



Mochoberi (Suing as the Administrator and Personal Representative of the Estate of Jeriah Nyaitondi Mochoberi) v Mochogwa (Environmental and Land Originating Summons E003 of 2022) [2024] KEELC 13467 (KLR) (20 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13467 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E003 OF 2022**

JM KAMAU, J

NOVEMBER 20, 2024

**IN THE MATTER OF: A CLAIM FOR ADVERSE POSSESSION PURSUANT TO
SECTION 38 OF LIMITATIONS OF ACTIONS ACT**

BETWEEN

**BENARD AUKA MOCHOBERI PLAINTIFF
SUING AS THE ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF
THE ESTATE OF JERIAH NYAITONDI MOCHOBERI**

AND

MARY NYANCHAMA MOCHOGWA DEFENDANT

JUDGMENT

1. This suit was commenced by way of an Originating Summons dated 23/9/2022 with Benard Auka Mochoberi suing in his capacity as the Administrator and personal representative of the Estate of his mother one Jeriah Nyaitondi Mochoberi having obtained Letters of Administration Ad Litem on 12/9/2022. The said Jeriah Nyaitondi Mochoberi died on 15/11/1985 and the Plaintiff attached a copy of the said Letters of Administration obtained from Nyamira Chief Magistrate's Court in CM Succession Cause No. E017 of 2022. He sought for Judgment against the Defendant for:-
 1. A declaration that the Defendant's rights to recover a portion of the land known as L.R. West Mugirango/Bosamaro West/544 measuring 0.351 Hectares is barred under the Limitations of Action Act, Chapter 22 of Laws of Kenya, and her Title thereto extinguished on the grounds that the Plaintiff herein has openly, peacefully and continuously been in occupation and possession of the aforesaid portion of land for a period exceeding 12 years.



2. There be an order that the Plaintiff be registered as the proprietor of a portion of L.R. West Mugirango/Bosamaro West/544 measuring 0.35 Hectares in place of the Defendant who currently holds the Title to the suit land.
 3. The portion measuring 0.351 Hectares out of land LR. West Mugirango /Bosamaro West/544 be sub-divided and the Title in respect thereof be issued in favour of the Plaintiff.
 4. There be a permanent order of injunction restraining the Defendant either by herself, agents, servants and/or employees from interfering with the Plaintiff's peaceful possession and occupation of the said portion of land measuring 0.351 Hectares comprising of all the parcel of land known as L.R. West Mugirango/Bosamaro West/544 in any manner whatsoever and/or howsoever.
 5. The Deputy Registrar and/or the Executive Officer of the Honourable Court be directed and/or ordered to execute the transfer instruments and all attendant documents, to facilitate the transfer and registration of land measuring 0.351 Hectares comprising the parcel of land known as LR. West Mugirango /Bosamaro West/544 in favour of the Plaintiff, in the event of default by the Defendant to execute the necessary transfer instruments.
 6. Costs of this originating summons be borne by the Defendant.
 7. Such further and/or other orders be made as the court may deem fit and expedient.
2. As Grounds to support the summons, the Plaintiff urged that his late mother entered into an agreement with one Obaki Siango who is now deceased to purchase a portion of land from Title No. West Mugirango/Bosamaro West/544 for a consideration of Kshs. 6,000/= only and a further portion on 10/1/1980 for Kshs. 5,000/=, on 5/9/1980, another portion for Kshs 3,000/= and finally on 24/2/1981 the last portion for Kshs. 6,000/= and a cow. The 2nd Agreement was with the late Auka Siango, 3rd with Marumbwa Siango and the last one with Onsarigo Siango (Deceased). The land was all along registered in the name of Siango Nyaata, the father to all the Vendors until 1997 when it was transferred to one Charles Onderi Siango by which time the Plaintiff had already taken possession and has lived thereon continuously and without interruption for a period of over 46 years and has fenced off the portion, planted maize, Napier grass, trees and also kept cows. But in the year 2022, the Defendant sent him an eviction Notice to vacate the parcel of land. By then, the land had been transferred to the Defendant through transmission. In his Affidavit in support of the Originating Summons Sworn on 23/9/2022 and filed in court on 26/9/2022, the Plaintiff repeated the grounds in support of the Summons and in addition deponed that the portions his late mother bought equaled 0.456 Hectares, that his late mother lived on the various portions since 1976, 1980 and 1981 respectively until she died in 1985 and left the Plaintiff and his brother Joash Morara Mochaberi and their families thereon where they have made considerable development to date which among others include permanent houses and that his niece (brother's daughter) was buried on the suit land in 2002. He further said that on the 29/8/2022 he was issued with a Notice to vacate almost one month before he filed the present suit. He therefore prays for the order of adverse possession.
3. In her Affidavit in response to the Summons sworn on 15/2/2023 and filed in Court on 27/2/2023, the Defendant denies the Plaintiff's claim and terms the Plaintiff a criminal land grabber and not an adverse possessor. That the Plaintiff is among several licensees of the suit land since 1990 since the Defendant's family had a large piece of land that they could not utilize due to their being impecunious and impoverished. There have been attacks by the Plaintiff's hired people since July 2013. She further said that at the behest of the Plaintiff the suit land was unlawfully sub-divided into 28 portions by the Land Registrar, Nyamira but which sub-divisions were reversed after the Plaintiff's complaint and



