



Kiburio & 2 others v Kiburio & another (Environmental and Land Originating Summons 1292 of 2015) [2025] KEELC 589 (KLR) (13 February 2025) (Judgment)

Neutral citation: [2025] KEELC 589 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 1292 OF 2015**

OA ANGOTE, J

FEBRUARY 13, 2025

**IN THE MATTER OF SECTION 38 OF THE LIMITATION
OF ACTIONS ACT, CAP 33 LAWS OF KENYA**

AND

**IN THE MATTER OF THE CLAIM TO TITLE BY ADVERSE
POSSESSION OVER LAND TITLE NO DAGORETTI/WAITHAKA/930**

BETWEEN

**MONICAH WAIRIMU KIBURIO 1ST APPLICANT
MARION NJERI KIBURIO 2ND APPLICANT
MARGARET WAMBUI KIBURIO 3RD APPLICANT**

AND

**ISAAC GICHUHI KIBURIO 1ST RESPONDENT
PETER KARIUKI KIBURIO 2ND RESPONDENT**

JUDGMENT

Background

1. Vide an Originating Summons dated 15th December, 2015 brought pursuant to the provisions of Section 38 of the *Limitation of Actions Act*, Section 3A of the *Civil Procedure Act*, Section 28 of the *Land Registration Act* and Order 37 Rule 7 of the Civil Procedure Rules, the Applicants seek the following reliefs:
 - i. That the Applicants Monicah Wairimu Kiburio, Marion Njeri Kiburio and Margaret Wambui Kiburio be declared to have acquired title by adverse possession of the suit premises known



as Dagoretti/ Waithaka/930 and the Respondents be ordered to transfer the same to the Applicants jointly.

- ii. That costs for the proceedings herein be borne by the Respondents.
2. The Originating Summons is supported by the joint Affidavit of Monicah Wairimu Kiburio, Marion Njeri Kiburio and Margaret Wambui Kiburio, the Applicants herein of an even date.
3. They deponed that they are all daughters of the late Hezron Kiburio wa Mukanda (now deceased) and the Respondents are their brothers; that land parcel no Dagoretti/Waithaka/930 (hereinafter the suit property) is a sub-division of Dagoretti/Waithaka/383 which originally belonged to their late grandfather, Mukanda Wa Kiburio and that the Respondents inherited their father's share on behalf of the whole family.
4. According to the Applicants, after the death of their grandfather, the Respondents fraudulently had the land parcel Dagoretti/Waithaka/383 registered in their names without their knowledge; that the Respondents subsequently sub-divided the said property into several portions including the suit property which they reside in; that their deceased father used to live on the suit property and that they were all born and brought up thereon.
5. They contended that they are currently all residing on the suit property on which they have constructed their homes, brought up their children and have been tilling; that a family meeting on the 22nd January, 1994 concluded that they were to be allocated the suit property; that the Respondents are trying to evict them after having the suit property illegally registered in their names and that despite demands, the Respondents have refused to allocate the suit property to them.
6. According to the Applicants, they have been in exclusive occupation and possession of the suit property for over 63 years and as advised by Counsel, are entitled to be registered as proprietors thereof by way of adverse possession.
7. Vide a Supplementary Affidavit dated 1st March, 2023, the Applicants, through the 2nd and 3rd Applicants, deponed that after the family concluded that they be allocated the suit property, the Respondents, in the year 1996, wrote to them demanding that they vacate the suit property.
8. They stated that they did not vacate as demanded as they are legitimately entitled to the suit property and that they remain on the property despite attempts by the Respondents to evict them. The Originating Summons was not defended.

Hearing and Evidence

9. The matter proceeded for formal proof hearing on the 25th June, 2024. PW1 was Monicah Njeri Kiburio. She placed reliance on her Affidavit dated 15th December, 2015 as her evidence in chief and the documents annexed thereto as PEXHB1-3. She also adduced the documents annexed to the Supplementary Affidavit dated the 1st March, 2023 as PEXHB-4.
10. Briefly, the Applicants' case as set out in the Affidavit is that they are the rightful owners of the suit property which forms part of the property that originally belonged to their grandfather; that the Respondents, being their brothers inherited their father's portion on behalf of all of them and that the Respondents have fraudulently registered the suit property in their names and tried to have them evicted in 1996.
11. They contended that they have been in open, continuous and exclusive occupation of the suit property for over 28 years after the attempt to evict them by the Respondents and that they have acquired



the property by way of adverse possession. Vide her oral testimony, PW1 stated that her and her co-Applicants have been on the suit property for 63 years and claim the same by way of adverse possession.

