



**Kitonga v Kitonga (Environment & Land Case 2 of 2021)
[2023] KEELC 371 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 371 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND CASE 2 OF 2021**

LG KIMANI, J

JANUARY 26, 2023

**IN THE MATTER OF: AN APPLICATION UNDER SECTION 38 OF
THE LIMITATION OF ACTIONS ACT CHAPTER 22 LAWS OF KENYA**

-AND-

IN THE MATTER OF: ACQUISITION OF TITLE BY ADVERSE POSSESSION

-AND-

**IN THE MATTER OF: LAND PARCEL NO. MULANGO/WIKILILYE/1515
SITUATE IN KITUI CENTRAL SUB-COUNTY IN KITUI COUNTY**

BETWEEN

MUTHOKA KITONGA APPLICANT

AND

MASILA KITONGA RESPONDENT

JUDGMENT

1. Before this honourable court is an originating summons application dated September 12, 2018 seeking for the following orders:
 - 1) That the plaintiff herein be declared to be entitled by adverse possession for over 12 years to Land Parcel Mulango/Wikiliye/1515 now registered in the name of Masila Kitonga.
 - 2) That the plaintiff be registered as absolute proprietor in respect of Title No Land Parcel Mulango/Wikiliye/1515
 - 3) That the costs of these summons be awarded to the plaintiff.
2. The application was accompanied by the supporting affidavit of the applicant sworn on September 12, 2018, further affidavit sworn on September 16, 2019 and witness statement by two witnesses.



The grounds relied in support of the application are that the applicant has enjoyed continuous, uninterrupted and peaceful occupation of Land Parcel Mulango/Wikiliye/1515 since he took vacant possession thereof in 1988 with full knowledge of the defendant, a period exceeding 12 years. He claims that as a result prescriptive rights have accrued in his favour and he is entitled to be registered as the absolute proprietor of Land Parcel Mulango/Wikiliye/1515 by operation of the law.

3. The applicant attached a copy of the official certificate of search indicating that the defendant is the registered proprietor of the suit land and he stated that he has developed the land by way of cultivation, digging bench terraces, planting trees and now has buildings on the land. He attached copies of photographs in support of his claim.

The Respondent's Case

4. The respondent filed a replying affidavit sworn on July 17, 2019 and a statement dated March 7, 2022 and a witness statement by one Francis Kyutha Kitonga. He stated that he is indeed the registered owner of the suit land Mulango/Wikililye/1515 and the applicant is his elder brother. He claims that he leased a portion of the land to him as a tenant at will and the Lease was renewable after every five years and every rainy season, the applicant has to give him Ksh 2000 as consideration.
5. The respondent avers that in the year 2014, he decided to sell the suit property and approached the applicant who told him that he was not able to purchase the suit land but that he should lease it to him for a period of two years as he looked for a purchaser. They entered into the lease agreement in writing and according to the respondent, the agreement was not renewable after the expiry of the said two years.
6. In the year 2015, the respondent stated that the applicant and his sons started putting up illegal structures thereon and he warned them verbally and also through a letter from his advocates which he has attached dated August 20, 2015. The letter instructed the applicant to vacate the land within 30 days.
7. Further to that, the respondent stated that the applicant started selling portions of the suit land to third parties alleging that he had purchased the land from him. That sometime in the year 2017, his house was broken into and his original title deed stolen together with the lease agreement between him and the applicant as well as some of his personal effects.
8. Upon reporting the matter to the police and the Lands Registry, due process was followed and the respondent was re-issued with a new title deed, evidenced by a copy of gazette notice and dated September 21, 2018 and a copy of the title deed issued in November 23, 2018.
9. According to the respondent, the applicant was ordered by the Chief Officer in charge of Lands, Infrastructure and Urban Development during the lost title deed investigations to vacate the respondent's land but did not heed to it. It is the respondent's averment that he has never ceded his rights over the subject land to his brother who has been on the land with his express permission as a tenant at will. He stated that the originating summons herein is full of falsehoods and urged the court to dismiss it with costs.

Evidence At The Hearing

10. Directions were given by the court on July 18, 2019 when the application dated March 22, 2019 was allowed in the following terms;
 - “i) The originating summons in this case do proceed as to cause had begun by filing a plaint



- ii) The affidavits filed herewith do stand as pleadings in the cause with liberty to add supplementary affidavits if need be
- iii) The parties to call *viva voce* evidence at the trial.”

