



**Josphat v Ithagu & another (Environment & Land Case E007 of 2023)
[2024] KEELC 13858 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13858 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E007 OF 2023**

CK YANO, J

DECEMBER 19, 2024

BETWEEN

SAMUEL KOOME JOSPHAT PLAINTIFF

AND

GLADYS WANJIKU ITHAGU 1ST DEFENDANT

MILKA NYAMBURA WANJIKU 2ND DEFENDANT

JUDGMENT

1. For determination is the plaintiff's Originating Summons dated 6th September, 2023. In the Originating summons the plaintiff is seeking for determination of the following questions;
 1. Has the plaintiff occupied land parcel No. Kiirua/Nkando/4562 and 4563 respectively measuring 3.4 and 2.8 hectares respectively (hereinafter referred to as suit land) for more than 26 years.
 2. Has the plaintiff been in occupation of the suit land since the year 1997.
 3. Has the plaintiff become entitled to the suit land by way of adverse possession?
2. The plaintiff is seeking for orders that:
 1. A declaration that the plaintiff Samuel Koome Josphat has become entitled by adverse possession to 3.4 and 2.8 Hectares respectively comprised in land parcel No. Kiirua/Nkando 4562 and 4563 respectively.
 2. An order that the plaintiff be registered as proprietor of 3.4 and 2.8 hectares respectively of the suit land in place of the defendants.
 3. An Order that the defendants herein do execute all the requisite instruments and/or documents to effectuate the transfer documents on his behalf.



4. The Honourable court do make further or better orders it might deem fit and expedient to meet the ends of justice.
3. The summons is supported by the affidavit of Samuel Koome Josphat sworn on 6th September, 2023. The plaintiff avers that he has been in exclusive, open and uninterrupted occupation and has made substantial development on the suit land since the year 1997. That the defendants are residents of Nairobi county within the Republic of Kenya.
4. The plaintiff states that he has planted mango trees, Oranges, onions, kales and other trees on the land. That the defendants acquired the said land in early 1990s and put him in actual possession and occupation in the year 1997 and since then he has been in exclusive possession, occupation and user of the said land parcel which occupation and user has been open and uninterrupted for about 26 years.
5. The plaintiff avers that on 29th July, 2009, the 1st defendant transferred to him a portion measuring 1 acre out of parcel Number 4562 and another one acre to one Susan Kaguri who is the plaintiff's mother in law. That sometimes later, the 1st defendant agreed with the plaintiff that he sells the said one acre and use the proceeds therefrom to fence the whole land for she was far away and could not be able to come to wade off the invaders who had invaded the suit land. That since 1997 to date, the defendant left the said land under the plaintiff's user and occupation.
6. The plaintiff states that he has consequently embarked on development of the land by putting up a house, installing water, trees and cultivating various crops and has leased part of the land to some leasee.
7. In opposing the plaintiff's claim, the defendants filed a replying affidavit sworn by Gladys Wanjiku Ithagu on 4th November, 2023. The 1st defendant admitted that it was true that she was the original registered owner of land parcel No. Kiirua/Nkando/4562 measuring approximately 17 acres. That in the year 2009 she sold 1 acre of the said property to the plaintiff which she duly transferred to him as agreed and the same does not form part of the suit properties. The 1st defendant attached a copy of the sale agreement marked "GW 1".
8. The 1st defendant avers that in 2014, she subdivided and transferred a portion measuring 2.8 Ha to her daughter, the 2nd defendant herein, the resultant subdivision being land parcel No. Kiirua/Nkando/4563. The 1st defendant attached copies of searches in respect to the said properties marked "G.W 12 (a) and (b)."
9. The 1st defendant states that later in 2015, the plaintiff asked for her permission to till the two properties as he kept watch of the same. That after consultations with the 2nd defendant, they agreed to let him utilize their properties on condition that he would fence their properties.
10. The 1st defendant avers that the plaintiff later asked her to allow him construct a farm house and a toilet for his farm workers which she again agreed. That at no time has she ever instructed the plaintiff to sell any of the portion of her property to anyone.
11. The 1st defendant states that she is advised by her counsel on record that for the plaintiff to sell the land on her behalf, he would need her duly executed and registered power of attorney for the same. That indeed neither her nor her co-defendant have executed any documents to transfer any of their portions to any third parties.
12. The 1st defendant avers that sometime in June 2023, she visited the suit premises where she requested the plaintiff to vacate the property. That in late August, she went to the suit premises where she contracted a tractor to plough the land in preparation for the planting season ahead of the long rains.



