



**Getonto v Bichage (Environmental and Land Originating Summons  
26 of 2019) [2023] KEELC 893 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 893 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 26 OF 2019  
JM ONYANGO, J  
FEBRUARY 16, 2023**

**BETWEEN**

**JOSEPH OINDI GETONTO ..... APPLICANT**

**AND**

**LAWRENCE MIRONGA BICHAGE ..... RESPONDENT**

**JUDGMENT**

1. This suit was instituted vide an Originating Summons dated September 5, 2019 in which the Plaintiff herein sought determination of the following questions:
  - a. Has the Applicant herein been in open and uninterrupted occupation of the portion measuring 219 feet by 50 feet by 219 feet by 30 feet in the parcel No West Kitutu/ Mwachichana/ 5029 for a period of more than 12 years?
  - b. If so, has the said open and on (sic) uninterrupted occupation and possession of the said portion been adverse to the title of the said land parcel no West Kitutu/ Mwachichana/ 5029?
  - c. Has the Applicant therefore acquired fifth (sic) for the said portion in land parcel no. West Kitutu/ Mwachichana/ 5029 under the provisions of the law of limitations of portion act (sic), against the registered proprietor?
  - d. Can the respondent now be compelled to transfer the said portion in the land parcel no. West Kitutu/ Mwachichana/ 5029 to the applicant herein and in default can the Deputy Registrar of this Honourable court be authorized to transfer the same on behalf of the said respondent to the applicant?
  - e. Who shall bear the costs of this suit?
2. The Originating summons was supported by the Affidavit of Joseph Oindi Getonto sworn on even date.



3. The Originating summons was vehemently opposed by the Defendant herein vide a Replying Affidavit sworn on October 1, 2019.
4. The matter proceeded to full hearing where both parties were heard and their respective evidence adduced before court.

### **Background**

5. There seems to be a consensus between the parties herein that the dispute herein commenced in 2005. The Plaintiff allegedly purchased a parcel of land from the Defendant.
6. The property was originally known as land parcel No. West Kitutu/ Mwangichana/ 1978 from where the disputed parcel emanated. The original title has since been subdivided numerously and the particular portion in which the suit property is located is known as land parcel No. West Kitutu/ Mwangichana/ 5029 measuring 219 feet by 50 feet by 219 feet by 30 feet or thereabouts.
7. The Plaintiff's claim is founded on the assertion that he has adversely occupied the said parcel of land for a period of over 12 years without any interruption from the Defendant and therefore seeks to assert a claim to the parcel of land by way of adverse possession. It is also uncontroverted that the parcel in dispute has not been transferred to the Plaintiff herein.

### **Plaintiff's Case**

8. In his supporting affidavit the Plaintiff alleged that on diverse dates between January 9, 2005 and March 13, 2006 the Defendant together with his brother, one Samwel Anuri Bichage sold to him various portions of the land parcel then known as land parcel No. West Kitutu/ Mwangichana/ 1978 at a total consideration of Kshs 65,000/-.
9. It is the Plaintiff's position that he paid the sum of Kshs.65,000/- in full and he produced several sale agreements as his exhibits in support of this assertion.
10. He claims that upon completion of the payment, he was given vacant possession of a portion from the parcel of land known as West Kitutu/ Mwangichana/ 1978 measuring 219 feet by 50 feet by 30 feet.
11. The Plaintiff goes on to aver that sometime in the year 2008 the land known as parcel No. West Kitutu/ Mwangichana/ 1978 was subdivided in two portions namely land parcels West Kitutu/ Mwangichana/ 3206 and West Kitutu/ Mwangichana/ 3207. He annexed a mutation form to support his assertion.
12. The Plaintiff further states that the Defendant proceeded to further subdivide the parcel of land known as West Kitutu/ Mwangichana/ 3206 into parcels no. West Kitutu/ Mwangichana/ 5027 and West Kitutu/ Mwangichana/ 5028 and West Kitutu/ Mwangichana/ 5029 (where the portion of land sold to him lies).
13. The Plaintiff claims that having taken possession and/ or occupation of the said portion sold to him, he has proceeded to develop the portion of land extensively by erecting a homestead and planting various trees and crops on the parcel for a period of over 12 years.
14. He claims that despite payment of the consideration for the property in full, the Defendant was unable to obtain consent from the Land Control Board thus rendering the agreement between the parties null and void after the expiry of 6 months.
15. The Plaintiff claims that upon the expiry of the agreement between the parties herein, his continued occupation of the suit property became adverse to the rights and the interest of the Defendant.