11. The trial proceeded on June 21, 2022 and PW 1 the applicant herein adopted his supporting affidavit and witness statement as his evidence in chief reiterating the facts as set out above. He stated that he has lived on the suit land for 34 years and no one has ever asked him to leave. He stated that he has 7 trenches on the land at an approximate length of 100 meters as well as mango trees.

On cross-examination, the applicant stated that he entered the land in 1988 when the respondent chased his wife away and his father told him to take care of the land since his brother the respondent had no wife or children. According to him, the land where the respondent used to live was demolished and was sold to an uncle known as Nzamba. The applicant testified that the respondent had no problem with him being on the land and cultivating. He prayed to the court to be given the land since from the time he started occupying the land and developing it no one has asked him any questions.
12. Upon re-examination, he stated that the land was given to him by his father because there was erosion and the land was being damaged. He denied knowing that the respondent’s life was threatened and that a new title deed was issued on the suit land.
13. PW 2 Patrick Mwendwa Makau adopted his witness statement and further stated to the court that he has known the applicant since he was born as they are neighbors. On cross-examination, PW 2 stated that he knew both parties as well as the suit land and denied knowing who the registered owner of the land is. It was his statement that the respondent was allowed to live on the suit property by their father. He also denies threatening anyone to come to court to give evidence.
14. The applicant did not call the second witness Hannington Nguthu Mbuvi who had recorded a witness statement.
15. DW 1 Masila Kitonga, the respondent herein gave evidence reiterating the evidence as summarized above and stated the suit land belongs to him and he has a title deed in his name. He adopted the replying affidavit as his evidence before court and his statement dated March 7, 2022. His statement was that the original title deed was given to him on March 10, 2009 but was stolen when he went to the shops in the evening and came back home and found that the window to his house was broken into and someone had stolen it on April 8, 2018.
16. He stated that he followed up the matter and was finally given another title deed. He acknowledged that the applicant is the one who uses the land and the applicant knowing that it belongs to him. According to the respondent, he allowed the applicant to use the land in 1988. After the applicant started building on the land and selling parts of it he asked him to stop. He also went to an advocate and asked him to write a demand letter for him to stop the building. The respondent stated that the land belongs to him and he was not willing to give it to the applicant.
17. Upon cross-examination, he stated that he does not work and lives on his uncle’s land where his father and mother had built and he has lived since the year 1985. He stated that his wife and children left him in 1984. He did not have any documents to show a police report that shows his claim that he was being threatened.
18. The applicant further stated that he was the one who allowed the applicant to live on the suit land and he has not lived on his land but instead lived on his father’ land. He also confirmed that he did not



have any document to show that he gave the applicant the land to use and that there were not witnesses since they had no quarrel.

19. He confirmed that the demand letter from JK Mwalimu Advocates dated August 20, 2015 was written 27 years from the time the applicant started living on the land and also that the applicant had grown mango trees on the land. He accused the applicant of selling plots in his name but did not have any document to show the alleged sale.
20. On re-examination, the respondent stated that whenever he tries to go to the land there was always a problem since he is refused entry in a hostile manner and cannot enter or cultivate the land and neither can his children enter the land.
21. The respondent did not call the witness Francis kyutha Kitonga whose witness statement had been filed. Both parties closed their cases and filed written submissions.

Applicant's Submissions

22. The applicant submitted that he took possession of the suit land in 1988 and that this occupation was open, continuous and uninterrupted for a period of over 12 years, where the 12 years lapsed in the year 2000. By this time of filing the suit, the applicant submitted that he had been on the suit land for 30 years. He claims that the presence of permanent buildings, mature mango trees and bench terraces in the photographs produced as exhibits are his evidence of continuous occupation.
23. The applicant noted that the respondent failed to produce the lease he claimed they had as an exhibit. He denied receiving the demand letter from JK Mwalimu Advocates dated August 20, 2015 and stated that there was no proof of service. In any case, the applicant submitted that by this time, 12 years had already lapsed and the respondent never exerted his rights during this period.
24. The applicant relied on the cases of: *Peter Mbiri Michuki vs Samuel Mugo Michuki* 2014 eKLR where the court set out the elements of adverse possession the plaintiff must prove. He also relied on the case of *Patrick Magu Mwangi Kimuyu v Joreth Ltd* 2015 eKLR where the court emphasized that the applicant must show continuous uninterrupted possession for a period of at least 12 years. Counsel further relied on *Wambugu v Njuguna* 1983 KCR 174 cited in the case of *Karuntimi Raiji v M'makinya M'itunga* [2013] eKLR where the court held that the proprietor must have been dispossessed of his title.
25. It was the applicant's submission that he has made out a case for adverse possession and relied on Justice Christine Ochieng's orders in Machakos ELC No 38 of 2008(O.S) where having found for the plaintiff for adverse possession, she made an order directing that the Land Registrar Kitui registers the plaintiff as the owner of the suit land and prayed for a similar order.