- That the advocate for the plaintiff confirmed the same when the matter came up before the court on 26th September, 2023.
13. The 1st defendant avers that the plaintiff has always been in occupation of the suit premises with her permission and blessings. That furthermore, the plaintiff has not been in adverse occupation of the suit premises for more than 12 years as she only allowed him permission into the suit premises in 2015.
 14. The 1st defendant states that the plaintiff should only be thankful that she allowed him to utilize her property since 2015. That the plaintiff's intention is to benefit illegally where he has no claim and urged the court not to aid him.
 15. The 1st defendant states that the suit is bad in law and the same should be dismissed with costs.
 16. At the hearing Samuel Koome Josphat the plaintiff herein testified as P.W 1. He stated that he was 51 years old and lives in Maili Saba in Isiolo. That he knew the 1st defendant and has known her since 1997. The plaintiff testified that he did not know the second defendant. The plaintiff testified that he has been in occupation of the suit parcels of land since 1997.
 17. The plaintiff stated that he has fenced the land and connected water and has used it ever since and no one has even come claiming the land until around October, 2023 when the 1st defendant came with her brother and other people and the 1st defendant claimed the land was hers.
 18. The plaintiff adopted his witness statement dated 6th September, 2023 and filed on 8th September, 2023 as his evidence in chief. The plaintiff also produced a receipt in his list of documents dated 6th September, 2023 as P exh 1. The plaintiff testified that the receipt is for the pipes he bought to connect water to the suit land. He further testified that he put up four houses on the land in 2005 which he still uses to-date. That he also put up a pit latrine.
 19. The plaintiff urged the court to declare that he has acquired the land by adverse possession.
 20. The plaintiff was cross examined by Mr Kaaria, learned counsel for the defendants. He stated that the documents he has produced as P exhibit 1 does not indicate the land he was connecting water to. The plaintiff testified that he had not produced photographs to show that there is water connected to the land.
 21. The plaintiff stated that the 1st defendant put him into possession and occupation of the land in 1997. That in his statement, he has indicated that he has been in open occupation and possession for 17 years up to 2015, when he talked to the 1st defendant who agreed that he sells one acre to one Susan Kaguri and fence off the whole land to wad off invaders. The plaintiff stated that he had not brought the case on behalf of the said Susan Kaguri who is his mother in law.
 22. The plaintiff testified that the whole land is about 12 to 14 acres. The plaintiff admitted that the 1st defendant asked him to sell one acre but he had no document from the 1st defendant authorizing him to sell the one acre as it was verbal.
 23. The plaintiff stated that he could not recall when the 1st defendants came to the land in 2023. The plaintiff stated further that in his affidavit in support of the originating summons, he stated that the defendant acquired the land in 1990s and put him in possession and occupation.
 24. The plaintiff was also re-examined by Mr. Mugambi learned counsel for the plaintiff. He stated that he entered the land in 1997 and sold one acre in 2015. That the 1st defendant never complained. He stated that he had not seen any photographs filed by the defendants to show that they are the ones on the land. He stated that he was the one in possession and occupation.