Submissions

12. The Applicants filed submissions on 9th October, 2024. Counsel submitted that the pre-requisites for a successful claim of adverse possession were explained in Benjamin Kamau Murima & Others vs Gladys Njeri, C.A No 213 of 1996, which stated that the combined effect of the relevant provisions of Sections 7, 13 and 17 of the Limitation of Actions Act is to extinguish the title of a proprietor of land in favour of an adverse possessor at the expiry of 12 years of possession of that land and that in determining whether the occupation is adverse, one only needs to look at the position of the occupier and if derived without permission from the owner, then it is adverse.
13. Counsel submitted that in the circumstances, the uncontroverted evidence shows that the Applicants have since the year 1996, when the Respondents demanded that they vacate from the suit property thereby withdrawing permission from them, been in open and continuous occupation and possession for over twenty eight (28) years and that the permission having been withdrawn in 1996, time started running and the Respondent's title was extinguished in the year 2008.
14. It was submitted that a party can claim adverse possession against a relative as long as the elements for adverse possession have been met and whereas the parties herein are siblings and the property was previously registered in the names of their deceased grandfather, nothing stops the court from granting the orders sought. Reliance in this respect was placed on the case of John Omuse vs Sifiroa Akumu Oburon[2021]eKLR.
15. Counsel urged that the Applicants have no other recourse considering the fact that the Respondents were registered as proprietors of the suit property way back before 1975 after filing of the succession cause meaning that succession must have been filed before the year 1975 and before the Law of Succession Act was enacted and that the previous law was the kikuyu customary law which discriminated against daughters and a claim under that law would be unsuccessful.

Analysis and Determination

16. Having considered the pleadings and submissions, the sole issue that arise for consideration is whether the Applicants are entitled to L.R Dagoretti/Waithaka/930 by way of adverse possession?
17. The Applicants lay claim to the suit the property by way of Adverse possession. They assert that they were born and have lived on the property, where they now raise their children. They further state that a family meeting held on 22nd January, 1994 resolved that they would be given the suit property. However, they allege that the Respondents, who are their brothers, fraudulently registered the property in their own names and later sought to evict them through a letter dated 6th March 1996.
18. They opine that they have remained in continuous occupation of the property for over 28 years since the withdrawal of permission vide the aforesaid letter and are therefore entitled to ownership of the land by adverse possession.
19. They adduced into evidence the certificate of title in respect of L.R Dagoretti/Waithaka/383 in the names of the Respondents registered on the 13th September, 1993; the green card indicating a subdivision of the parcel into several portions including the suit property registered in the Respondents' names; letter dated the 22nd January, 1994 and the demand letter dated the 6th March, 1996.
20. The Respondents neither entered appearance nor filed any response and the summons proceeded as undefended. Subsequently, the Applicants' allegations remain uncontroverted. This does not however



lessen the burden of proof placed on them. Indeed, the elementary principle of law that he who alleges must prove remains steadfast. The burden of proof is outlined in Section 107(1) and (2) of the [Evidence Act](#), which states that a party seeking Judgment based on asserted facts must prove their existence.

21. Additionally, Sections 109 and 112 elaborate on the evidential burden, specifies that the burden of proving a particular fact rests on the party relying on it unless otherwise provided by law. In civil proceedings, if a fact is especially within the knowledge of one party, the responsibility to prove or disprove it lies with them.
22. The Court of Appeal in *Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & Another* [2014] eKLR while addressing the question of whether the standard of proof shifts in instances where there is no rebuttal by the opposing party stated thus:

“It is a firmly settled procedure that even where a defendant has not denied the claim by filing a defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of rebuttal by the other side.”

23. The court will be so guided by the afore stated principles noting there is no contest regarding the validity of the adduced evidence. The law on adverse possession is provided for under the [Limitation of Actions Act](#). Section 7 of the Act, 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 first accrued to some person through whom he claims, to that person.”

