



**Washe & 23 others v Mitchel (Environmental and Land Originating Summons E007 of 2023) [2024] KEELC 14232 (KLR) (13 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 14232 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E007 OF 2023  
EK MAKORI, J  
NOVEMBER 13, 2024**

**BETWEEN**

**MACMILLAN KALAMA WASHE & 23 OTHERS ..... APPLICANT**

**AND**

**DAVID MITCHEL ..... RESPONDENT**

**JUDGMENT**

1. By way of Originating Summons dated 24<sup>th</sup> October 2023, the Applicants instituted this suit seeking the following orders:
  - a. That the Applicants herein, after a significant period of over 12 years of living, occupying, developing, and being in actual possession of the parcel known as Plot Number 536 Mtwapa Settlement Scheme, are entitled to be declared as proprietors. They have acquired the land through adverse possession, using it peacefully, uninterrupted, and without interference from the Respondents and/or any other person.
  - b. A declaratory order be issued that the Applicants are entitled to be registered and issued with title documents over land Plot number 536 Mtwapa Settlement Scheme in place of the Respondents.
2. The OS is premised on grounds on its face and the Supporting Affidavit Macmillan Kalama Washe, the 1st Applicant, with the authority of the other Applicants. He deponed that the Applicants and himself have lived, cultivated, built, and developed the suit property for a period of 12 years without any interruption, thus entitled to the suit land by way of adverse possession. Upon search, it was discovered that the land is registered in the name of the Respondent. He also stated that they have built a church and a school on the suit land.



3. The Respondent was served through substituted service vide the Daily Nation dated 18th January 2024 but did not enter appearance nor file any defense or documents to refute the assertions by the Applicants, thereby strengthening the Applicants' case.
4. The matter was set for hearing, with four witnesses testifying for the Applicants.
5. Macmillan Kalama (PWI) adopted his witness statement dated 24<sup>th</sup> November 2023 as his evidence in chief. He produced PEX. 1-3 documents as per the list of documents of even date. The other Applicants, Wilson Kahindi Kombe (PW2), Mwanatumu Omar (PW3), and Julius Daniel Kalama (PW4), also adopted their witness statements dated 24<sup>th</sup> November 2023 as their evidence in chief. They all averred they have lived on the suit property without let or hindrance over a span of over 12 years, demonstrating their unwavering commitment to the land and their entitlement to be conferred registration of titles under their names in the portions they occupy under the doctrine of adverse possession.

### Disposition

6. The Applicants filed written submissions. It was submitted that the presence of permanent houses, a church, and a school, as well as the evidence of the witnesses that they have either been born on the land or lived there for over 20 years, is a clear demonstration that they have met the threshold for acquisition of the suit property by way of adverse possession. In support of their position, they relied on the following authorities: Stephen Mwangi Gatunge v Edwin Onesmus Wanjau (Suing in her capacity as the administrator of the estate of Kimingi Wariera (Deceased) and of Mwangi Kimingi (Deceased) [2022] eKLR and Joseph Macharia Kairu v Kenneth Kimani Muiruri [2021] eKLR.
7. I frame the issue for this Court's decision as whether the Applicants are entitled to the suit land by way of adverse possession.
8. The burden of leading the Court to ascertain this lies with the Applicants. In *Kimani Ruchure v Swift Rutherfords & Co. Ltd* [1980], KLR 10 Kneller J. held that:

“ the Plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion)”
9. The principle of adverse possession is well settled under the *Limitation of Actions Act*. Section 7 of the said Act places a bar on actions to recover land after 12 years from the date the right accrued. Further, Section 13 of the same Act provides that adverse possession is the exception to this limitation:
  - “(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 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.”

Finally, Section 38 of the Act provides that:

“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.”

In the case of *Gabriel Mbui v Mukindia Maranya* [1993], eKLR adverse possession was defined as;

“..the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owner’s enjoyment of land for purposes for which the owner intended to use it.”

In the case of *Mtana Lewa v Kahindi Ngala Mwangandi* [2015] eKLR, the Court of Appeal defined adverse possession as:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or in action of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity, and in extent to show that possession is adverse to the title owner.”

10. Therefore, to claim rights to land through adverse possession, one must demonstrate that there was open possession and occupation, uninterrupted occupation for not less than twelve years, and that the said occupation was within the owner’s knowledge. The Applicants’ case was that they occupied the suit property for well beyond 12 years. The building of permanent houses, a church, and a school clearly show they have settled on the suit land uninterrupted. The Respondent did not dispute this position. The court, in the case of *Susan Mumbi v Kefala Grebedhin* (Nairobi HCC NO. 332 1993) Juma J. (as he then was), held that:

“The question of the court presuming adverse evidence does not arise in civil cases. The position in civil cases is that whoever alleges has to prove. It is the Plaintiff to prove her case on a balance of probability, and the fact that the Defendant does not adduce any evidence is immaterial.”

11. Flowing from the foregoing and in light of the case law herein referred to against the evidence adduced, I am of the view that the Applicants have demonstrated that they are deserving of the suit land by way of adverse possession and proceed to give the following final orders:



- a. That the Applicants herein be and are hereby declared as proprietors of the parcel known as Plot Number 536 Mtwapa Settlement Scheme, which they have acquired by way of adverse possession having lived, occupied, developed, and been actual possession for over 12 years well beyond the statutory period.
- b. A declaratory order be and is hereby issued that the Applicants are entitled to be registered and issued with title documents over land Plot Number 536 Mtwapa Settlement Scheme in place of the Respondents.
- c. The Land Registrar Kilifi be and is hereby directed to effect the said registration.
- d. No order as to costs.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 13<sup>TH</sup> DAY OF NOVEMBER 2024.**

**E. K. MAKORI**

**JUDGE**

In the Presence of:

Mr. Makworo, for the Applicants

Happy: Court Assistant

