



**Namakhuli & 3 others v Warunga (Enviromental and Land Originating Summons  
E002 of 2023) [2024] KEELC 6820 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6820 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2023**

**EC CHERONO, J**

**OCTOBER 17, 2024**

**IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP 22, SECTIONS  
5,7 & 17 AND SECTIONS 36 & 38 OF THE CIVIL PROCEDURE RULES**

**AND**

**IN THE MATTER OF LAND PARCEL NO. NDIVISI/MAKUSELWA/406**

**BETWEEN**

**ALUMINAH NAMAKHULI ..... 1<sup>ST</sup> APPLICANT  
ELIZABETH NANJALA WANYAMA ..... 2<sup>ND</sup> APPLICANT  
PRISCILA ISISKA MCHEYWA ..... 3<sup>RD</sup> APPLICANT  
ALICE NANYAMA MCHEYWA ..... 4<sup>TH</sup> APPLICANT**

**AND**

**WENANI IMIYU WARUNGA ..... RESPONDENT**

**JUDGMENT**

1. By an Originating summons dated 29<sup>th</sup> August, 2023 the Applicants seek for determination of the following questions;
  - a. That the Applicants be declared the owners of the land parcel measuring approximately 6.4 acres to be curved out of Land Parcel No. Ndivisi/Makuselwa/406 which she has been in adverse possession of having occupied the same for a period of over 12 years.
  - b. That an order that the Applicant has been entitled to and should be registered as the owner of a piece of land measuring approximately 6.4 acres comprised in Land Parcel No. Ndivisi/Makuselwa/406 respectively by operation of the law viz section 7, 17 and 38 of the Limitation of Actions Act (Cap 22 Laws of Kenya) in the place of the Respondent.



- c. That the Respondents Name on the said parcel of land be removed and cancelled on the said land parcels measuring approximately 8 acres comprising Land Parcel No. Ndivisi/Makuselwa/406 and the 6.4 acres be jointly registered in the name of the Applicants and the rest to remain in the name of the Respondent herein.
  - d. That in the alternative and without prejudice to paragraph 1,2,3 & 4 above (questions to be determined) a declaration that the Respondent holds title to 6.4 acres to be carved out of Land Parcel No. Ndivisi/Makuselwa/406 in trust and for the benefit of the Applicants.
  - e. That costs of this originating summons be provided for and be borne by the Respondent.
  - f. That this court to grant any other relief that it may deem proper and fit to grant.
2. The basis of the Applicants claim is contained in the grounds apparent on the face of the application and the supporting affidavits by the Applicants all sworn on 29<sup>th</sup> August, 2023. The deponent stated that she was the 2<sup>nd</sup> wife of one Wanyama Walusa Wambulwa Waluke and the other Applicants are her co-wives. That the Respondent is the registered owner of land parcel Land Parcel No. Ndivisi/Makuselwa/406(hereinafter 'the suit land'). It is deposed that in 1969, the Applicants husband purchased the entire suit land measuring approximately 8.1Ha from the Respondents father namely Wenani Werunga at a consideration of Kshs.2,000/= and vacant possession was handed over to him.
  3. The Applicants stated that their husband did not obtain title but placed a caution to protect his interest in the land and that sometime in the year 1980, the Respondent and his siblings fraudulently obtained title of the suit land without first obtaining letters of administration and despite the caution in place. They further stated that despite obtaining title to the suit land, the Respondent and his siblings never took possession of the same. It was their case that their late husband had sued the Respondent before the Ndivisi Land Disputes Tribunal in Tribunal case no. 1 of 2006 which award was adopted by the Magistrate court in Webuye SRMC Misc. Civil case no. 13 of 2006. They stated that the Tribunal issued directions that their husband be registered as the owner of the suit land. The Applicant argued that they have lived in the suit land openly, notoriously, continuously and uninterrupted for over 50 years and have extensively developed the land by constructing both permanent and semi-permanent houses.
  4. The Respondent filed a replying affidavit sworn on 13/09/in defense to the claim sworn on 3<sup>rd</sup> October, 2023. It was averred that the suit land is registered in his name and that of his brothers John Juma Wenani, Barasa Wenani, Wafula Wenani And Wamalwa Wenani and that the said land does not form part of the estate of Wanyama Walusaka Wambulwa-dcd. He deposed that the Respondent herein is a decree holder in Webuye ELC No. E006 of 2022 between him and the 1<sup>st</sup> widow of the deceased namely Joice Nasimiyu Wanyama who is next of kin/ 'grant holder' of the estate of Wanyama Walusaka Wambulwa-dcd. He stated that the Applicants children are said to have applied for letters of administration in succession cause No. E003 of 2022 which were revoked. He further deposed that the applicants through their sons also sought for stay in Webuye ELC No. E006 of 2022. The Respondent argued that this suit is in bad taste and that litigation should come to an end.
  5. When the matter came for pre-trial directions, the parties confirmed that that they had complied with Order 11 of the Civil Procedure Rules and that the suit was ripe for hearing. The court certified this case as ripe for hearing and thereafter set it down for hearing. The Applicants called seven (7) witnesses while the Respondent called two (2) witnesses
  6. PW1 Aluminah Namakhuli adopted the applicants joint statement dated 16/3/2024 as her evidence in chief and produced into evidence a list of documents of an even date as PExhibit 1-5. She reiterated