24. Further provisions are made under Section 13 which provides:

- “(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.”



25. And Section 17 of the Act which states:

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”

26. Finally, Section 38(1) and (2) states as follows:

“(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.”

27. The net effect of the foregoing section is to extinguish the title of the proprietor of the land in favour of a party who has been in possession thereof for a minimum period of 12 years.

28. Discussing the concept of adverse possession, the Court of Appeal in *Mtana Lewa vs Kahindi Ngala Mwangandi* [2015] eKLR stated thus:

“Adverse possession is essentially a situation where a person takes possession of land, 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 12 years.”

29. As regards the elements, the Court of Appeal in the case of *Richard Wefwafwa Songoi vs Ben Munyifwa Songoi* [2020] eKLR explained as follows:

“A person who claims adverse possession must inter alia show:

- (a) on what date he came into possession;
- (b) what was the nature of his possession;
- (c) whether the fact of his possession was known to the other party;
- (d) for how long his possession has continued; and
- (e) that the possession was open and undisturbed for the requisite 12 years.”

30. Earlier on, the Court in *Gabriel Mbui vs Mukindia Maranya* [1993] eKLR gave a thorough and exhaustive explanation of these elements thus:

“i. The intruder must make physical entry and be in actual possession for the statutory period. Time does not begin to run unless there is some person in adverse possession of the land and time does not begin to run merely because the land is vacant, adverse possession rests on the de facto use and occupation by an entrant. There must be actual possession which requires some with sufficient degree of physical occupation for 12 years.



- ii. The entry and occupation must be with, or maintained under, some claim or color of right or title, made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else. In other words the intruder must have some apparent title, the appearance of title but not the reality of it. He must have with him his own apparent right which affords him some semblance of title under which he claims to found his occupation of the land independently of anyone else's power.
- iii. The occupation of the land by the intruder must be without permission from the true owner of the land. Permissive occupation or where possession was consensual or contractual cannot be called adverse. Any kind of permissive use, as a tenant, licence, contract purchaser in possession, or easement holder is rightful and not hostile. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive and with an evinced unmistakable animus possidendi that is to say, occupation with the clear intention of excluding the owner as well as other people. Exclusive possession means that the exercise of dominion over the land must not be shared with the owner....”
- v. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner, unless the acts be done are inconsistent with the owner's enjoyment of the soil for the purpose which he intended to use it. He must show that his possession was of such a nature and involved the exercise of rights so irreconcilable with those claimable by the owner of the land, and gave rise to a cause of action or right to sue for possession throughout the 12 years. Where the true owner of land intends to use it in the future for a particular purpose, but has no immediate use for it so leave is unoccupied does not lose his title to it simply because someone enters on it and uses it for some purpose not even if this purpose continues year after year for 12 years or more (see Leigh V Jack 1879 5 Ex D 264) The reason being by using land knowing it does not belong to him, he assumes the owner permits it and by not turning him off the owner impliedly gives him permission. Where the true owner can make no immediate use of the land, as the years go by it cannot be said he would lose his rights as an owner merely by reason of acts of trespass. Time therefore does not run against a true owner whose purposes are not prejudiced by the intruder's acts.
- vi. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice by the owner and the community of the exercise of dominion over the land. The owner has an opportunity to notice the intruder if reasonable inspection is conducted. There must be a denial of the owner's right by an open assertion of a hostile title by the person setting up adverse possession and there must be notice of the denial to the owner, either given directly or inferred from notorious acts and circumstances. So notorious must be the overt acts of ouster that there must be nothing that would lead the owner to suppose that his rights remain intact.
- vii. The possession must be continuous, uninterrupted, unbroken for the necessary statutory period. The possession by the adverse possessor must continue without significant interruption for a solid block of time at least so



long as the period of limitation being at the moment 12 years before filing of the suit. The test is whether the adverse possessor used the land as a true owner would. There are a number of ways in which adverse possession which has begun to grow may be interrupted. Possession may be interrupted:-

