



**Mwagoyo v Pauma Investment Company Ltd (Environmental and Land Originating Summons 001 of 2023) [2024] KEELC 13872 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13872 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 001 OF 2023**

**AE DENA, J**

**DECEMBER 19, 2024**

**BETWEEN**

**SALIM HASSAN MWAGOYO ..... PLAINTIFF**

**AND**

**PAUMA INVESTMENT COMPANY LTD ..... DEFENDANT**

**JUDGMENT**

1. The Land Law Textbook 15<sup>th</sup> Edition by Gordon Henry defines adverse possession as possession inconsistent with the title of the true owner. It is stated that acquisition of title by adverse possession is among the aspects of the law of limitation of actions and which provides that no action shall be brought to recover land after expiration of 12 years from the date on which the right of action accrued. The doctrine of adverse possession in Kenya is embodied in Section 7 of the *Limitation of Actions Act*, (Cap 22) in these terms:

“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 is first accrued to some person through whom he claims, to that person”.

2. The instant suit is premised upon the doctrine of adverse possession. The Applicant Salim Hassan Mwagoyo claims to have acquired land reference Kwale/Diani Settelement Scheme/144 that is currently subdivided into 20 plots known as Kwale/Diani Settelement Scheme 2147-2166 and seeks for the following orders; -

1. The Applicant herein be declared the rightful owner of the suit properties Kwale/Diani Settlement Scheme/144 that is currently subdivided into 20 plots known as Kwale/Diani Settelement Scheme 2147-2166 by adverse possession of over 12 years since 1989



2. An order do issue to the Registrar of Land Kwale to strike out the name of the Respondent from the register and subsequently enter the names of the Applicant as the sole proprietor of the suit property Kwale/Diani Settlement Scheme/144 that is currently subdivided into 20 plots known as Kwale/Diani Settlement Scheme 2147-2166
3. A permanent injunction do issue restraining the Respondents whether by themselves, their servants, representatives, agents and/or assigns howsoever from dealing with, entering in, obstructing any activities on, interfering with the Applicant's agents and or representatives subdividing, demolishing any structures on selling, alienating, occupying and/or in any other way interfering with the suit properties.
4. That costs of this suit be provided for.
3. The Originating Summons is supported by an affidavit sworn by the Applicant who states that his late father Hassan Juma Mwangoyo who had been in possession of the suit properties for a period exceeding 12 years from the year 1977 until his death in 2010. The Applicant avers that his late father drilled a borehole on the suit property in 2006 and a survey conducted in the year 2006 confirmed that his late father was in occupation of the property. The Applicant states that he grew up on the suit property and is in current use and occupation of the same.
4. At paragraph 8 of the affidavit, the Applicant states that in the year 2009 and 2010 entries were made on the green card. In 2009 the green card indicates the owner of the suit property as the Respondent and who had the same subdivided to several portions. He states that at the alleged time of the subdivision the Applicant and his father were on the suit property and never saw anyone on the land. The Applicant maintains that their occupation of the land is adverse to the interest and the title held by the Respondent. That they have acquired legal rights of ownership of the suit property by way of adverse possession and the Respondent's rights over the said suit parcel have been extinguished by effluxion of time.
5. On 1/11/2023 Counsel for the Applicant confirmed to court that service had been effected upon the Respondent and referred to the affidavit of service dated 15/2/2024. In the same, it is stated that as per the CR 12 form the Respondents official premises is situated on aqua plaza situated along Murang'a road adjacent to Pioneer International University. The affidavit confirms that proper service was effected in the Respondent's office. The Defendant did not, however, enter appearance. Consequently, this suit proceeded to hearing as an undefended cause on 7/5/2024. The Applicant called one witness in addition to himself.
6. PW1 was Salim Hassan Mwangoyo the Applicant testified on his behalf and adopted the affidavit in support of the Originating Summons as his evidence in court. The contents of the affidavit have already been summarised hereinabove. PW1 also produced the documents in the list of documents dated 3/8/2024 as part of his evidence ( PExh1-10). The Ground status report was however at the instance of the court marked for identification for production by the maker MF1 11. The witness testified that at the time of adjudication his father and his uncles were present on the suit property.
7. On inquiry by the court about the occupation of the house seen in the photos produced before court, PW1 testified that his maternal uncle lives in the house. On further inquiry by the court whether this uncle was a witness, PW1 indicated that he was not a witness. Asked about the whereabouts of his mother, the witness stated she had been deceased since the year 2012. The witness asked the court to help him because the property was his inheritance from his father.
8. PW2 was Suleiman Yusuf Mwadzoyo the Assistant Chief Diani Location Ukunda. He produced the letters dated 10/5/2023 and 8/5/2023 being the maker thereof. He testified that the suit property used



to belong to the late Mwaguyo and after he died, he left it to his children who were cultivating. He was informed by one of the village elders that the land was given to late Mwaguyo in 1977. That it is the deceased's son who uses the suit property. On inquiry by the court whether there were houses in the land and if PW1 lived in the land, the witness stated that there was only one semi-permanent house where the Plaintiff's uncle resided.

9. With the above the Plaintiff's case was marked as closed. The court issued orders for filing of final submissions.
10. The Applicant's submissions are dated 15/8/2024. The contents thereof are duly noted and have been considered by the court in preparation of this judgement.

