



REPUBLIC OF KENYA



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**Amoni & 20 others v Guhad & another (Environment & Land Case  
1357 of 2014) [2023] KEELC 471 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 471 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1357 OF 2014**

**LN MBUGUA, J  
JANUARY 26, 2023**

**BETWEEN**

**SYLVANUS MUKATSA AMONI ..... 1<sup>ST</sup> PLAINTIFF**  
**GEORGE JUMA ODONGO ..... 2<sup>ND</sup> PLAINTIFF**  
**JOHN OKELLO WAKA ..... 3<sup>RD</sup> PLAINTIFF**  
**JAMES GITAU MBUGUA ..... 4<sup>TH</sup> PLAINTIFF**  
**EDWARD KAMAU GITAU ..... 5<sup>TH</sup> PLAINTIFF**  
**JOSEPH KANYINGI NDIRANGU ..... 6<sup>TH</sup> PLAINTIFF**  
**JOSEPH GACHERU MAINA ..... 7<sup>TH</sup> PLAINTIFF**  
**FRANCIS MAINA NJUGUNA ..... 8<sup>TH</sup> PLAINTIFF**  
**DENNIS OWINO WAKA ..... 9<sup>TH</sup> PLAINTIFF**  
**STEPHEN NJUGUNA WAIGANJO ..... 10<sup>TH</sup> PLAINTIFF**  
**CHARLES KARANJAH ..... 11<sup>TH</sup> PLAINTIFF**  
**GEOFFREY OJUNGA JUMA ..... 12<sup>TH</sup> PLAINTIFF**  
**TONY THUO MWANGA ..... 13<sup>TH</sup> PLAINTIFF**  
**STEPHEN KAMAU MWANGI ..... 14<sup>TH</sup> PLAINTIFF**  
**FINNY OUMA ODOYO ..... 15<sup>TH</sup> PLAINTIFF**  
**JACKTON AMUNGA JACQUEZ ..... 16<sup>TH</sup> PLAINTIFF**  
**WILLIAM NGARE MWANGI ..... 17<sup>TH</sup> PLAINTIFF**  
**EVANS OCYAMA NYABOLA ..... 18<sup>TH</sup> PLAINTIFF**  
**ANTHONY KAMAU ..... 19<sup>TH</sup> PLAINTIFF**



**JULIUS MWASYA ..... 20<sup>TH</sup> PLAINTIFF**

**NOAH OWAKA AGUYO ..... 21<sup>ST</sup> PLAINTIFF**

**AND**

**SAID MOHAMMED GUHAD ..... 1<sup>ST</sup> DEFENDANT**

**HARRISON KABIRU MUGO ..... 2<sup>ND</sup> DEFENDANT**

### **JUDGMENT**

1. Vide the originating summons dated October 23, 2014, the Plaintiffs claim that they have become entitled to all that parcel of land comprised in Plot No 36/111/151 (the suit land) in Eastleigh Section 3 Nairobi by way of adverse possession. The Originating summons was based on the supporting affidavit of the 1<sup>st</sup> Plaintiff who deponed that on or around 1972 his father and other Plaintiffs occupied the suit land where they commenced mechanic businesses. That the suit plot was left to them by one Jayant Kumar Jamnadas Reparel and they have been in continuous occupation thereof since 1972, a period exceeding 12 years.
2. The 1<sup>st</sup> Defendant opposed the suit by way of his Replying Affidavit sworn on July 26, 2017, where he avers that he is the legally registered owner of the suit land, having purchased the same from the 2<sup>nd</sup> Defendant on May 4, 2012.
3. The 2<sup>nd</sup> defendant did not file any pleading but he gave evidence as a witness for the 1<sup>st</sup> defendant.
4. The matter was heard by way of *viva voce* evidence. PW1, Joseph Gacheru Maina, the 7<sup>th</sup> Plaintiff testified that the suit property belonged to an Asian by the name Kumar Jamnadas Ruparel. To this end, he produced a memorandum of registration of transfer of lands dated February 11, 1970 as P Exhibit 1 depicting the said Ruparel as having bought the suit land from one Naurata Ram.
5. It was his testimony that they entered the suit land in 1972 after Ruparel invited 15 of them unto the land. Ruparel then left for India and never came back. The plaintiffs continued to occupy the land, adding that the 2<sup>nd</sup> Defendant was one of them and he used to do wiring.
6. Pw1 further testified that they occupied the property for a period of over 50 years without anyone claiming title to or ownership until 2014 when a Mr Mwangi entered thereon claiming that the suit property had been sold to a Somali by the name Said Mohammed Guhad, and that the 2<sup>nd</sup> Defendant had procured papers showing he had conveyed the suit land to the 1<sup>st</sup> Defendant. Thereafter, the 2<sup>nd</sup> defendant parked his things and left the suit land prompting the Plaintiffs to move to Court to challenge these turn of events, they also reported the matter to the police.
7. Pw1 produced P Exhibit 2(a) and 2 (b) which are photographs of motor vehicles to show that the Plaintiffs carried on mechanic works on the suit property.
8. On cross examination, Pw1 stated that he does mechanic work on the suit property but he did not have a County Government license. He further stated that he is now 83 years old and he used to work for Ruparel as a cleaner and caretaker. He had no document to show that Ruparel left them the suit land. He added that the original occupants were 15, but some died but their children continued to occupy the land. He identified some of the original occupants as himself, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 20<sup>th</sup> and 21<sup>st</sup> plaintiffs. He further stated that one Michael Maina was one of them but