25. 2 was David Mugambi. He adopted his statement dated 15th December, 2023 as his evidence in chief. He stated that the plaintiff has been using the suit land as a shamba boy since the year 1997 and he used to assist him as a supervisor. That he never saw the defendants until August 2023 when the 1st defendant came with some people and asked to see the plaintiff.
26. When he was cross examined by Mr. Kaaria, P.W 2 stated that he did not know the suit parcel numbers. That the parcel of land is about 10 acres. P.W 2 testified that he was aware of how the plaintiff started using the land though he did not know the owner of the land. That he knew the plaintiff as the owner.
27. 2 stated that the plaintiff is the one using the land and he too lives on the land. That the plaintiff had employed him as a shamba boy. D.W 2 stated that he has been on the land for over 30 years from 1997. D.W 2 stated that he did not know if the plaintiff bought the land and was not aware if the plaintiff sold any land in 2015. He did not know Susan Kaguri.
28. When he was re-examined by Mr. Mugambi, P.W 1 reiterated that he has lived on the land since the year 1997 when the plaintiff employed him.
29. The 1st defendant, Gladys Wanjiku Ithagu testified as D.W 1. She stated that she lives in Ongata Rongai in Kajiado County. That she knows the plaintiff whom she sold one acre of her land. D.W 1 adopted her statement dated 4th November, 2023 as her evidence in chief. She also produced a list of documents dated 4th November, 2023 which comprised search certificates, sale agreement and acknowledgement which she produced as D. exh 1 to 4 respectively.
30. D.W 1 stated that she was the original registered owner of land parcel No. Kiirua/Nkando/4562 measuring about 17 acres. That in the year 2009, she sold one (1) acre of the said land to the plaintiff herein and transferred the same. That the said one (1) acre does not form part of the suit properties. That the plaintiff later sold that one acre.
31. D.W 1 stated that later in the year 2014, she subdivided and transferred a portion measuring 2.8 ha to her daughter, the 2nd defendant herein, and the resultant subdivision is parcel No. Kiirua/Nkando/4563.
32. The 1st defendant testified that in 2015, the plaintiff asked her for permission to till the two suit properties as he kept watch of the same. That they agreed to let the plaintiff use the suit lands on condition that he would fence it. That the plaintiff was later allowed to construct a farm house and a toilet for farm workers since the defendants had no immediate plans to utilize the land. She denied permitting the plaintiff to sell any portion of the land and never executed any transfer documents.
33. D.W 1 testified that in June 2023, she visited the suit properties and requested the plaintiff to vacate therefrom. That she then ploughed the land, prompting the plaintiff to file suit. D.W 1 reiterated that the plaintiff has always been in occupation of the land with their permission and blessings.
34. D.W 1 was cross examined by Mr. Mugambi and re-examined by Mr. Kaaria. She stated that the land belonged to her and her daughter, the 2nd defendant herein. D.W 1 reiterated that in 2008/2009, she permitted the plaintiff to use the land. That the plaintiff put up a temporary house cum store and connected water to the land from a river.
35. D.W 1 stated that she verbally asked the plaintiff to vacate from the two parcels of land as they are all hers. That her daughter had taken her to an advocate where she confirmed that she had given her land but D.W 2 stated that she had misplaced the documents. D.W 1 testified that she is planting maize and beans in about 4 acres.



36. D.W 1 stated that she had brought people to assist her to farm. That she had not removed the plaintiff's properties though she is not using them. D.W 1 stated that she could not remember the time the plaintiff asked her for permission to construct a farm house and a toilet, but reiterated that she gave him permission to put them up.
37. D.W 2 was Alois Ebong Engor. He stated that he is a farmer and lives in Maili Saba. He testified that he was sold land measuring one acre in 2008 by the 1st defendant. That in 2009, the plaintiff came and bought one acre from the 1st defendant next to his. D.W 2 stated that when he bought his land in 2008 he took care of the whole land which is about 17 acres by grazing his animals. D.W 2 also adopted his statement dated 29th, February, 2024 as his evidence in chief and was cross examined.
38. D.W 2 stated that when the plaintiff purchased one acre from the 1st defendant, he fenced it and started utilizing it. That in 2015, the plaintiff informed him that he had been granted permission to also utilize the rest of the defendant's property and would stop him from allowing his cattle to enter therein.
39. When he was cross examined, D.W 2 stated that the land belongs to the 1st defendant. That the 1st defendant is using the land by growing beans. That the plaintiff started using the land in 2015 and put up a temporary structure and a toilet therein and also connected water to the land. D.W 2 stated that he has been there since the year 2008 and was aware of everything that goes on on the land.
40. D.W 3 was Gitongi M'Iniu and is the area manager in Maili Saba area. He adopted his statement dated 29th February, 2024 as his evidence in chief and was cross examined and re-examined. He stated that he knows the parties herein and he knew the plaintiff when he bought one acre of the land in 2009 from the 1st defendant. That later in 2015, the plaintiff asked the 1st defendant to allow him till the rest of the land since the 1st defendant and her daughter were far and were not utilizing the land and that he was allowed to utilize it. That in August 2023, he learnt that the plaintiff had refused to return the suit premises to the defendants and filed suit. D.W 3 stated that the plaintiff already had the portion he had bought. That the plaintiff's claim is intended to benefit him illegally and he urged the court not to aid him. The witness admitted that the plaintiff had connected water to the land and put up a structure and toilet. That the 1st defendant is the one currently using the suit land having planted beans. D.W 3 did not know if the plaintiff had removed his properties from the land.
41. The parties also filed written submissions through their counsels on record. The plaintiff filed submissions dated 19th August 2024 through the firm of Kiogora Mugambi & co. advocates while the defendants filed their submissions dated 13th September, 2024 through the firm of Muchomba Law Advocates.
42. In his submissions, the plaintiff gave brief facts of the case and submitted that the defendants in their replying affidavit claim that in the year 2015, the plaintiff asked them permission to till the two properties as he kept watch of the same which is a prove to the plaintiff's case that he is in actual possession of the suit property. That the same is in support of the plaintiff's claim of adverse possession.
43. The plaintiff further submitted that the defendants did not file any counter claim against the plaintiff's claim herein seeking orders of permanent injunction to restrain him from entering the land and dismissal of the plaintiff's claim. That the plaintiff has been in use and occupation of the suit property for a period of over 26 years and that the defendants in their testimonies before court admitted that there was no attempt to remove the plaintiff from the suit property until the year 2024 when the 1st defendant sub-divided the suit land into two portions, namely KIIRUA/NKANDO/4562 and 4563 in an attempt to evict the plaintiff therefrom.