### **Analysis and Determination**

11. Having considered the foregoing the key issue that calls for determination is whether the Plaintiff has proved a claim for adverse possession of the suit property against the Defendant.
12. It is noted that the Defendant did not participate in the suit despite service being effected on it. However, the Applicants do not escape the burden and standard of proof which they have to satisfy and discharge in accordance with the law in order for his claim to succeed. This Court has a duty to interrogate and evaluate uncontroverted evidence in order to determine whether the Applicant is entitled to the prayers sought. Section 107(1) of the *Evidence Act* provides that

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

13. Additionally, Sections 109 and 112 of the *Evidence Act* (CAP. 80) state as follows: S.109. “The burden of proof as to any particular fact lies on the person who wishes the court to believe in the existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”
14. In the case of *Charter House Bank Limited (Under Statutory management) v Frank N. Kamau* [2016] eKLR, the Court of Appeal when discussing the burden of proof upon the Plaintiff in a situation where the Defendant failed to adduce evidence had this to say;-

“We would therefore venture to suggest that before the trial court can conclude that the Plaintiff's case is not controverted or is proved on a balance of probability by reason of the Defendant's failure to call evidence, the court must be satisfied that the Plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence from the Defendant.... The Plaintiff must adduce evidence, which in the absence of rebutted evidence by the Defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgement merely because the Defendant has not testified”

15. The Court of Appeal in the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Mureithi* (2014)eKLR, held as hereunder;

It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the Defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of



proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.

16. The *Limitation of Actions Act* Cap 22 of the laws of Kenya underpins the doctrine of adverse possession in the undernoted provisions;

Section 7 states 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

- (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.

Section 17 goes on to state;

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”.

Finally, Section 38(1) and (2) states;

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

17. To prove a claim for adverse possession it is now trite that several elements must be met by the party claiming adverse possession. Simply put the suit property must have a known owner; That the said known owner must have lost his right to the land by being dispossessed by the applicant; That the applicant's possession of the land was without the true owner's permission; That the discontinuance by possession has been open for a continuous period of 12 years; The defendant has not taken any action against the plaintiff to extinguish their occupation of the suit land or interrupt the same over the minimum statutory period of 12 years and that the applicant has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it. See *Wambugu Vs. Njuguna* (1983) KLR 172, The court of appeal in *Benson Mukuwa Wachira*



Vs Assumption Sisters of Nairobi Registered Trustees [2016] eKLR as well as Chevron (K) Ltd Vs.Harrison Charo Wa Shutu (2016)eKLR .\_\_

18. It is trite law that the Applicant must have been in possession of the property nec vic, nec clam, nec precario in order to claim prescription. In *Malan v Nybergelegan*, the Appellate Division of the South African HC held as follows:

“In order to avoid misunderstanding, it should be pointed out that mere occupation of property ‘nec vic. nec clam, nec precario’ for a period of thirty years does not necessarily vest in the occupier a prescriptive title to the ownership of that property. In order to create a prescriptive title, such occupation must be a user adverse to the true owner and not occupation by virtue of some contract or legal relationship such as a lease or usufruct which recognizes the ownership of another.”

19. I must clarify at this juncture that for purposes of adverse possession time starts running at the point of registration of the suit property to a third party. It would not start to run at the point of adjudication but at titling. I would also not treat the suit as a claim for the deceased land by its beneficiaries or an issue of inheritance, that is not the claim before this court. According to the green card produced the register was first opened in the year 1992. For the instant suit the Respondent was registered as proprietor in 2009 which meets the 12 years limitation period. To the extent that the land is registered to the Respondent as the absolute proprietor then one limb has been met. The court also recognises that action has been taken by filing this suit since adverse possession is not automatic.
20. The other requirement is possession and which must satisfy the conditions already enumerated hereinabove. Has the applicant proved possession and use to the exclusion of the registered proprietor? In his evidence before court the Applicant testified that he has been in occupation of the land since he was born. PW2 told the court that the Applicant was 35 years old at the time of his testimony before court. According to both PW1 and PW2 the Plaintiff has been using the land including cultivation. However, in examination of the witness by the court, it was clear that it was not the Applicant that was in use of the property but his maternal uncle. This was confirmed by not only the Applicant but his witness PW2. The said uncle was not called as a witness neither is he one of the Applicants in this case.
21. It is also noted that the ground status report was marked for identification but was not produced. It is noted that summons were issued to the County Land Surveyor Nicholas Sanya to attend court so as to produce the ground status report. On 20<sup>th</sup> June 2024 Mr. Makowade informed the court that he had challenges availing the witness and sought for adjournment. The court acquiesced. The court however declined an oral application by counsel to review the report with a view to adding additional information. The said witness did not however appear before court on 26/07/24. The court was ready to adjourn the matter. However, Counsel for the Plaintiff closed the Plaintiff case. The court therefore had nothing to further authenticate the alleged occupation, use, its extent and the persons in occupation.
22. I am not convinced that the Defendants have been dispossessed of their land as alleged by the Applicant. There has not been sufficient evidence of use and occupation of the land by the Applicant. With the evidence presented before this court, the court is hesitant in allowing the adverse possession claim as sought.
23. Consequently, the court finds that the Applicant Plaintiff has failed to prove his case to the required standard of a balance of probability. The suit is hereby dismissed. There shall be no orders as to costs. Orders accordingly.



**JUDGEMENT DATED SIGNED AND DELIVERED THIS 19<sup>TH</sup> DAY OF DECEMBER 2024.**

**A E DENA**

**JUDGE**

Mr. Makowade for the Applicant

No appearance for the Respondent

Mr. Daniel Disii – Court Assistant

**HON. LADY JUSTICE A.E DENA**