Respondent's Written Submissions

26. Counsel for the respondent submitted that the applicant continued to use the suit land with the respondents express permission. The respondent stated that in cross-examination the applicant admitted that he was put in possession of the defendants land because the defendant who was his younger brother, had no family and that the evidence of the applicants witness was to the same effect. The defendant testified that the applicant continued in possession of the land with his permission until the year 2014 when he terminated the periodic lease by asking the applicant to move out of the suit land as evidenced by a demand letter. That at that point he wanted to sell a portion of the suit land and it is the demand letter that sparked the filing of this suit.
27. According to the respondent, he realized that his life was in danger after his house was broken into and his title deed was stolen, prompting him to move out of his house and has been living with a



relative besides renting a room in the nearby market. It was his submission that the applicant has been occupying the land by force from 2015.

28. The respondent submitted on the requirements necessary to establish a claim for adverse possession as stated in the cited case of *Richard Wefwafwa Songo v Ben Munyifwa Songoi* [2020] eKLR. Submitting that it is not clear in this case when the plaintiff came into possession of the suit land but by the applicant's admission, it was by a request by their father to take care of the suit land because the respondent had no family. The respondent submitted that the possession came about by way of a periodic lease.
29. The respondent submitted that the applicant has denied access to anyone who attempts to get into the land and that adverse possession cannot be established or acquired through the use of force, while relying on the case of *Samuel Kibamba v Mary Mbaisi* [2015] eKLR where the court held that adverse possession should be open and without force.
30. According to the respondent, the mere fact that the owner of the land has not used the land is not conclusive proof of effective dispossession to herald the establishment of adverse possession as was held in the case of *Christopher Kioi and Another v Winnie Muklwe & others* [2018] eKLR.
31. The respondent submitted that he never denounced the title and continued to charge periodic tenancy charges up to 2014 when the plaintiff stopped paying for the same and soon hereafter, the defendant served a notice to the plaintiff to vacate the suit land but the plaintiff remained put.
32. The respondent concluded that the plaintiff failed to establish the salient ingredients of adverse possession and consequently, the case has not been proven to the required standards and ought to be dismissed with costs.

Analysis and Determination

I have considered the application herein by way of originating summons, the supporting affidavit, supplementary affidavit, replying affidavits and witness statements and the evidence adduced during trial and submissions by counsel. In my view the issues for determination are

- A. Whether the applicant has met the threshold for grant of orders for adverse possession?
- B. Whether the applicant is entitled to Land Parcel Mulango/Wikiliye/1515 now registered in the name of the respondent Masila Kitonga.
- C. Who should bear the cost of the suit?

A. Whether The Plaintiff Has Met The Threshold For Grant Of Orders For Adverse Possession

33. The applicant has applied for a declaration that he is entitled to be registered owner of the suit land by way of adverse possession. Section 7 of the *Limitation of Actions Act* of 1968 provides 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.”



34. The procedure for making such an application is set out by order 37 rule 7 of the *Civil Procedure Rules* [2010] which provides that:

“An application under section 38 of the *Limitation of Actions Act* shall be made by originating summons. (2) The summons shall be supported by an affidavit to which a certified extract of the title to the land in question has been annexed.”

35. With regard to what constitutes a claim for adverse possession the court in *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR. At the hearing the burden is upon the person claiming adverse possession to prove, on a balance of probability that claim. In *Kimani Ruchine v Swift Rutherford & Co Ltd* [1980] KLR it was stated on this point that;

“The plaintiffs have to prove that they have used this land which they claim, as of right: nec vi, nec clam, nec precario So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration; See *Wanyoike Gathire v Berverly* [1965] EA 514, 518, 519 per Miles, J.”

36. The Supreme Court of India discussed the essentials of adverse possession in *Karnataka Board of Wakf v Government of India & Others* [2004] 10 SCC 779 and stated as follows:

“In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is “nec vi, nec clam, nec precario”, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

37. The applicant has stated that he has been in occupation of the suit land since the year 1988 for the last 34 years. It was his case that even if the respondent attempted to assert his rights over the suit property with the demand letter they are relying upon, the applicant had already been on the suit land for over 12 years by that time. The applicant attached photographs to his supporting affidavit to prove that he has planted trees on the land; he cultivates, built buildings and dug trenches on the land. The respondent on the other hand states that the applicant and his sons started constructing on the land in the year 2015 after he had in 2014 indicated that he intended to sell a portion of the land and the applicant had indicated that he was not able to purchase the land.