- the averments in the originating summons and supporting affidavit and added that she is entitled to the suit land having resided therein for over 50 years. In cross-examination it was her testimony that her late husband purchased the suit land in the year 1969 and she has lived there since the year 1970.
7. PW2 Elizabeth Nanjala, Pw3 Priscila Isiska Mcheywa, Pw4 Alice Wanyama Mcheywa, Pw5 Lawrence Siundu, Pw6 Alfred Mamalo Masinde, Pw7 Eliab Masinde Panda adopted their respective witness statements dated 16/3/2024 as their evidence in chief reiterated the evidence as stated by PW1.
  8. DW1 Simiyu Wenani Werunga adopted his replying affidavit dated 3/10/2023 and witness statement dated 8/4/2024 as his evidence in chief. He produced into evidence his list of documents dated 8/4/2024 which contained 12 items as DExhibit 12. It was his evidence that together with his co-proprietors they became registered owners through transmission in the year 1980 after a Kimili Succession Cause no. 7 of 1997. He confirmed that the Applicant lives on the suit land. In cross-examination he testified that he left the suit land in the year 1969 and has never occupied the same since then. He testified that the Applicant took possession of the suit land in 1969 to date.
  9. It was his evidence that he sued one of the widows of Wanyama Walusaka Wambulwa-dcd but has never sought to evict the Applicants from the suit land. He confirmed before they were registered as proprietors of the suit land the Applicants' family had placed a caution. He also confirmed that the green card does not speak on how they became registered owners in the year 1980. The witness testified that he is the sole Applicant in Webuye PMCC Case No. E006 of 2022 where he has sued one Joice Nasimiyu. In re-examination he stated that despite being registered amongst others, the Applicants have only filed a case against him. It was his evidence that the suit land had been divided amongst the proprietors Simiyu Wanani Werunga, John Juma Wenani, Barasa Wenani, Wafula Wenani and Wamalwa Wenani as follows: 2 acres, 2 acres, 2 acres, 1.1 acres and 1.1 acres respectively.
  10. DW2 Wamalwa Wenani adopted witness statement dated 8/4/2024 as his evidence in chief. He testified that he was amongst the registered proprietors of the suit land. He testified that the other co-proprietors are since deceased and that he and his brother were joint proprietors. The witness testified that together with the Respondent they wanted 3 acres for themselves and 5 acres to go to Joice Nasimiyu.
  11. Directions were taken for parties to file submissions. The Applicants filed submissions dated 24/6/2024 where they urged the court to allow their claim. The Respondent on his part filed submissions dated 18<sup>th</sup> June, 2024 where he stated that the Applicant did not establish his case and the same ought to be struck out.