- he was compromised while the 2<sup>nd</sup> Plaintiff was not among the original 15 but his parent was. The 2<sup>nd</sup> Defendant was also one of them but he fraudulently sold the suit land and they learnt of the illegal transaction when auctioneers came to the suit property.
9. PW2, James Gitau Mbugua, the 4<sup>th</sup> Plaintiff testified that he is one of the mechanics who have been occupying the suit land and has been there for 20 years. His entry on that land was in 1985, but he left and went upcountry, then went back to the suit land in 1990. He further stated that they are claiming title to the suit land because they have stayed there for long.
  10. On cross examination, Pw2 stated that he is 56 years old, that he entered the suit land in 1985 and the registered proprietor left in 1972. That the 2<sup>nd</sup> Defendant was one of them but he cannot tell if he had a title or not. He confirmed that he is currently in occupation of the suit property.
  11. DW1 Harrison Kabiru Mugo is the 2<sup>nd</sup> Defendant. He told the court that he was born in 1962, and that he entered the suit land in 1980 as a mechanic, and by then, there was nobody on the suit property. In 1999 James Mwangi Gacheru sold to him the suit property and he produced a copy of the conveyance to that effect as Defence exhibit 1.
  12. He also testified that some of the plaintiffs have never stepped on the suit property while the rest were his casual workers. To this end, he does not know the 1<sup>st</sup> 5<sup>th</sup> 10<sup>th</sup> 12<sup>th</sup> 14<sup>th</sup> 19<sup>th</sup> 20<sup>th</sup> and 21<sup>st</sup> plaintiffs. He added the 6<sup>th</sup> Plaintiff is a young man who started working for him recently, while the 7<sup>th</sup> Plaintiff used to be on Kirinyaga road until recently. He recognized James Gitau as the only one who had been in the suit property since 1985, who was occupying the land as a licensee of Dw1.
  13. It was also his testimony that he sold the suit land to the 1<sup>st</sup> Defendant and gave him the title documents.
  14. On cross-examination, Dw1 stated that he does not know Jayant Kumar but he knows some of the Plaintiffs, of which, two were in court. He further stated that he entered the suit property in 1980 and purchased it in 1999 and that between 1980 and 1999, he was on the suit property with the permission of the owner, one James Mwangi Gacheru. Only one or two Plaintiffs were on the suit property, one being James Gitau, but he left in year 2012.
  15. He also stated that he last visited the suit property in year 2012 when he sold the land. He does not know the current status though he knows there is no garage there.
  16. DW2, Said Mohamed Guhad is the 1<sup>st</sup> Defendant. He adopted his Replying Affidavit sworn on July 26, 2017 and the 6 annexures thereof as his evidence. He also produced an official search dated December 6, 2021 as D Exhibit 7. The same indicates that the current registered owner of land parcel 36/111/151 (suit property) is the 1<sup>st</sup> defendant.
  17. On cross examination, Dw2 stated that before he purchased the suit property, he had visited the same and had found a garage thereon. That after the purchase, the mechanics who were operating the garage declined to move out and instead moved to court. When re-examined, he stated that the mechanics are still on the suit property due to this case.
  18. On December 5, 2019, the court issued witness summons to the Chief Land Registrar to attend court and produce records relating to the ownership of the suit property from 1972 to date. In that regard, one Gildine Gatwiri Karani, a Principle Land Registrar testified and produced a current search for Plot No36/iii/151 which indicated that the current proprietor is the 1<sup>st</sup> Defendant and a copy of the volume register showing an indenture of conveyance dated 3<sup>rd</sup> February 2012 to the 1<sup>st</sup> Defendant. Other documents availed by the Land Registrar include a volume of conveyance dated August 19, 1999