38. The court record shows certain admitted facts; the applicant and the respondent are brothers the applicant being the elder. Each of them was given their own parcel of land by their father with the respondent being given the suit land while the applicants land is adjacent. The applicant uses both parcels of land. The respondent had a wife and children who left his home sometime in 1984. The applicant commenced use of the suit land in 1988. The applicant stated in his evidence that he came onto the suit land when the respondent chased away his wife and children and his father told him to go onto the land and take care of it. In cross-examination the applicant admitted that he entered the land with Masila's permission to farm for his children and if that were not so Masila would have chased



- him away. He further confirmed that Masila had no problem with him cultivating the land since he had no wife or children.
39. On re-examination, the applicant stated that the land was given to him by his father because there was erosion and the land was being damaged.
40. The respondent in his evidence in court stated that the applicant uses his land because he (respondent) got injured and stayed in hospital for 3 years and that the applicant asked to use his land and he agreed knowing well it belonged to him. He confirms that he allowed the applicant to use the land in 1988. That their father gave all of them land and they all knew their portions.
41. Having listened to both parties, I believe that the applicant commenced occupation of the suit land with permission from the respondent who is his younger brother and that their father endorsed this arrangement taking into account that he is the one who had given land to the applicant and the respondent who were his sons. The applicant on his part denied that there was any lease of the suit land from the respondent and stated that there was no proof of the lease. In my view even though the respondent has not exhibited a formal lease, the respondent clearly stated that they had no documents to show that he had given the land to the applicant since there was no quarrel at the time. He further confirmed that he did not disallow the applicant to plant mangoes since he was not using the land. It is noted that the respondent was not cross-examined on the question of whether or not he used to receive any money from the applicant for the use of his land. In my assessment of the evidence, there may not have been a formal lease of the land from the respondent by the applicant but I believe there was money that was paid for use of the land. I further find that there was permission given to the applicant by the respondent to use the land taking into account that he was not living on or using the land.
42. The parties confirmed that the respondent used to live on his father's land parcel No 644 and even when his parents died he continued living on the land. He had no wife or children as the other applicant stated. That "he was not working but used to roam around while drinking alcohol."
43. However, the mere fact that the respondent was not using his land did not divest him of his ownership of the land and entitle the applicant to claim the same. As was stated in the case of [*Karnataka Board of Wakf v Government of India & Others*](#) [2004] 10 SCC 779 (supra)
- "In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title"
44. It is further a requirement of the law that a person claiming adverse possession that the possession was non-permissive or non-consensual. In the case of [*Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others*](#) [2018] eKLR the court stated as follows:
- "Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non-permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12years as espoused in the Latin maxim, *nec vi nec clam nec precario*."
45. In my view, the facts stated above do not show that commencement of the applicants possession of the suit land was non-permissive or non-consensual. The evidence shows that the parties may have fallen out when the applicant is said to have started selling the respondent's land and when the respondent indicated that he wished to sell a portion of the land. The respondent stated that in 2015, the applicant and his sons started constructing on the land and when he was asked by the respondent by way of an advocates demand letter dated August 20, 2015, he did not stop and he became hostile to the



respondent. By this letter the applicant was asked to vacate the land within 30 days from the date of the letter. In my view this is the letter that terminated the permission and/or consent given to the applicant to be in possession and use of the land. The respondent stated that from the time he issued the letter from the Advocates the applicant would not let him into the land. I further hold the view that this was the date when time would have started running for purposes of a claim for adverse possession and not before the said date as claimed by the applicant.

46. From the above analysis of facts, I do find that the applicant has not met the threshold for grant of orders for adverse possession.

B. Whether the applicant is entitled to Land Parcel Mulango/Wikiliye/1515 now registered in the name of the respondent Masila Kitonga.

47. Having found that the applicant has not met the threshold for grant of orders of adverse possession, I do find that is not entitled to be registered as owner of Land Parcel Mulango/Wikiliye/1515 now registered in the name of the respondent Masila Kitonga.

48. I therefore make the final order that this suit be and is hereby dismissed with costs to the respondent.

DELIVERED, DATED AND SIGNED AT KITUI THIS 26TH DAY OF JANUARY, 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Judgment read in open court in the presence of-

Musyoki Court Assistant

M/S Mwatha holding brief for Kalili Advocate for Plaintiff

Mwalimu Advocate for the defendant