### **Analysis And Determination**

12. Adverse possession is a doctrine where a person obtains legal title to land by operation of law through actual, open and continuous occupation of it to the exclusion of the registered owner for a prescribed period. In Kenya, the prescribed period is 12 years. The doctrine is anchored on Section 7, 13 and 38 of the *Limitation of Actions Act*. Section 7 provides that:

“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 of the *Limitation of Actions Act* 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 this Act referred to as adverse possession), 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 cease 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 purpose 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.

The procedure for seeking relief on a claim based on adverse possession is provided for in Section 38 of the *Limitation of Actions Act* and Order 37 of the Civil Procedure Rules, 2010 Section 38 (1) provides;

- (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 sub-section (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

And Order 37 Civil Procedure Rules provides

- “(1) An Application under Section 38 of the *Limitation of Actions Act* shall be made by Originating Summons
- (2) The summons shall be supported by an Affidavit to which a certified extract of the title to the land in question has been annexed.”

13. From the pleadings filed herein, evidence adduced and submissions made by and on behalf of the parties, the one issue that arises for this court’s determination is whether or not the Applicant has acquired title to the suit land by operation of law through the doctrine of adverse possession.

14. It is trite that a claim for adverse possession is attached to land and not title. This was the position in *Maweu VS Liu Ranching & Farming Cooperative Society* [1985] eKLR as quoted in Civil Appeal No 164 of 2011 *Gachuma Gacheru VS Maina Kabuchwa* [2016] eKLR where the Court held;

“Adverse possession is a fact to be observed upon the land. It is not to be seen in a title”

15. It is the Applicant’s case that they have been in continuous uninterrupted occupation and possession of the suit property for a period of over 50 years which is well in excess of 12 years. They averred that they first came into possession after their deceased husband purchased the suit land from the Respondent’s Father in the year 1969 who gave them vacant possession. The Respondent admitted that he was not in possession of the suit land having vacated in the years 1969. It is also not in contention that the Applicants who are in possession of the suit land have constructed their houses thereon.



16. The burden of leading the Court to ascertain the Applicant's claim lies with the Applicants themselves. This Court concurs with the sentiments of Justice Kuloba J, (as he then was,) in Nairobi Civ No. 283 of 1990 *Gabriel Mbui v Mukindia Maranya* [1993] Eklr, where the Court held:

“The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown”

17. The law on Adverse Possession is well settled and the essential requirements that one has to meet in order to succeed in an application for Adverse Possession have been discussed by Superior courts. The ingredients were discussed by the court of Appeal in the case of *Wilson Kazungu Katana & 101 others v. Salim Abdalla Bakshwein & another* [2015] eKLR where the court defined what constitutes adverse possession as follows:-

“From all these provisions, what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner. This concept of adverse possession has been the subject of many discourses and decisions of this Court. Suffice to mention but two, *Kasuve v Mwaani Investments Limited & 4 others* [2004] 1KLR 184 and *Wanje v saikwa (2)* (supra). In the first decision, the court was emphatic that in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of twelve years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition. In the *Wanje* case, the Court went further and took the view that in order to acquire by statute of limitations a 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 and that what constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use. Further, the court opined that a person who occupies another's persons land with that person's consent, cannot be said to be in adverse possession as in reality he has not dispossessed the owner of the land and the possession is not illegal.

18. As mentioned earlier, the Applicants took possession and occupation of the suit land after their husband purchased it from the Respondent's father. In this regard, I am guided by the case of *Wambugu -vs- Njuguna* (1983) KLR 173 where the Court interalia held thus:-

“Where a claimant pleads the right to land under an agreement and in the alternative seeks an order on subsequent adverse possession, the rule is: the claimant's possession is deemed to have become adverse to that of the owner after payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve years after such payment”.