44. It was submitted on behalf of the plaintiff that the contention of the defendants that the plaintiff's occupation of the suit land was on account of permission was not proved. That there is no evidence of the said permission and or letter of appointment to the plaintiff as proof that the plaintiff was indeed employed by the defendants or any evidence to prove that the plaintiff was receiving salary for managing the suit property. The plaintiff relied on the case of *Gatuhi Murathe Vs Gakuru Gathimbi* [1998] eKLR and submitted that he has proved his case on a balance of probabilities.
45. The defendants gave a summary of the case and the evidence adduced. It was submitted on behalf of the defendants that the onus is on the person claiming adverse possession. The defendants relied on the case of *Benjamin Kamau Murma & others Vs Gladys Njeri* [CA No. 213 of 1996](#) and *Kasuve Vs Mwaani Investments Limited & 4 others* (2004) 1 KLR 184 and submitted that the plaintiff's occupation of the suit premises has always been with the consent of the defendants herein. The defendants relied on the case of [Mwinyi Hamisi Vs Attorney General and Philemon Mwaisaka Wanaka Civil Appeal No. 125 of 1997](#) in which it was held that "adverse possession does not apply where possession is by consent...."
46. The defendants submitted that from the plaintiff's pleadings and testimony in court, it is not clear when the said possession became adverse. That from his own witness statement, the plaintiff states that as of 2015, he was still consulting the defendants on anything carried on on the suit premises, including fencing. The defendants also relied on the case of *Acheri Vs Oduogi* ELC No. 58 of 2019 (2023) KEELC 21827 (KLR).

Analysis & Determination

47. I have carefully considered the pleadings, the evidence on record and the submissions made. From the pleadings and the evidence adduced, this court frames the issues arising for determination to be whether the plaintiff has met the threshold for grant of orders of adverse possession and who should bear the costs.
48. The doctrine of adverse possession in Kenya is founded under the [Limitation of Actions Act](#), Cap 22 Laws of Kenya. Section 7 of the said Act places a bar on actions to recover land after 12 years from the date on which the right accrued. Further, Section 13 of the same Act, provides that "(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 section 9, 10, 11 and 12 of this Act a right of action to recover possession accrues on a certain date a right of action does not accrue unless and until some person takes possession of land. 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), the land in reversion is taken to be adverse possession of the land."
49. In addition, Section 38 of the said Act allows a claimant to apply to court for orders of adverse possession and 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."



