was seen to be outside the boundaries of the property...There was a fenced portion in one corner of the property with a signage for a proposed public school. ...There was a gentleman who indicated to have been the area chief between the year 1995 and 2014, he informed the court that he had never witnessed any burial take place there. There was no livestock seen but there was a small portion of about 1/8 of an acre that had some growing maize on it. It was noted that there were several



iron sheet structures, quite new/recent going by the state of the iron sheets, only 2 small permanent structures were seen. The ongoing activities noted were the construction of a house at its foundation stage as well as a recently dug trench presumably for the construction of a wall in a portion of the property. One of the Plaintiffs informed the Court that their concern was how the 1st Respondent was able to acquire land that according to them is government land and that their aim was to benefit in equal measure while alleging that they have been thereon since the year 2010. The Officer in Charge Sabaki Police Post Snr Sgt Emmanuel Lubisia informed the court that the land had been vacant with no issues until November, 2022.”

24. In the case of *Wainaina vs. Muarai & others* (1976) KLR 227, the Court observed that:-

“The land or portion of land adversely possessed must be definitely identified, defined or at least an identifiable portion with a clear boundary or identification for this purpose that which can be ascertained is certain that which is definitive. It must at least be plotted that if not certain it can be made certain.”

25. I note the Applicants opted to rely on the Supporting Affidavit of the 1st Applicant and never tendered viva voce evidence to prove their claim. From the averments in the respective Affidavits, I find that none of the Applicants confirmed the exact date they entered the suit land nor the identifiable portion they each occupied. From the report of the Deputy Registrar which I have cited above, I note the local Police confirmed that the suit land had been vacant. Further, it emerged that there was indeed a wall and even with the few structures, there was no indication that the forty nine (49) Applicants had indeed been thereon. In associating myself with the decisions cited above, since the Applicants did not indicate the exact date or year they entered the suit land, I find that they have failed to demonstrate when time began to run to prove their claim for adverse possession. Further, from the aforementioned report, there was no indication of an existing school, roads, graves or rearing of livestock as claimed. Insofar as the Applicants claim to have entered the suit land and have been using it, except for the photos of the few houses, a foundation of a house, and trenches, in my view, I find that they failed to demonstrate the uninterrupted use of the suit land as claimed. I opine that for a party to succeed in a claim for adverse possession, they have to fulfil all the requirements and in the absence of the same, it renders the claim unsuccessful. In the foregoing, I find that the Applicants’ claim for adverse possession over the suit land must hence fail.

26. As to who should bear the costs of the suit. Costs generally follow the outcome of a suit and since the Respondents are the inconvenienced parties, noting that the 2nd Respondent does not even proprietary rights over the suit land and was wrongly enjoined in these proceedings, I will direct that the Applicants do pay the costs of this suit.

27. It is against the foregoing that I find that the Applicants have not proved their case on a balance of probability and will proceed to dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 28TH DAY OF OCTOBER, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Shikanda holding brief for Okwach for 2nd Respondent



Okello for Applicants

Ms. Misiati for 1st Respondent

Court Assistant – Simon/Ashley

