



**Kimani v Kabugua (Environmental and Land Originating Summons  
E009 of 2023) [2024] KEELC 6931 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6931 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E009 OF 2023  
LN GACHERU, J  
OCTOBER 17, 2024  
IN THE MATTER OF AN APPLICATION FOR ADVERSE POSSESSION  
AND  
IN THE MATTER OF LAND PARCEL NUMBER LOC.6/KANDANI/255  
AND  
IN THE MATTER OF SECTION 30 (F) OF THE REGISTERED LAND ACT  
(REPEALED) AND SECTION 28 (L) OF THE LAND REGISTRATION  
ACT, 2012 AND SECTIONS 13, 37 AND 38 OF THE LIMITATION OF  
ACTIONS ACT CAP 22 LAWS OF KENYA**

**BETWEEN**

**KAMANDE KIMANI ..... APPLICANT**

**AND**

**NJOGU KABUGUA ..... RESPONDENT**

**JUDGMENT**

1. The Originating Summons herein is dated 28<sup>th</sup> August, 2024, which is brought under Order 37 Rule 7, of the Civil Procedure Rules, by the Plaintiff/ Applicant Kamande Kimani, wherein he has sought for Judgement against the Respondent for these orders: -
  1. That the Applicant is entitled to be registered as the legal owner of land parcel number LOC.6/ Kandani/255, measuring 0.4 Acres under Section 38 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya, having openly and exclusively possessed, occupied and utilized the said land for a period of over 12 years immediately preceding the presentation of this summons in Court.



2. That the Respondent's title to the land herein has been extinguished by the applicant's possession and occupation by way of Adverse Possession by operation of the law.
  3. That the Applicant be registered as the owner of land parcel number Loc.6/Kandani/255, and the Land Registrar Murang'a do effect such registration in accordance with the Order of the Court.
  4. The costs herein be provided for.
2. This Originating Summons is premised on the Supporting Affidavit of Kamande Kimani (the Applicant herein) sworn on 28<sup>th</sup> August 2024, wherein he averred that he has resided on the suit land, Loc.6/kandani/255 (the suit property), measuring approximately 0.4 Acres since year 1976, together with his family.
  3. It was his further contention that he purchased the suit property from the registered owner, Njogu Kabugua(Respondent herein), in year 1975, and his occupation of the said land has been open, exclusive and uninterrupted since 1976. Further, that he has cultivated the suit land for over 40 years, and has planted mature trees and subsistence crops thereon.
  4. The Applicant further averred that despite the Respondent/registered owner having given an undertaking before the local administration to transfer the suit property to the Applicant's name, he has neglected to do so, hence the present suit.
  5. He urged the Court to direct that he be registered as the proprietor of the suit property, having occupied, possessed and utilized the same as his own property for more than 40 years.
  6. The Respondent did not Enter Appearance nor file any Response to the Originating Summons. The Applicant filed a Return of service which this court has considered and is satisfied from the said Return of Service on record that the Respondent was notified of the present proceedings. Since the Respondent did not enter appearance nor defend the suit, the suit proceeded for formal proof by way of viva voce evidence.

### **The Applicant's Case**

7. PW1 Kamande Kimani, the Applicant herein testified that he is a peasant farmer and lives in Kandani area, Murang'a County. He also testified that the Respondent is well known to him, and that according to his National Identity Card, he was born in year 1943. He adopted his Witness Statement as his evidence in Chief, and produced his list of documents as exhibits.
8. Further, the Applicant testified that he paid the entire purchase price in respect of the suit land in year 1976. However, the Respondent did not give him the title document, nor did he obtain the title deed thereto. It was his further testimony that the Respondent has refused to have the suit property transferred to his name.
9. Further that he instituted a suit before the Land Disputes Tribunal (LDT), following the Respondent's refusal to transfer the suit land to him. That he entered the suit property in year 1976, and has built his family home thereon, and the Respondent has never demanded or requested him to vacate the suit land, nor has he refunded the purchase price already paid. It was his further testimony that the Respondent owns a separate parcel of land, on which he lives.
10. After the close of the Applicant's evidence, he filed written submissions, which the court has considered and summarizes as below;



