



**Kithure & 2 others v Bariu (Environment & Land Case 7(b) of 2012)
[2023] KEELC 22624 (KLR) (15 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 22624 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 7(B) OF 2012
CK YANO, J
FEBRUARY 15, 2023**

BETWEEN

GEDIEL KIMATHI KITHURE 1ST APPLICANT

SHADRACK MUGAMBI M'KITHEA 2ND APPLICANT

SAMUEL KARUTI 3RD APPLICANT

AND

ELIJAH KINYUA BARIU RESPONDENT

JUDGMENT

1. The applicants filed originating summons dated January 16, 2012 brought under order 37 rules 14 of the *Civil Procedure Rules* and invited the court to make a determination of the following questions;
 - i. Did the respondent enter into land sale agreements with the applicants as pleaded in paragraph 3, 4 and 5 of the supporting affidavit?
 - ii. Did the applicants enter into actual and quiet possessions of their respective parcels of land in the year 2003?
 - iii. Who is in actual and quiet possession of the parcels of land the subject matter in this case.
 - iv. Have the plaintiffs occupied their respective parcels of land openly, without fear and without the consent of the plaintiff (sic).
 - v. Who is entitled to payment of costs of this case?
2. The originating summons is supported by the affidavit of Gediel Kimathi Kithure the 1st applicant sworn on July 16, 2012. The 1st applicant averred that he is duly authorized to swear the affidavit on his own behalf and on behalf of the other applicants and has annexed the authority.



3. The 1st applicant averred that by an agreement in writing dated May 5, 2003, the respondent agreed to sell and he agreed to buy 0.30 acres of land to excise from the respondent's land parcel No Njia-Ciamwendwa/3322 which was then in the process of adjudication at a consideration of Kshs 40,000/= which amount was paid in full and he annexed a photostat copy of the said agreement and the same is marked GKK "1"
4. The 1st applicant further stated that by a further agreement dated the same day, the respondent agreed to sell to him and to the second respondent a further 40 (point forty) acres of land to be excised from the same parcel of land at a consideration of Kshs 50,000/= which amount he states they paid in full and annexed a photo stat copy of the said agreement marked GKK "2"
5. The 1st applicant states that the respondent further agreed to sell a further 0.50 (zero point fifty) acres of land to the third applicant for Kshs 62,000/= which amount the third applicant paid in full and a photo stat copy of the said agreement is annexed herein and marked GKK "3"
6. The applicants contend that they went with the respondent to the District Land Adjudication and Settlement Officer to effect the transfer but were advised that the records for the adjudication section had been taken to the Chief Land Registrar, Nairobi for the purpose of preparing the title deed.
7. The applicant further contend that they took actual and quiet possession of their respective parcels of land and are still in occupation. That the third applicant further cautioned the said parcel of land when the applicants learned that the respondent was about to dispose of the land to other persons and have annexed a copy of the Register marked GKK "4"
8. The applicants' aver that the respondent thereafter filed Maua CMCC No 135 of 2008 praying that the caution thereof be removed and a photo stat copy of the proceedings is annexed and marked GKK '5'
9. The applicants further aver that the respondent has now refused to transfer the parcel to them and has been taking them round and round and apparently he has refused to effect the transfers.
10. The applicants further state that the Deputy Registrar of this court to be empowered to execute all documents to effect transfer of Njia-cia-mwendwa/3322.
11. The applicants state that on 9th of December, 2011, they approached their lawyers for the purpose of filing a suit but were advised that the statutory period of six years had expired.
12. The 1st applicant testified as P.w 1 and averred that the respondent came and sold to them land measuring 40 points out of Njia-Mwendwa/3322 and they paid him the entire purchase price. The 1st applicant stated that he purchased 0.30 of an acre for Kshs 50,000 and 0.40 of acres for shs. 50,000/=.
13. The 1st applicant further stated that the 3rd applicant bought 50 points for Kshs 62,000/= and that the parcels bought were to come from the same parcel of land and they paid the entire purchase price.
14. The 1st applicant testified that when they went to the Adjudication Officer, they were told to wait the Land Registrar for purposes of preparing title and that the respondent filed a case No 135 of 2008 praying for the removal of the caution.
15. The 1st applicant stated that the respondent agreed that they remove the caution for them to transfer the plots to them but he did not do so. The 1st applicant further stated that they wanted the court to award them the portions they bought and that he had authority from the other applicants to testify on their behalf.
16. The 1st applicant further stated that he relied on the supporting affidavit in support of the originating summons and the annexures thereto which were produced as P exhibits 1 to 5 respectively.



17. After the close of the applicants' case the applicant advocate filed written submissions on October 11, 2022.
18. This matter proceeded in the absence of the respondent who never entered appearance though he was duly served. Consequently, the matter will be decided on merits.

Plaintiff/applicant submissions.