objection on 8/6/2021 and 9/6/2021 respectively. She concluded her depositions by urging the Court to find that the doctrine of adverse possession does not apply and that the suit ought to be dismissed with costs.

4. The parties' witness statements were filed and the case matured for hearing which commenced on 2/3/2023 with Benard Auka Mochoberi, son to the late Jeriah Nyaitondi Mochoberi, being the 1st Plaintiff's witness. He testified that he was born in 1960 and that he and his siblings have been on the suit land since 1976. He testified that the Defendant is a widow to the Vendor's brother – Charles Onkari Siango son to the late Siango Nyaata and a brother to Obaki Siango (Deceased) the late Onsarigo Siango, Auka Siango (deceased) and one Marumbwa Siango. He repeated the averments contained in his Supporting Affidavit sworn on 23/9/2022 effectively in verbatim and also produced the following documents in support of his case;
 1. A copy of his mother's Death Certificate serial number 1175586.
 2. Copy of the letters of Administration Ad litem issued in Nyamira Chief Magistrate's Succession Cause No. E085 of 2022 issued on 26/10/2022.
 3. Copy of Introductory letter dated 10/10/2022 from the Chief, Bosamaro Chache.
 4. Copy of sale agreement dated 14th April 1974, copy of translated sale agreement and certificate of translation.
 5. Copy of Sale agreement dated 7th November, 1978 copy of translated sale agreement and certificate of translation.
 6. Copy of a Sale agreement dated 8th March, 1979, copy of translated sale agreement and certificate of translation.
 7. Copy of receipt for survey fee dated 11th August, 1975.
 8. Copy of notice to vacate dated 29th August, 2022.
 9. Copy of certificate of confirmation date 12th July 2022
 10. Copy of certificate of official search
 11. Copy of a chief's letter dated 15th November, 2021
 12. Copy of chief's letter dated 16th August, 2021
 13. Copy of a chief's letter dated 18th August, 2021
 14. Copy of a chief's letter dated 17th August, 2021
 15. Bundle of photographs.
5. On cross-examination by Mr. Kavita for the Defendant, the witness admitted that the seller, Obaki Siango never signed the sale agreement dated 17/11/1976 but only wrote his Identity card number. Nor did the buyer sign it. The same applied to all the subsequent sale agreements. Only their names appear in the respective sale agreements. He admitted that he had had a Title Deed bearing his name issued by the Land's office Nyamira but the same remains in the Lands Office because it was said that the transfer was irregularly effected. The Title had been given to one Jenifer Kerubo Onderi – Onderi's son's wife. He also admitted to have received Notice to vacate from the Defendant dated 24/2/2022. While answering questions from the Court, the witness said he could not understand why the sale agreements were not signed and that he was not physically present.