- to the 2<sup>nd</sup> Defendant, conveyance dated February 3, 2012 for registration to the 1<sup>st</sup> Defendant and the indenture of conveyance between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
19. On cross-examination, the Land Registrar stated that these were the documents she could trace in the GLA file. However, there were documents which were tattered and volumes which were missing. There were no documents of 1972 in the file.
  20. The submissions of the plaintiffs are dated November 11, 2022 where they aver that in line with the provisions of Section 38(1) and (2) of the *Limitation of Actions Act*, the title of the owner of the suit land has been extinguished, and they are now entitled to the said land by way of adverse possession. Relying on the case of *Kasuve v Mwaani Investment Limited & 4 others* 1KLR 184, they submitted that they have been in open, un interrupted occupation of the suit land for more than 12 years. They pointed out that DW1 stated that he entered the land in 1985 yet the conveyance in his favour is dated 1999, therefore even if the court is to take his averments as the truth, the Defendants' claim still fails since the Plaintiffs had already occupied the suit land for more than 12 years from 1985.
  21. They further submitted that after obtaining a conveyance in 1999, the 2<sup>nd</sup> Defendant did not evict the Plaintiffs and by the time he sold the land to the 1<sup>st</sup> Defendant, another 12 years had lapsed.
  22. It was also submitted that the conveyance to the 2<sup>nd</sup> defendant was fraudulent and the root of his title was not explained, thus his title stands as impeached. To this end, the cases of *Propwa Company Limited v Justus Nyamo Gatondo & another* [2020] eKLR and the case of *Daudi Ledama Morintat v Mary Christine Kiarie & 2 others* [2017] eKLR were proffered.
  23. The 1<sup>st</sup> Defendant's written submissions are dated April 22, 2022. It was submitted that according to the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, a party invoking the doctrine of adverse possession must prove; open and notorious use of the property, continuous use of the of the property, exclusive use of the property and actual possession of the property, but the Plaintiffs have failed on all the aforementioned required elements.
  24. It was further submitted that all along, the plaintiffs were working for the 2<sup>nd</sup> defendant, hence they had the consent of the 2<sup>nd</sup> defendant to be on that land. Thus the 2<sup>nd</sup> defendant was never dispossessed of his land by the Plaintiffs, and even after the sale of the land by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant, the latter was not discontinued or dispossessed of the said land. To this end, reliance was made to the cases of *Ruth Wangari Kanyagia v Josephine Muthoni Kinyanjui* [2017] eKLR and the case of *William Kipnyor Rotich v Paul Kiprof Karoney* [2021] eKLR.
  25. The issue for determination is whether the Plaintiffs are entitled to the suit land through the doctrine of adverse possession.
  26. The doctrine of adverse possession is underpinned in the statute, where under Section 38(1) of the *Limitation of Actions Act*, it is stated 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”.



27. The Court of Appeal in *Titus Mutuku Kasuve v Mwaani Investments Limited & 4 others* [2004] eKLR, set out what a party claiming an interest by way of adverse possession must prove. The court stated that;

“..In order to be entitled to the 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 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition”.

28. In *Mate Gitabi v Jane Kabubu Muga Alias Jane Kaburu Muga & 3 Others* [2017] eKLR, the Court of Appeal stated that:

“For one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin maxim *nec vi, nec clam, nec precario*.”

29. In *Samuel Kihamba v Mary Mbaisi* [2015] eKLR, the Court of Appeal stated that;

“Accordingly, when determining a claim in adverse possession the court must consider two questions: firstly, whether the owner has been dispossessed openly or willingly and secondly whether the claimant has been in uninterrupted possession for 12 years with an intention to own the land”.