16. It is the Plaintiff's claim that consequently, he be registered as the owner of the said portion of land by way of adverse possession.
17. During the hearing of the case the Plaintiff stated that sometime in 2010 the Defendant started threatening him and even entered the suit property. It was further established (in Plaintiff's exhibit 1) that the Plaintiff bought the parcel of land from on Lawrence Andicha, the Defendant's stepbrother. The Plaintiff admitted during the hearing that he did not conduct a search in 2005 to determine the registered proprietor of the land. It was his evidence that he was made to believe that the Defendant had the title to the suit property.
18. In cross-examination, the Plaintiff admitted that he filed a case at Marani Land Disputes Tribunal in relation to the suit property six years after he bought the same. The defendant then filed an application for Judicial review to quash the decision of the Land Tribunal and the same was quashed in 2013.
19. He also stated that he has not lived peacefully on the suit property since the Defendant has been bothering him.
20. PW2 testified that the Plaintiff bought the suit property from her late husband. She stated that the Plaintiff had constructed a mud house on the suit property although she was unsure whether the Plaintiff has physically occupied the house. She stated that the Plaintiff had been in occupation of the suit property for about 15 years.

#### **Defendant's Case**

21. In his witness statement dated December 2, 2019 the Defendant stated that his father, now deceased was the registered owner of the parcel of Land known as West Kitutu/ Mwachichana/ 1978. He stated that after succession he was allocated the parcel of land as the sole proprietor.
22. The Defendant alleged that after succession was concluded the Plaintiff instituted a suit against his step brothers namely Lawrence Andika Bichage (deceased) and Samwel Anuri claiming that that they had sold a portion of West Kitutu/ Mwachichana/ 1978 to him. He avers that the matter was determined and judgment entered against the Plaintiff herein.
23. The Defendant further stated that he thereafter subdivided the parcel of land into 2 portions and it yielded two parcels being West Kitutu/ Mwachichana/ 3206 and West Kitutu/ Mwachichana/ 3207.
24. He stated that he subsequently sold the parcel of land known as West Kitutu/ Mwachichana/ 3207 to one Dominic Awera and remained with the portion of land being West Kitutu/ Mwachichana/ 3206 which he later subdivided to give rise to the parcels of land known as West Kitutu/ Mwachichana/ 5027 and West Kitutu/ Mwachichana/ 5028 and West Kitutu/ Mwachichana/ 5029 which are registered in his name.
25. The Defendant told the court that he has never sold any parcel of land to the Plaintiff nor has the Plaintiff resided in any portion of his land as he alleges.
26. He stated that the structure purported to be the Plaintiff's homestead was in fact built by himself. He also said that he had planted the trees and crops on the suit property.
27. It was his contention that the orders sought by the Plaintiff were prejudicial to him as the Plaintiff had never been in occupation of the parcel of land known as West Kitutu/ Mwachichana/ 5029.
28. He stated that there had been previous litigation over the suit property. He produced the judgment in Judicial Review case No.8 of 2012 as Defence Exhibit 2. He stated that he was not ready to give up his land



29. During cross examination the Defendant confirmed that parcel no. West Kitutu/ Mwagichana/ 5029 is a sub-division of parcel no. West Kitutu/ Mwagichana/ 1978. He denied the allegation that the Plaintiff had been in occupation of the suit land from 2005 to 2019.
30. In re-examination, he reiterated that his brother, Lawrence Andicha Bichage did not have authority to sell his parcel of land and averred that he did not witness the sale agreements produced as exhibits by the Plaintiff herein.
31. DW2 stated that the Defendant was his uncle and the administrator of the estate of the late Bichage Mabiria's estate. He claimed that it is not true that the structure on the suit property was constructed by the Plaintiff. He confirmed that there was a case over the suit property at Marani Land Disputes Tribunal.
32. DW3 stated that Lawrence Andicha (deceased) was his step brother and further that he never sold the portion of land in dispute to the Plaintiff herein.

### **Issues for determination**

33. Having considered the pleadings, evidence and submissions presented before me the following issues emerge for determination:
  - a. Whether the Plaintiff is entitled to parcel no. West Kitutu/ Mwagichana/ 5029 by way of adverse possession.
  - b. Who shall bear the costs of the suit?

