



**Masika v Mwayitsi (Environmental and Land Originating Summons  
8 of 2023) [2024] KEELC 13902 (KLR) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13902 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 8 OF 2023**

**EC CHERONO, J**

**DECEMBER 17, 2024**

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

**AND**

**IN THE MATTER OF LAND PARCEL NO. LR NO. KIMILILI/KIMILILI/1093**

**BETWEEN**

**BETWEEN**

**JOSEPH WAMALWA MASIKA ..... PLAINTIFF**

**AND**

**MARY TINDI MWAYITSI ..... DEFENDANT**

**JUDGMENT**

1. The Applicant commenced these proceedings by an Originating Summons dated 27/10/2023 seeking determination of the following questions;
  - a. That the Applicant be declared the owner of a parcel measuring 0.05Ha known as land parcel no. Kimilili/Kimilili/1093 which he has been in adverse possession having occupied the same for a period of over 18years.
  - b. That an order that the Applicant has become entitled to and should be registered as the owner of land parcel no. Kimilili/Kimilili/1093 by operation of the law to wit; section 7,17 and 38 of The Limitation of actions Act (Cap 22 Laws of Kenya) in place of the Respondent Mary Tindi Mwayitsi.
  - c. That the Respondent's name on the said parcel of land be removed and cancelled on the said land parcel measuring 0.05ha of land parcel no. Kimilili/Kimilili/1093 and be replaced with those of the Applicant.



- d. That in the alternative and without prejudice to para 1,2 &3 above (questions to be determined), a declaration that the Respondent holds title to a portion of land parcel LR No.Kimilili/Kimilili in trust and for the benefit of the Applicant.
  - e. That costs of this application be provided for and be paid by the Respondent.
  - f. That this court to grant any other relief that it may deem proper and fit to grant.
2. The summons are premised on the grounds shown on the face of the said application Supported by the Affidavit of the Applicant sworn on 27/10/2023.
  3. The Respondent failed to file enter appearance and file defence to the suit despite evidence that She was served with Summons. When the matter came up for directions, the court directed that same to proceed ex-parte.
  4. At the hearing of the suit, the Applicant testified as PW1 and adopted his witness statements dated 27/10/2023 and 27/04/2023 respectively as his testimony-in-chief. He further produced into evidence three items contained in his list of documents dated 27/04/2024 as P-Exhibit 1-3. In his oral testimony, the Applicant reiterated the contents of his witness statement. He called two more witnesses as PW2 and 3 who also adopted their witness statements dated 27/04/2024 as their testimony-in-chief and closed his case.

### **Legal Analysis And Determination**

5. I have considered the pleadings, annexures, submissions and authorities cited by the Applicant and in my view, the issues for determination are as follows;
  - i. Whether the Applicant's occupation of the Suit Land is adverse to that of the Respondent and
  - ii. who should bear costs
6. As earlier stated, despite service of Summons and pleadings, the Respondent did not enter appearance nor file defence to the Applicant's claim. In instances such as this, the Court has a duty to interrogate and evaluate uncontroverted evidence in order to determine whether the Applicant is entitled to the prayers sought. While discussing the consideration of uncontroverted evidence, the court in the case of Murang'a ELCA No. 16 of 2017 Gichinga Kibutha v Caroline Nduku [2018] eKLR pronounced itself as follows:-

It is not automatic that in instances where the evidence is not controverted, the claimant's claim shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.
7. Section 108 & 109 of the *Evidence Act* is clear that the burden of proof is placed on the person alleging the occurrence of an event and where there is no evidence to challenge the allegations, the standard of proof automatically becomes higher. Undoubtedly, owing to the nature and extent of orders for adverse possession to wit extinction of right to property, the burden is higher. The burden of proof squarely lies on the Applicant to demonstrate that he has met the requirements for the grant of an order of adverse possession. The Applicant is the one who has made the allegations and must therefore proof. (See Nairobi CoA App No. 95 of 2014 Ruth Wangari Kanyagia vs Josephine Muthoni Kinyanjui [2017] eKLR)
8. In this case, the Applicant states that the Respondent is his sister -in-law having been married to his brother, one Mathews Ngichabe Sisende (deceased). The deceased is said to have died in the year 2020



and that his widow, the Respondent herein obtained title of the land in the year 2023. The Applicant avers that when the deceased purchased the suit land, he put him in possession and that he has been residing in the suit land since the year 2005. It was his contention that the deceased had gifted the land to him and having been in peaceful and uninterrupted occupation and use of the land for more than 12 years, the Applicant is now claiming entitlement through adverse possession.

9. Section 7 of the Limitations of Actions Act provides as follows:-

(a) An action to recover land 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.

10. After the expiration of 12 years, a party may approach the High Court under section 38 of the Limitation of Actions Act for a declaration that the property has devolved to him in accordance with the doctrine of adverse possession.

11. Section 38(1) of the Act states as follows;

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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 a proprietor of the land.”

12. The Court of Appeal in the case of *Wilson Kazungu Katana & 101 others v. Salim Abdalla Bakshwein & another* [2015] eKLR sought to define what constitutes adverse possession and stated 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.

What these authorities are emphasizing is that for one to stake a claim on a parcel of land on the basis of adverse possession, he must show that he entered the parcel of land more or



less as a trespasser as opposed to by consent of the owner. In other words his entry must be adverse to the title of the owner of the land.

In the case of *Samuel Miki Waweru v Jane Njeri Richu, Civil Appeal No. 122 of 2001*, (UR), this court delivered the following dictum:

“...it is trite law that a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in *Jandu v Kirpal* [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted...”

13. From the evidence on record, the Applicant stated that he was placed on the suit property by the deceased. This, in my considered view connotes that the Applicant’s occupation was with the consent and or permission of the deceased. From the above authority, it is clear that the law on adverse possession provides that the entry by the adverse possessor should not be with the permission or consent of the owner as in reality, he has not dispossessed the owner and the possession is not illegal (*Wanje vs. Saikwa (No.2) (1984) KLR 284*.)”
14. Further, the Applicant asserts that the land was gifted to him by the deceased. The Blacks law Dictionary, 10<sup>th</sup> Edition describes a gift inter vivos as follows: “Gift between the living relating to or involving property conveyed not by will or in contemplation of an imminent death, but during the conveyors lifetime.”
15. Discussing the law with respect to gift inter vivos, the Court in *In Re Estate of Chesimbili Sindani (deceased) 2021 eKLR* stated thus:

“The principles relating to inter vivos gifts have been stated in very many cases...From the case law above, the principle that emerges is that any gift inter vivos should be backed by some memorandum in writing, and the gift would be complete once title to the subject property is transferred to the name of the beneficiary of the gift.
16. From the foregoing, it is my finding that the Applicant has not proved that the land was gifted to him in any way. The effect therefore is that upon his death, the property remained part of the deceased’s Estate.
17. Considering the elements as set out in the cases above, it is clear that the Applicant’s claim in this regard fails at the onset. The Applicant contends that he was placed in possession of the suit land by the deceased which I have found connotes permission/consent. Further and having found that the allegation of a gift fails, it follows that the concept of adverse possession has not been proved.
18. In the end, the Applicant’s suit commenced by way of originating summons dated 27/10/2023 is without merit and the same is hereby dismissed. Since the Respondent did not participate in these proceedings, I make no orders as to costs.
19. It is so ordered

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 17<sup>TH</sup> DAY OF DECEMBER, 2024.**

.....

**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of



Mr. Were for Applicant

Respondent/Advocate-absent

Bett C/A