11. In his written submissions dated 11<sup>th</sup> April, 2024, and filed through the Law Firm of Kirubi, Mwangi Ben & Co Advocates, the Applicant submitted that the Respondent was served with the instant Originating Summons and subsequently with various hearing and mention notices, but he did not enter appearance in the suit nor file a defence; therefore, the matter proceeded as a formal proof.
12. The Applicant further submitted that according to the entries appearing on the Green card of the suit property which forms part of his exhibits before the Court, the Respondent was registered as the proprietor of the suit land on 14<sup>th</sup> November 1969, being the first registered owner thereof.
13. He further submitted that on 8<sup>th</sup> July 1976, he executed an agreement for the disposal of the suit property with the Respondent herein, and paid the entire agreed-upon purchase price of eight (8) goats and three (3) rams, which mode of payment was notorious and rampant at the time. It was his further submission that he took possession of the suit property immediately upon completing payment of the purchase price in the same year 1976.
14. Further, that thereafter, the Respondent refused to transfer the suit land to him as contracted, and he became evasive, which led to the Applicant to seek the assistance of the local District Officer, and local Land Disputes Tribunal, all in an effort to have the Respondent effect the said transfer, which overtures did not bear fruits, hence the instant suit.
15. The Applicant argued that the Respondent, by not defending this suit, has demonstrated that he sold the suit property to the Applicant. Moreover, the Respondent currently resides on a separate parcel of land.
16. The Applicant asserted that he approached this Court through the instant suit to enforce his prescriptive rights over the suit property, pursuant to the provisions of Section 28 of the [Land Registration Act](#), as read together with Sections 13, 37 and 38 of the [Limitation of Actions Act](#).
17. The Applicant reiterated that he has been in occupation of the suit property in excess of the Statutory period of 12 years, and thus is entitled to be declared as the registered owner of the said land under the doctrine of adverse possession.
18. For the above submissions, reliance was placed in the holding of the Court in the following cases: Wilfred Kagonye Babu vs Henry Mose Onuko (2019) eKLR; Wambugu vs Njuguna (1983) KLR 172; and, Cathy Alucia Kiplagat vs Vincent Komen Kielnut (2018).
19. This court has carefully considered the available evidence, the written submissions and the relevant provisions of law, and finds the issues for determination are as follows; -
  - i. Whether the Applicant is entitled to the Orders sought.
  - ii. Costs of the suit.

**i). Whether the Applicant is entitled to the Orders sought.**

20. As the court had observed earlier, this suit was undefended and it proceeded by way of formal proof. However, even with uncontroverted evidence, the burden of proof is still on he who has alleged and on the required standard. The Applicant has alleged, and thus the onus was upon him to call sufficient evidence and prove his case as be the laid down standard, balance of probabilities.



21. In the case of *Rosaline Mary Kahumbu v National Bank of Kenya Ltd* [2014] eKLR, the Court understood the meaning and import of the term “formal proof” as follows:

“In contrast, at a formal proof hearing, if the party with the onus of adducing evidence fails to satisfy the truth threshold, the matter would stand to be dismissed on the basis that it was unmeritorious and did not raise sufficient proof of any issues of fact or law. It would be heard and determined on its merits.”

22. Further, in the case of *Samson S. Maitai & Another v African Safari Club Ltd & Another* [2010] eKLR, the Court opined as follows: -

“..... I have not seen a judicial definition of the phrase "Formal Proof". "Formal" in its ordinary Dictionary meanings - refers to being "methodical" according to rules (of evidence). On the other hand, according to Halsbury's Laws of England, Vol. 15, para, 260, "proof" is that which leads to a conviction as to the truth or falsity of alleged facts which are the subject of inquiry. Proof refers to evidence which satisfies the court as to the truth or falsity of a fact. Generally, as we well know, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden passes to the other party who will fail unless sufficient evidence is adduced to rebut the presumption.”

23. Notwithstanding the fact that the suit herein is undefended, the Applicant had the onus of adducing such sufficient evidence as to satisfy the Court as to its truthfulness, pursuant to the provisions of Sections 107, 108 and 109 of the [Evidence Act](#).

24. The Applicant stated and adduced evidence that on 8<sup>th</sup> July, 1976, he executed an Agreement to purchase the suit property with the Respondent. Further, that he entered into the suit land immediately upon delivering the full purchase price thereof to the Respondent in year 1976. It is clear that his entry onto the suit property was permissive and arose out of a sale agreement.

25. In the case of *Stephen Mwangi Gatunge v Edwin Onesmus Wanjau (Suing in her Capacity as the Administrator of the estates of Kimingi Wariera (Deceased) and of Mwangi Kimingi (Deceased)* [2022] eKLR, the Court declared as follows:

“The Applicant’s occupation having been permissive, it will follow that a claim for adverse may not issue. However, Courts have found that such claim can be sustained after payment of the last installment.”

26. The Applicant is claiming to be entitled to the suit property pursuant to the doctrine of prescriptive rights/adverse possession. The law on adverse possession is provided for under the [Limitation of Actions Act](#). Section 7 of the Act [Limitation of Actions Act](#) stipulates 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. Section 13 “(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”.
27. Section 17 of the [Limitation of Actions Act](#) extinguishes the rights of a registered owner, where there is a successful claim for adverse possession. Section 38 of the [Limitation of Actions Act](#) provides 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.”
28. In the case of [Mtana Lewa v Kabindi Ngala Mwangandi \[2015\] eKLR \(Malindi App No. 56 of 2014\)](#), the Court declared 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 nor 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.”
29. Further, in the case of [Samuel Kihamba v Mary Mbaisi \[2015\] eKLR Kisumu Civil Appeal No. 27 of 2013](#), the Court held:
- “Strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land”.
30. Again, in [Richard Wefwafwa Songoi v Ben Munyifwa Songoi \[2020\] eKLR](#), the Court of Appeal held that a person claiming Adverse Possession needs to establish the following:
- 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.