6. PW2- Jared Nyabinga Onderi, a grandson of Siango Nyaata who died in 1978 and who was the registered proprietor of L.R NO. West Mugirango/Bosamaro West/544 testified and said that the land was allocated to Charles Onderi Siango in 1999 after land adjudication. He said that the 2 families have had land disputes in the past over the suit land. He admitted that the land had been sub-divided into 22 parcels one of which was West Mugirango/Bosamaro /2713 in the name of the Plaintiff, Benard Auka but were later cancelled and reverted to the name of the Defendant. On re-examination by Ms. Ndemo for the Plaintiff, the witness said that there have also been disputes between 4 other brothers of his father who had a share in the said land.
7. Peterson Mika Marigi, Pw3 relied on his recorded statement dated 9/2/2023. He said he was a neighbour to the late Jeriah Nyaitondi who he knew since 1976 and said he witnessed the latter buying a portion of land on 5/9/1980 from one Murumbwa Siango, and that he witnessed 3,000/= being paid to the Vendor. He did witness the agreement of 24/2/1983 between Jeriah and the late Onsarigo Siango where also 6,000/= changed hands and that after every transaction, Jeriah Nyaitondi Mochoberi took possession of the respective parcel and settled her family thereon who have all along been utilizing the land and have planted tea, nappier grass, trees and who have been rearing cattle thereon. There has been open, exclusive occupation and with no disagreements or quarrels between the 2 parties and/or their families. He further said that during those days there was no signing of the sale agreements and that he was also among those who had bought parcels of land from Morumbwa.
8. Pw4, Mathew Ombana Onderi gave evidence similar to that of PW3 and in cross-examination he admitted that he was also a purchaser of a piece of the suit land but whose Title Deed was later cancelled by the Land Registrar, Nyamira after the same had been transferred to them by the elder wife of Onderi, Kwamboka.
9. The last witness, Mr. Solomon Njoga produced a Report dated 17/4/2023 attaching an R.I.M showing the acreage bought by the Plaintiff, who instructed him.
10. After the Plaintiff closed his case on 31/11/2024, the Defendant, Mary Nyanchama Mochongwa took to the witness box on 19/3/2024 and testified that he got married into the family of Siango Nyaata in 1976 when the Plaintiff and his siblings were not on the suit land. They got into the suit land in 1990 before the Title Deed to the land was issued in 1999. She testified that there have been wrangling over the suit land since 2002. She produced the following documents in support of her case: -
 1. Patient Discharge form from Nyamira District Hospital
 2. Police order of arrest
 3. Copy of certificate of search dated 12.01.2018
 4. Copy of certificate of search dated 03.03.2020
 5. Copy of Area RIM of subdivisions
 6. Copy of letter dated 08.06.2021
 7. Copy of letter dated 09.06.2021
 8. Copy of letter dated 24.05.2017
 9. Copy of letter dated 13.05.2021
11. Having allowed both parties to make submissions in the case, I find that there is only one issue to determine in this case which if answered in the negative, would dispose of this case. The issue is: Have



all the elements of adverse possession been met? In other words, did adverse possession ever mature and if so, was it ever interrupted before the case was filed?

12. In a case of Adverse Possession, the Adverse Possessor has to prove that he has been in occupation of the suit land which he claims as of right: *Nec Vi, nec clam, nec precario* (no force, no seeing, no evasion), that the Appellant had knowledge (or the means of knowing, actual or constructive) of the possession or occupation and that the possession must be continuous and uninterrupted.
13. Interruption of possession is significant in that it stops time from running under the *Limitation of Actions Act*. In the case of *Mwangi Githu vs Livingstone Ndeete* [1980] eKLR the court addressed the issue of interruption as follows:

.....Time ceases to run under the *Limitation of Actions Act* either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. See *Cheshire's Modern Law of Real Property*, 11th Edition at p. 894.....”

14. This position of common law was also espoused in the case of *Amos Weru Murigu V. Marata Wangari Kambi and another* [NBI H.C.C. Suit No.33 OF 2002 (O.S.) where Justice G. B. M. Kariuki (as he then was) had the following to say with regard to Adverse Possession and interruption of time: -

.....he (the Defendant’) bases his claim, inter alia, on section 38 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya which entitles a person to be registered as proprietor instead of the registered proprietor where such person establishes by evidence that he or she has become entitled to be so registered on account of his or her occupation of the land, openly and continuously and without interruption and with the knowledge of the registered proprietor for a period of 12 years or more adversely to the title of the registered owner. In other words, where a person trespasses on the land of another with the knowledge of the latter who does not assert his right to the title to the land by evicting the trespasser or by suing him or her in court for eviction or ejection but instead lets the trespasser openly occupy the land for a continuous and uninterrupted period of not less than twelve years, the trespasser is entitled to apply under section 38 (supra) to be registered as the proprietor of the land. This is what the doctrine of Adverse Possession means. Where the period of 12 years is not continuous or is interrupted, the period of Adverse Possession is broken and must start all over again. But where one trespasser removes another trespasser who is in Adverse Possession to the owner and continues to occupy the land, the period of Adverse Possession is not broken and the second trespasser is entitled to combine the period of trespass of the first trespasser to his own. The land claimed by Adverse Possession need not be all the land comprised in the title; it may be a portion of it provided that the portion claimed is demarcated well enough to be identifiable. And as regards assertion of title, it is not enough for a proprietor of the land to merely write to the trespasser. A letter by the proprietor, even if it be through an advocate or the chief of the area does not amount to assertion of title in law and cannot therefore interrupt the passage of time for purpose of computing the period of Adverse Possession.....”