50. It is common ground that for a person to succeed in a claim for adverse possession, he must prove that he has been in peaceful, open and uninterrupted possession of the land in question for a period of twelve years or above. The ancient lawyers used to say that the claimant's occupation must be *nec vi nec clam nec precario*.”
51. In this case, the plaintiff's claim is predicated on his own evidence that the 1st defendant acquired the suit land in early 1990s and put him in actual possession and occupation in the year 1997. That since then, he has been in exclusive possession, occupation and user of the said land parcel which occupation and user has been open and uninterrupted for about 26 years. The plaintiff stated that for all that time, the land has been under his care. That in the year 2009, he purchased a portion measuring one acre from the 1st defendant. That the defendants also instructed him to fence off the whole land to wad off invaders who had started invading some parts of the land. The plaintiff stated that he sold the said one acre and fenced the whole land as agreed with the 1st defendant. That was in the year 2015. The plaintiff stated that he was surprised when the defendants came in 2023 to take the land.
52. The defendants' case, on the other hand is that in 2015, the plaintiff asked for permission to till the two properties as he kept watch of the same. That after consultations with the 2nd defendant they agreed to let him utilize the suit properties on condition that he would fence it. It is therefore the defendant's case that the plaintiff entered the land with their permission.
53. From the evidence of both parties, it is clear that the plaintiff entered the suit land with the defendants' permission. The plaintiff was also permitted to use the land and even instructed to fence it to wad off invaders. The question that arises is whether there can be adverse possession when the entry to the suit land was permissive.
54. The doctrine of adverse possession was aptly defined in *Mtana Lewa Vs Kahindi Ngala Mwangandi* (2015 eKLR where the court of Appeal held that:-
- “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 to the title owner.”
55. From the above definition, adverse possession can only arise out of nonpermissive possession. From the facts of this case, the plaintiff entered the suit land with the permission of the owners and was even asking for permission whenever he wanted to do any development on the land like building a temporary structure and a toilet. The plaintiff was even instructed by the defendants to fence the land to wad off invaders from entering the land. The plaintiff was more or less like a caretaker in the land.
56. The element of permissive possession was well explained in *Gabriel Mbui Vs Mukindia Maranya* (1993) eKLR, where Justice Kuloba had this to say-;
- “(3) the occupation of the land by the intruder who pleads adverse possession must be non-permissive use, i.e without permission from the true owner of the land occupied. It has been held many times that acts done under licence or permitted by or with love of, the owner do not amount to adverse possession and do not give the licensee or permitted entrant any title under the limitation statute. If one is in possession as a result of permission given to him by the owner, or if he is in possession of the land as a licensee from the owner, he is



not in adverse possession. Permissive occupation is inconsistent with adverse possession. The stranger must show how and when his possession ceased to be permissive and became adverse. The rule on permissive possession is that possession does not become adverse before the end of the period during which one is permitted to occupy the land ... where possession was consensual or contractual in its inception, it cannot be called “adverse.”. Thus when possession is given by the vendor in pursuance of a sale, it is by leave and licence of the vendor; it is not just taken... the actual possessor must have usurped the land without leave. Possession by leave and licence of the owner is not adverse possession, for then the owner who has given leave has no cause of action during the time span of his permission or licence and the limitation period does not run against him until the licence has ended. If possession has commenced and continued in accordance with any contract, express or implied, between the parties in and out of possession, to which the possession may be referred as legal and proper, it cannot be presumed adverse. So also in cases between mortgagor and mortgagee. The ingredient of unpermitted occupation is usually expressed as “hostile” possession, to emphasize that “hostility” is the very marrow of adverse possession. And to say that possession is hostile means nothing more than that it is without permission of the one legally empowered to give possession. Any kind of permissive use, as by a tenant, licensee, contract purchaser in possession, or easement holder, is rightful and not hostile. Any time an adverse possessor and owner have discussed the adverse possession, permissive agreement may have occurred, and that destroys adverse possession (cobb V Lane [1952] 1 All ER 1199; Denning, MR. in Wallis’s Cayton Bay Holiday Camp Ltd Vs Shell- Mex and DP Ltd [1974] 3 All ER 575 at P 590, Chanan Singh, J. Jandu Vs Kirpal and another [1975] EA 225 at pp 233, 234, 237; Madan J (as he then was), in Gatimu Kinguru Vs Muya Gathangi , 1 [1976] Kenya L.R 253 at pp 257, 258);”

57. Considering the totality of the evidence availed in this case, and applying the legal principles as outlined above, I am not satisfied that the plaintiff has proved his case on a balance of probabilities. It is my finding that the plaintiff has failed to bring himself within the limits of the doctrine of adverse possession. This is because the plaintiff’s entry into the land was with the permission of the defendants. The plaintiff was not able to demonstrate from which date his permissive entry became adverse. From the evidence adduced it is clear that the plaintiff had purchased one acre from the defendants and was taking care of the rest of land pursuant to a request made by the 1st defendant. It was only in or about July, 2023 that the defendants came and wanted to utilize the land themselves that the plaintiff rushed to court claiming adverse possession. How could his user and occupation be adverse when it was pursuant to an agreement with the 1st defendant?
58. Consequently, the plaintiff’s claim is without merit and must fail. The same is dismissed. The costs of the suit shall be in favour of the defendants against the plaintiff.
59. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 19TH DAY OF DECEMBER, 2024.

IN THE PRESENCE OF

Court assistant – Tupet



Kaaria for defendants

No appearance for Kiogora Mugambi for plaintiff

C.K YANO

JUDGE