19. From the evidence on record, the Respondent did not controvert the Applicants' contention that their husband purchased the suit land from his late father nor raised any objection that the consideration of Kshs. 2,000/= as indicated in the agreement dated 23/1/1969-PExhibit 2 was not paid. It is therefore



my considered view that the Applicants were given vacant possession of the suit land in the year 1969 and applying the principle espoused in the case of Wambugu -vs- Kamau (supra), the period of limitation started to run in favor of the Applicants from 23/1/1969 so that as at 29/8/2023 when the suit was filed, the Applicants have been in adverse possession of the suit land for a period of over twelve years and had become entitled to be registered as the owner of the land.

20. The Respondent conceded in evidence that the Applicants occupation and possession was continuous and was uninterrupted having stated that since their departure in 1969 they have never returned to the suit land and that the Applicants are in occupation to date. The Respondent produced a green card and a copy of certificate of search as DExhibit 1 &2 which indicates that he and others were registered as the proprietors of the suit land in the year 1980. Over the entire period since they became the registered owners in 1980, neither of the registered owners have taken any legal steps to enforce their alleged rights over the suit land.
21. It has come to the attention of this court that the Respondent filed an eviction case against one Joice Nasimiyu Wambulwa, who is said to be the first wife of Wamalwa Walusala Wambulwa, in Webuye PMELC Case No. E006 of 2022. It is unclear why the Respondent chose to sue only Joice Nasimiyu Wambulwa, despite confirming in his testimony before this court that the Applicants were also residing on the disputed land. No evidence has been presented to demonstrate that she was acting on behalf of the Applicants. Additionally, I am of the opinion that the consent recorded by the parties in the aforementioned case was malicious, intended solely to deprive the Applicants of their claim to the suit land.
22. Nevertheless, the Webuye case notwithstanding and as I mentioned elsewhere in my analysis, time started running in the year 1969 and 12 years were attained in the year 1981 and having said that adverse possession runs with the land as opposed to the title even when the Respondent and his siblings became registered owners, they held the land in trust for the Applicants. Their right, if any, was extinguished upon the attainment of 12 years of the Applicants uninterrupted possession and occupation which is way before the Webuye PM-ELC case waE006 of 2022 was filed.
23. The Respondent contends that despite the land being registered in his name and that of his siblings only, he was sued. From the evidence on record, the suit property is registered in the names of Simiyu Wanani Werunga, John Juma Wenani, Barasa Wenani, Wafula Wenani and Wamalwa Wenani. It has also emerged that out of the five, only two i.e. Simiyu Wanani Werunga and Wamalwa Wenani are alive. I have stated elsewhere in this judgment that adverse possession is attached to land and not title, therefore, it is immaterial in whose name the land was registered.
24. Considering the totality of the evidence adduced in this case and applying the legal principles as outlined above, it is clear that the Applicants have proved their case on a balance of probabilities and have brought themselves within the limits of the doctrine of Adverse Possession.
25. In the result, I find that this suit commenced by way of originating summons dated 29/4/2023 is merited and hereby enter judgment as follows:
  - a. That the Applicants are entitled to be registered as the owners of 6.4 acres to be carved out of Land Parcel No. Ndivisi/Makuselwa/406
  - b. The respondents to execute the transfer documents and all statutory documents to effect the portion of 6.4 ares of the suit property in favour of the Applicants in default the Deputy Registrar of this Court to sign.
  - c. The Costs of the suit to be borne by the Respondents.



26. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT BUNGOMA THIS 17<sup>TH</sup> DAY OF OCTOBER, 2023.**

**HON.E.C CHERONO**

**JUDGE**

In the presence of;

Mr. Were for the Plaintiff/Applicant.

Defendant/Respondent-absent

Bett C/A.