15. Earlier, the Court of Appeal in *Gabriel Mbui V Mukindia Maranya* (1993) eKLR held that: -

.....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 de facto use and occupation by an entrant. There



must be actual possession which requires some sufficient degree of physical occupation for 12 years.....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, licensee, contract purchaser in possession, or easement holder is rightful and not hostile.....The nonpermissive 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. The owner ceases to be in occupation by reason of dispossession or discontinuance of possession. Dispossession is where a person comes in and drives another out of the land; discontinuance of possession is where a person in possession goes out and another person takes possession, in other words the owner has given up, ceases to use and abandons the land and ceases occupation. The fact that nothing has been done on the land to improve is not evidence that the owner has abandoned the possession or has been eliminated from it. The mere fact that for 12 years or more has been no suit brought against a squatter or the mere fact that for 12 years a squatter has been in actual possession of the land is not enough to make *Limitation of Actions Act* operative. The Act is operative only where there has been exclusive possession for the statutory period for the person to be protected by the statute. It must be shown that the title holder has been dispossessed or has discontinued his possession of the land for the statutory period. The person relying on the statute must prove that he was in exclusive possession and that the true owner was out of possession..... 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.

16. In light of all these principles it is stated broadly that a person in possession of land is not entitled to the protection of the statute of limitations as against the owner of land where the latter and his predecessors in title have not been kept dispossessed or have not abandoned possession of the land and the adverse possessor remained in actual possession for the whole statutory period without a break in the block period: Smith, J, in the Court of Appeal of Eastern Africa in Hassanali Mamuji V Alibhai Ebrahimji Dar & Sons (1935) 2 EACA 111 at 116.

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.....
The burden of proving title by Adverse Possession rests upon the person asserting it on a balance of probabilities. To prove title by Adverse Possession it is not sufficient to show that some acts of Adverse Possession have been committed; the possession must be adequate in continuity, in publicity and in extent to show that it is adverse to the rightful title owner. It must be actual, visible, exclusive, hostile, open and notorious. There has to be a total ouster of the owner from the title and there is no room for tenancy in common or joint tenancy. It is all or nothing.....In case of registered land, Adverse Possession dates from the granting of certificate of title, for that is when the title holder is prima facie entitled to possession and therefore entitled to take action against any intruder of the land.The plea of Adverse Possession is always based on facts and they must be asserted, pleaded and proved. The person claiming Adverse Possession must show on what date he took occupation of the premises, the nature of his possession, whether his possession is known to the true owner, how long the possession went on, whether his possession was open and undisturbed. Unless these questions are asserted and proved, a plea of Adverse Possession must fail.....”

17. The Defendant’s possession and occupation of the suit property was interrupted and time stopped running impoverished 2002. That is when interrupted possession of the said portions of land took place, when wrangling started between the 2 parties.

The evidence on record shows that the Defendant was in actual and/or constructive possession of the suit property; that the possession by the Defendant was open and uninterrupted. Then in 2002, the Adverse Possession which had matured was interrupted hence the element of “without interruption” was negated. This in effect terminated the adverse possession which had already accrued.

18. From the above, as at the time of filing the Originating Summons, twelve (12) years had already been interrupted and the Defendant’s right and claim based on Adverse Possession had been defeated. By their own admission, the period of Adverse Possession was interrupted in 2002 by wrangling when the Defendant started to claim the land back. Both parties gave unanimous evidence in this regard.
19. The upshot of the above is that the Originating Summons dated 23/8/2022 was defeated and consequently, the Suit is dismissed with costs to the Defendant.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 20TH DAY OF NOVEMBER, 2024.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Brenda

Plaintiff’s Counsel: Ms. Ndemo

Defendants’ Counsel: Mr. Kavita