19. The applicants submitted that they took possession of their respective portions immediately after executing the sale agreements and have been in actual and quiet possession of their respective parcels for a period of over 19 years. That however, the respondent has refused to effect the transfer of the said parcels to the applicants despite having received the total agreed consideration as agreed to unjustly enrich himself.
20. The applicant further submitted that they have acquired title to the suit land by way of adverse possession having been in continuous, open and uninterrupted possession of the suit land and relied in the case of the *Public Trustee and Beatrice Muthoni v Kamau Wandura* Civil appeal No 73 of 1982 where Madan, JA stated as follows-;

“...that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from that date, the true owner was dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is person in whose favour the period of Limitation can run”
21. The applicants submitted that in the instant case the plaintiffs/ applicants were put in possession in 2003 when they completed payment of the purchase price and therefore the applicants submitted that time started running for purpose of limitation from 2003 when they were granted possession on payment of the purchase price.
22. The applicants submitted that they have proved their case on a balance of probability thus are entitled to judgment in terms that the Deputy Registrar of this court be empowered to execute all documents necessary to effect transfer of 0.30 acres of land to 1st applicant, 0.40 acres of land to the 1st and 2nd applicants jointly and 0.5 acres of land to the 3rd applicant and further an order directing the land registrar at Maua to dispense with the production of copies of the National Identity card, Pin certificate and pass port size photographs of Eliyah Kinyua Bariu the respondent when registering the necessary documents.
23. The applicants urged the court to be guided by the earlier decided case of *James Maina Kinya v Gerald Kwanaka* [2018]eKLR

Analysis And Determination

24. Having considered the applicants case and submissions on record and having taken into consideration that the respondent has neither entered appearance nor has he filed a defence, I find that the following issues are for determination;
 - i. Whether the applicants have proved that their occupation of the suit land is adverse for the requisite period hence to be entitled to be declared the owners of the suit premises as prayed in the originating summons.



25. Adverse possession is a common law doctrine under which a person in possession of land owned by someone else may acquire valid title to it. In Kenya this doctrine is alive in Section 7 of the [Limitation of Actions Act](#) that states;
- “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 first accrued to some person through whom he claims, to that person.”
26. In *Alfred Welimo v Mulaa Sumba Barasa* CA No 186 of 2011 the Court of Appeal expressed itself thus-;
- “It is trite that adverse possession is not established merely because the owner has abandoned possession of this land and ceased to use it, for as Robert Megarry aptly observed in his Megarry’s Manual of the law of property, 5th edition page 490 the owner may have title present use for the land and that land may be used by others, without the users demonstrating a possession inconsistent with the title of the owner. So the mere fact that the appellant abandoned possession of the suit property and went to live at Ndalul scheme by and of itself does not establish adverse possession. The abandonment of possession must be complied with animus possidendi (the intention to possess) and asserting thereon rights that are inconsistent with those of the appellant as the owner of the land...”
27. The court further held that, for a claim founded on adverse possession to succeed, the person in possession must have a peaceful and uninterrupted user of the land. Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are important factors in a claim for adverse possession.
28. In *Wambugu v Njuguna* (1983) KLR 173, the Court of Appeal held that adverse possession contemplates two concepts possession and discontinuance of possession. It was further held that the proper way of assessing proof of adverse possession is whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.
29. The ingredients were recently discussed by the Court of Appeal in the case of *Mutana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR where it was stated:
- “Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya is twelve (12) years. The process springs into action essentially by default or inaction of the owner...”
30. The appellants have to prove that they have used the suit premises as of right *nic vi nec clam nec precario*. It must be shown that the registered owner of the land had knowledge (or means of knowing actual or constructive) of the possession or occupation. Further, the possession must be continuous.
31. In the instant case, the applicants stated that they have been in exclusive open and continuous possession and occupation of the suit parcels of land since 2003 which is a period in excess of 12 years. That the owner did not take any step to evict the applicants from the suit premises for over twelve years. The applicants have tendered evidence that has not been challenged or controverted by the respondent. The applicants’ evidence is that they took possession of their respective portions immediately after executing the sale agreement and have been in actual and quiet possession of their respective parcels



for a period of over 19 years. The applicants use their land at the exclusion of everyone else as if they were the actual owners.

32. Presented before this court is undisputed and undefended evidence by the applicants. I find that the applicants have on a balance of probability proved that they have a claim over portions of Njia/cia-mwendwa/3322 by way of adverse possession. From the material presented before this court, I find that the applicants have on a balance of probabilities proved that they have adversely remained in possession and occupation of the suit properties for a period in excess of 12 years to exclusion of the respondent who is the registered owner. The respondent as registered owner has certainly lost his right over the property and the applicants have now acquired prescriptive rights over the property by way of adverse possession. I find that all the questions for determination in the originating summons dated January 16, 2012 are in the affirmative. I enter judgment as follows;

- i. The respondent's right over portions measuring 0.30 acres, 0.40 acres and 0.5 acres out of land parcel No Njia-cia-Mwendwa/3322 have been extinguished.
- ii. The 1st applicant is hereby declared to have become entitled to 0.30 acres out of LR No Njia-cia-mwendwa 3322 by virtue of adverse possession and the 1st applicant is entitled to be duly registered as proprietor thereof.
- iii. The 1st and 2nd applicants are declared to have become entitled to 0.40 acres out of LR No Njai/cia-Mwendwa/3322 by way of adverse possession and are entitled to be duly registered as proprietors thereof.
- iv. The 3rd applicant is hereby declared to have become entitled to 0.5 acres out of land parcel No Njia-cia-Mwendwa/3322 by virtue of adverse possession and is entitled to be duly registered as proprietor thereof.
- v. Since the suit is undefended, I make no orders as to costs.

33. Orders accordingly.

DATED SIGNED AND DELIVERED AT MERU THIS 15TH DAY OF FEBRUARY 2023.

C.K YANO

JUDGE

In the presence of

C.A Kibagendi

Mbumbuya for plaintiff

No appearance for defendant