30. Have the Plaintiffs met the above criteria set out in the statute and case law?. PW1 has given an account of how they entered the suit land upon the invitation of one Jayant Kumar Jamnadas Ruparel, of which they produced a Memorandum of Registration of transfer of the suit land dated February 11, 1970 from Naurata Ram son of Mai Ditri Ram to Jayantkumar Jamnadal Ruparel. No evidence has been availed by the defendants to challenge the registration of the suit land in Rupparel’s name as at 1970. As for the Land Registrar, her evidence was that their file was incomplete, thus they had no records regarding ownership of the suit land from 1970 to 1999. There is also no evidence of how James Mwangi Gatheru became the owner of the land, so as to sell the same to the 2<sup>nd</sup> defendant.

31. Pw1 stated that Ruparel left the suit land in 1972, never to return and he left the plaintiffs on the suit land. Therefore, from 1972 when Ruparel discontinued possession to 1984, 12 years had lapsed, enough time for the claim of adverse possession to mature.

32. DW1 testified that the 4<sup>th</sup> Plaintiff entered the suit land in 1985 as his licence. If indeed the land was registered in James Mwangi Gacheru’s name as per the claim of Dw1, then the 4<sup>th</sup> Plaintiff would have sought a Licence from Gatheru and not Dw1 in 1985. There is no evidence that as at 1985, the suit land was registered to James Mwangi Gacheru whom the 2<sup>nd</sup> Defendant claims to have purchased land from.

33. Dw1 claims to have entered the suit land in 1980 as a mechanic, an averment in tandem with Pw1’s evidence that indeed Harrison Kabiru Mugo was one of them, the mechanics who had settled on the suit land. And according to Pw1, Harrison only left the land after he irregularly sold it to the 1<sup>st</sup> defendant.

34. Plaintiff Exhibit 2a and 2b depict a garage. DW2 also confirmed that he visited the suit land before the purchase and he found a garage on it. There is no evidence that the garage was the 2<sup>nd</sup> Defendant’s



business and that he had employed some of the Plaintiffs as alleged by Dw1. If indeed the garage belonged to Dw1, he would have evicted the Plaintiffs in 1999.

35. As the matter stands Dw2 (1<sup>st</sup> defendant) was unable to remove the occupants of the garage after he bought the land. This is what he told the court during cross examination;

“After I purchased the suit property, the mechanics who were operating in the garage declined to move out and moved to court”.

36. It is worthy to note that Dw2 does not refer to the occupants of the suit land as employees of the 2<sup>nd</sup> defendant. Dw1 had also stated as follows during his evidence in chief;

“I entered the land in 1980. I stayed there up to 1999..... I do not know the current status of the land”.

37. What resonates from the foregoing evidence is that the occupation of the suit land by the plaintiff was not interrupted by the defendants, despite the apparent seedy change of ownership of the land over the decades through the hands of one Gatheru, to Harrison and eventually to Guhad. Further, the said occupation of the land by the plaintiffs did manifest unmistakable animus possidendi, that is occupation with the clear intention of excluding the owner and all other persons from that land, that it is why the plaintiffs stayed put and even resulted to filing the suit and even reporting the matter to the police when they got wind that 1<sup>st</sup> defendant had bought the land.

38. In the case of *Maweu Vs Liu Ranching & Farming Cooperative Society Limited*, [1985] KLR 430 at 434, the court stated that any man who buys land without knowing who is in possession of it risks his title. This is exactly what the 1<sup>st</sup> defendant did, buying land without ascertaining the nature and extent of the rights of the occupants of the said land. In any event the mere change of ownership of the land which is occupied by another under Adverse Possession does not interrupt such person’s adverse possession – see *Githu v. Ndeete* [1984] KLR 776. Thus the change of ownership of the suit land through the decades does not in any way affect the plaintiffs claim of adverse possession on the said land.

39. In conclusion, I find that the plaintiffs have proved their claim on a balance of probabilities. I therefore enter judgment against the defendants jointly and severally as follows;

1. It is hereby declared that the plaintiffs are entitled to the land parcel No 36/111/151 by way of adverse possession.
2. An order is hereby issued for the cancellation of the 1<sup>st</sup> defendant Said Mohamed Guhad as the registered owner of parcel 36/111/151 and instead, the plaintiffs and or their appointed legal representatives are to be registered as the owners of the said land.
3. Each party is to bear their own costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF JANUARY, 2023 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

Mohamed Maulid holding brief for Abdiaziz for the Defendant

Court assistant: Eddel