- a) By the physical entry upon the land by any person claiming the land in opposition to the person in actual possession with the intention of causing interruption.
 - b) By the institution of legal proceedings by the rightful owner to assert his right to the land; or
 - c) By any acknowledgement made by the person in possession, to any person claiming to be the rightful proprietor, that such claim is admitted or otherwise recognized.
- viii. The rightful owner against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, during the statutory period. If at any time in the course of the running of the time he had no right to claim possession, or he was under a disability or legal impediment, time does not run against him during that spell. The true owner must have the right to immediate possession during the 12 years and if he has no right to immediate possession it is practically immaterial to him who is in possession. Having no right himself to possession, he cannot eject the person in possession.
- ix. The rightful owner must know that he is ousted, he must be aware that he has been disposed or he must have parted and intended to part with possession. Just as the adverse possessor cannot succeed if he did not know he was in actual possession of another's land, the owner who had not intended to part with possession or is unconsciously dispossessed cannot be said to have been evicted or have quit the land."

31. The Court is so guided.
32. As stated earlier, the Applicants claim ownership of the suit property based on adverse possession. It is their case that they are rightfully entitled to the suit property stating that the Respondents inherited their father's share from their grandfather on behalf of the entire family, including themselves. Further, that their entitlement to the property was affirmed vide a family meeting held on 22nd January, 1994.
33. This dual claim raises a fundamental question, can a party who claims to be a rightful beneficiary of property, also lay claim thereto by way of adverse possession.?
34. The doctrine of adverse possession is premised on the idea that a person occupies land openly, exclusively, and continuously for the prescribed statutory period, without the permission of the legal owner, and in a manner that is hostile to the owner's rights. On the other hand, a claim as a beneficiary is a claim of legitimate ownership of the property. The two positions are at variance.



35. Speaking to this, the court in *Saju vs Baker & 2 Others* (Environment and Land Case Civil Suit E008 of 2023) [2023] KEELC 21837 (KLR) (23 November 2023) (Ruling), persuasively stated:

“ Suffice it to state that one cannot purport to hold and/or lay a claim as an heir, beneficiary and/or administrator on one hand; and on the other hand, purport to stake a claim founded on adverse possession.

Notably, the claim of beneficial interests and/or ownership, cannot co-exist with one based on adverse possession. To be precise, a claim for adverse possession is antithetical to one based on administration [based on a Grant of Probate].”

36. In the case of *Richard Wefwafwa Songoi vs Ben Munyifwa Songoi* [2020]eKLR, the Court of Appeal held as follows:

“ The appellant testified that he started using the suit property when he was given by his father. In the same vein, the appellant claims title to the parcel by way of adverse possession. The appellant’s claim is founded on title by way of gift from his father. He prevaricates and lays claim to the land parcel by way of adverse possession against the respondent. The pleas of title and a claim for adverse possession are mutually inconsistent and exclusive.”

37. The court concurs. A claim for adverse possession cannot simultaneously lie with one of being a beneficiary. It is also trite that in claims of adverse possession, a claimant must first concede to the legality of the title held by the registered owner as to do otherwise would make the claim of adverse possession legally unsustainable. In arriving at this position, the court adopts the holding by the Court of Appeal decision in *Catherine Koriko & 3 Others vs Evaline Rosa* [2020] eKLR where the court stated as follows:

“ In *Haro Yonda Juaje vs Sadaka Dzenge Mbauro & Kenya Commercial Bank* (2014) eKLR it was stated:(29)One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession.”

38. In the circumstances, not only do the Applicants claim to be legitimate beneficiaries of the suit property, they assert that the registration of the title to the suit property in the Respondents’ names was actuated by fraud.

39. As to the plea presented by Counsel, asserting that the Applicants have no other recourse due to the historical registration of the Respondents as proprietors and the applicability of Kikuyu customary law, does not overcome the fundamental legal inconsistency in the Applicants’ claims.

40. In any event, siblings living on their father’s land are on the land because they were born there. Their being on the land can never be adverse to their father or beneficiaries. In view of the foregoing, the court finds the Applicants prayer for title by way of adverse possession to be untenable and unmerited.

41. Ultimately, the court makes the following final disposal orders:

- i. The Originating Summons dated 15th December, 2015 be and is hereby dismissed.
- ii. As the summons was undefended, the Applicants shall bear their own costs.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 13TH DAY OF FEBRUARY, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Gachuhi for Applicant

No appearance for Respondent

Court Assistant: Tracy