### **Analysis and Determination**

34. The Plaintiff's main argument is that he bought the suit property sometime in 2005 and that he has been in possession of the property since then. He submitted that the plaintiff bought various portions of land from the defendant on diverse dates between 2005 and 2006 but they did not obtain consent of the Land Control Board and therefore the sale became null and void. It was his contention that despite the fact that the agreement became void, the plaintiff had been in occupation of the suit property to date. He relied on the case of *Peter Mbiru Michuki v Sameul Mugo Michuki* (2014) eKLR where the court held that adverse possession should be calculated from the date of payment of the purchase price to the full span of 12 years because it is from this date that the owner is dispossessed.
35. He contended that the dispute before the Land Disputes Tribunal involved land parcel number West Kitutu/Mwagichana/3206 and not 5029. He further argued that the Judicial review proceedings did not deal with the merits of the case.
36. It was counsel's submission that the Plaintiff had proved his case on a balance of probabilities and the claim for adverse possession ought to be allowed as prayed.
37. On the other hand, learned counsel for the Defendant submitted that the Plaintiff had not met the prerequisites for a claim of adverse possession. He relied on the case of *Titus Mutuku Kasuve v Mwaani Investment Ltd & Another* (2004) eKLR where the Court of Appeal held that:

“...for an order that he be registered as proprietor in place of the registered proprietor and 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 discontinuance of possession by the owner on his own volition”

38. He submitted that in the instant suit, the plaintiff had in cross-examination admitted that his stay on the suit property was not peaceful. He argued that time started running in 2006 but it was interrupted 5 years later when the plaintiff filed a case at the Land Disputes Tribunal whose decision was challenged by the Defendant vide Judicial Review No. 8 of 2012.
39. Counsel submitted that the defendant had testified that he had been in occupation of the suit property and he had planted trees and Napier grass. He had also constructed a house on the suit property where he kept his farming tools. He submitted that the plaintiff had not met the pre-requisites for adverse possession as laid out in the case of *David Kipkosgei Kimeli v Titus Barmasai* [2019] eKLR.
40. The doctrine of adverse possession has been subject of numerous cases and its principles have long since been established in law. The said doctrine in Kenya is embodied in Section 7 of the *Limitation of Actions Act*, in the following 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 first accrued to some person through whom he claims, to that person.”

41. The *Limitation of Actions Act* makes further provision for adverse possession at Section 13 that:

“

- “(1) (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 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 afresh 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.”

Sections 37 and 38 of the *Limitation of Actions Act* stipulate that if the land is registered under one of the registration Acts then the title is not extinguished, but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him.

Section 37 provides that:-

- “(1) (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, to land or easement or land comprised in a lease registered under any of those Acts, 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.”

42. The key aspects the doctrine of adverse possession have been argued and analyzed in many authorities. The salient requirements necessary to establish a claim for adverse possession are well settled in law.
43. A party claiming Adverse Possession ought to prove that his possession was “nec vi, nec clam, nec precario,” that is, peaceful, open and continuous. The possession should not have been through force, not in secrecy and without the authority or permission of the owner.
44. This being a claim for Adverse Possession, the plaintiffs must show that they have been in continuous possession of the land for 12 years or more; that such possession has been open and notorious to the knowledge of the owner and that they have asserted a hostile title to the owner of the property.
45. I take note that the claim is not founded on the agreement between the plaintiff and the defendant but rather on the Plaintiffs assertion that he has occupied the suit property continuously for a period of over 12 years.
46. However, by his own admission during trial, the Plaintiff’s possession of the suit property if at all has not been peaceful by any stretch of the imagination. This assertion was highlighted during the plaintiff’s cross-examination.
47. It should be noted that for such a claim to succeed, all the ingredients ought to be met. Mere occupation of a person’s property does not automatically qualify one to be an adverse possessor.
48. The evidence presented before court elucidates the fact the parties herein have on previous occasions litigated over the suit property both at the Land Disputes Tribunal and vide J R No 8 of 2012 which was determined by this court. The said case touched on the suit property herein. Furthermore, even though the plaintiff claimed that he was in occupation of the suit property, it was evident that he had never occupied or cultivated the suit property. Instead, it is the defendant who stated that he had planted trees and Napier grass on the suit property and that he had constructed a house where he kept his farming tools. The plaintiff has therefore failed to demonstrate that he has been in exclusive, continuous and uninterrupted occupation of the suit property. Consequently, his claim for adverse possession cannot succeed and the same is hereby dismissed with costs to the Defendant.

**DATED, SIGNED AND DELIVERED, VIRTUALLY VIA MS TEAMS PLATFORM THIS 16<sup>TH</sup> DAY OF FEBRUARY 2023**

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**J. M. ONYANGO**

**JUDGE**

**In the presence of:**

- 1. Miss Ndemo for the Defendant**
- 2. No appearance for the Plaintiff**
- 3. Court Assistant: Mr. Oniala**