31. The Applicant attached a copy of the Green card to the suit property wherein, it is shown that the Respondent was registered as the proprietor of the suit land on 14<sup>th</sup> November 1969, being the first registered owner thereof. The Court is satisfied that the Applicant has conclusively established that the suit property is registered in the name of the Respondent.
32. Further, the Applicant attached a Sale Agreement written in the Kikuyu language dated 8<sup>th</sup> July 1976, and which was accompanied by a translation of the same to English Language, and a Certificate of translation thereto. From the above document, it stated that the Respondent disposed the suit property to the Applicant on 8<sup>th</sup> July 1976, for entire purchase price of eight (8) goats and three (3) rams. There was no dispute that the entire purchase price was paid and time started to run once the full purchase price was paid see the case of Gabriel Mbui vs Mukindia Maranya (1993) eKLR, the Court reasoned as follows:
- “Where adverse possession arose out of a sale of agreement under which the payment of the purchase price by the adverse possessor was by installments, and the agreement fails, the period of limitation affords an action for adverse possession only after the last and final payment has been made to complete the agreed purchase price. The period of limitation starts to run on the date of the payment of the last installment of the purchase price...”
33. Furthermore, in the case of Civil Appeal No. 73 of 1982 Between Public Trustee and Wanduru Ndegwa eKLR, the Court stated as follows:
- “The position of a vendor and a purchaser of registered land is this. The vendor as the registered owner retains the legal estate and becomes the trustee of it for the purchaser when the purchaser pays a deposit for it. The vendor retains a lien on the property for the balance of the purchase money which disappears when it is paid and the purchaser then becomes the sole beneficial owner and the vendor becomes a bare trustee for the purchaser. If the vendor trustee allows the purchaser cestui qui trust to remain in possession, the latter is in adverse possession because the vendor as the absent registered owner always retains the legal estate and this prima facie entitles him to resume possession from the purchaser in possession.”
34. Similarly, in the case of Gatu v Kimani & 2 others (Environment & Land Case 16 of 2020) [2023] KEELC 20883 (KLR) (18 October 2023) (Judgment) the Court declared as follows:
- “In this case the Applicant paid the full purchase price in 1986 therefore he becomes a person in whom the period of limitation runs from 1986 and by 1998 adverse possession had crystallized in favour of the Applicant.”
35. The Applicant further annexed photographs of a semi-permanent house and mature trees located on the suit property, as part of his Exhibits. He also claimed and testified that he constructed the house erected on the suit property, and that he has continued to live thereon, occupy and possess the said land.
36. Therefore, the said construction and occupation was inconsistent with the owners possession of the suit land. The Applicant dispossess the owner of the suit land. See the case of Wambugu vs Njuguna [1983] KLR 172, where the Court held that:
- “In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts



which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.”

And that:

“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”

37. Upon careful evaluation and consideration of the totality of the pleadings, exhibits, oral testimony and submissions placed before the Court, it is the finding and holding of this Court that the Applicant has demonstrated that he has been in open, continuous and uninterrupted occupation of the suit property in excess of the statutory period of 12 years. Therefore, he is entitled to a declaration that he is entitled to the ownership of the suit land under the doctrine of prescriptive rights/adverse possession.
38. Having evaluated the evidence as above, the court finds and holds that the Applicant has proved his case against the Respondent on the required standard of balance of probabilities. Accordingly, the Court enters judgement for the Applicant against the Respondent herein in terms of prayers No (1), (2) and (3), of the Applicant’s Originating Summons dated 28<sup>th</sup> August 2024.
39. On the issue of costs, the court will be guided by section 27 of the *Civil Procedure Act*, where costs are granted at the discretion of the court, but ordinarily follow the event. It is also trite that costs are granted to the successful litigant, and the Applicant herein has succeeded in his claim. If the Respondent had transferred the suit land to the Applicant, there would have been no need to file the suit herein. Consequently, the Applicant is entitled to costs of this suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 17<sup>TH</sup> DAY OF OCTOBER 2024.**

**L. GACHERU**

**JUDGE**

**17/10/2024**

**Delivered online in the presence of:**

Joel Njonjo – Court Assistant

Mr. Kirubi for the Plaintiff/Applicant

Defendant - Absent

**L. GACHERU**

**JUDGE**

**17/10/2024**

