



**Kaume (suing as the legal representative of the Estate of Late  
Gidion Uruka M'Amburugua) v Lichoro (Environment & Land Case  
38 of 2020) [2022] KEELC 2276 (KLR) (11 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2276 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 38 OF 2020**

**CK NZILI, J**

**MAY 11, 2022**

**BETWEEN**

**STANLEY KAUME ..... PLAINTIFF**

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF LATE GIDION  
URUKA M'AMBURUGUA**

**AND**

**STEPHEN KINANCHUI LICHORO ..... DEFENDANT**

**JUDGMENT**

**A. Pleadings**

1. By an originating summons dated September 7, 2020 the plaintiff asked this court to find that he was entitled to be registered as the owner of a portion measuring one acre of LR No Meru North/Athinga/Athanja 4243 allegedly acquired by way of adverse possession. The application was supported by a sworn affidavit of Stanley Kaume suing as a legal representative of the estate of Gedion Uruka M'Amburugua. In the said affidavit, the plaintiff attached a copy of the limited grant, copy of the register for the suit land photos showing developments thereon as annexures marked SK "1" – III respectively.
2. The defendant filed a replying affidavit sworn on September 29, 2022. He averred that the suit was both res judicata and res sub-judice on account of Tigania ELC No. 14 of 2019. Stephen Kinanchui Lichoro vs Gedion Uruka Mburugua which sought for eviction orders. He maintained he was a duly registered owner of the suit land after the plaintiff's deceased father's objection during adjudication was dismissed. He claimed notices to vacate had been served severally but in vain; The defendant attached a certificate of title, an official search, objection proceedings, demand notice to vacate and the plaint in the lower court as annexures marked SK (a) (b) SK "3" and SK 3 (a) & (b) respectively.



## B. Pre-Trial Directions

3. The plaintiff filed a case summary and a list of issues dated 10.4.2021, whereas the defendant filed his list of witnesses, witnesses' statements and list of documents dated September 23, 2021.

## C. Testimony

4. PW 1 adopted his supporting affidavit sworn on September 7, 2020 and produced the grant, a copy of the register and photographs as P. Exhs 1, 2 & 3 respectively. He confirmed suit at Tigania Law Court was determined and eventually transferred to the High Court. He denied being served with any notice to vacate the suit land. Regarding the A/R objection PW1 could not confirm its outcome. He insisted that he had made many developments on the suit land and had won all cases brought against him.
5. DW 1 adopted his replying affidavit sworn on September 29, 2020 and produced copies of the certificate of title, official search, ruling relating to the A/R objection, demand notices to vacate and a plaint dated April 15, 2019 in Tigania PMCC No 14 of 2019 as D. Exhs 1 -7 respectively.
6. In cross examination, DW 1 stated that the plaintiff came into the suit land at the A/R stage and allegedly constructed a house drawing protest from him as indicated in D exh 4. He confirmed the A/R objection was dismissed and after the plaintiff refused to vacate the land hereof. He sued him for vacant possession and eviction in Tigania Law courts.

## D. Written Submissions

7. By submissions dated January 19, 2022 the plaintiff takes the view he has established by evidence his continuous, uninterrupted occupation and possession of the suit and in non- permissive, notorious and exclusive manner, against the defendant. Reliance was placed on [\*Celina Muthoni Kitbinji v Safiya Binti Swaleh & 8 others\* \[2018\] eKLR.](#)
8. On the other hand, the defendant relied on [\*Wambugu v Njuguna\* \[1983\] KLR](#) on possession and discontinuance of possession; [\*Mbira v Gachubi\* \[2002\] 1 EARL 131](#) on the concept on non-permissive or non- consensual, actual, open, notorious, exclusive and adverse use; [\*Mtana Lewa v Kabindi Ngala Mwangandi\* \[2015\] eKLR](#) on assertion of rights over the land and the omission or neglect to take action against such person in assertion of rights for 12 years by the registered owner and; [\*Kasuve v Mwani Investment Ltd and 4 others\* \[2004\] KLR 184](#) on the key ingredients of adverse possession.
9. The defendant submitted that going by the principles enunciated in the cited authorities the plaintiff had failed to specify the period of possession and occupation, further there was the defendant interruption and assertion of his ownership rights through the notice to vacate and subsequent filing of the suit for eviction and vacant possession.
10. In light of the defence, oral and documentary evidence, the defendant urged the court to find the suit lacking merits and ripe for dismissal with costs.

## E. Issues for Determination

11. Having gone through the pleadings testimony and written submissions the issues commending themselves for determination are:-
  - (i) If the plaintiff has proved entitlement to one acre of the defendants parcel of land by virtue of adverse possession.
  - (ii) If there has been resistance, interruption and or assertion of ownership right by the defendant



- (iii) What is the order as to costs.
12. The ingredients of adverse possession were restated by the Court of Appeal in *Loise Nduta Itotia v Aziza Said Hamisi* [2020] eKLR that a party has to prove the use of the land which they claim as of right with no force, no secrecy and no persuasion with knowledge of the owner with no interruptions temporarily or with any endeavors to interrupt it or by way of recurrent consideration.
  13. In *Kasuve v Mwaani Investment Ltd case (supra)*, the court held a party must prove exclusive possession, as of right for 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition.
  14. The plaintiff has not pleaded the date of entry to the suit land and forceful take over thereof to the detriment of the defendant. At paragraph 6 of the supporting affidavit the plaintiff avers he has been in continuous and uninterrupted possession for a very long time of period. See *M'Mbaoni M'Thaara v James Mbaka* [2017] eKLR.
  15. In cross examination however the plaintiff said he gained entry in 1996. At D. Exh 2, the proceedings indicate that the deceased Gedion Uruka testified on November 11, 2001 and said the respondent had made a complaint against him at Ngundune police station and was later taken to Maua law courts regarding the suit land.
  16. The defendant also indicated that on March 17, 1999 parties appeared before the area sub chief over this case.
  17. Following the objection proceedings the defendant was confirmed the true owner of the suit land. D. Exh 3 is dated April 20, 2012 and 7.9.2020 while D. Exh 4 indicates the eviction suit was filed on April 4, 2019 which was before this instant suit.
  18. In D. Exh 4 it was indicated that the A/R objection was lodged in 2007 by the plaintiff's late father alleging trespass (illegal construction and the continued illegal plucking of his tea.
  19. It was not clear if the plaintiffs' father late ever filed a defence to the suit in Tigania Law Court. Secondly there was no prove that the plaintiffs' late father lodged a minister's appeal or any suit after losing the A/R objection if at all he was aggrieved by the said decisions.
  20. During the A/R objection the plaintiffs' late father based his claim on inheritance but not adverse possession.
  21. Apart from oral testimony on the date of entry in 1996, there was no other evidence produced on possession and occupation of 12 years. The defence exhibits show otherwise that the plaintiff only trespassed into the suit premises during the A/R objection proceedings in 2007 or thereabout which entry was vehemently resisted by the defendant going by his demand letters and the evidence during the A/R objections. Subsequently, the defendant sued for declaratory orders for ownership and for vacant possession and for restraining orders stopping the plaintiff from any further tress pass to the suit land.

## **E. Interruptions**

22. In *Jason Masai v Masai Kipsamu* Kisumu CA No 181 of 1996 the Court of Appeal held a mere demand letter could not amount to interruption of possession. In *Elijah Ikhoka Ikanzo v Joseph Ngaira Asusta* [2006] eKLR the court held an advocates demand letter and a chief's letter did not amount to assertion for title and could not therefore interrupt the passage of time.
23. In *Githu v Ndeete* [1984] KLR it was held interruption means asserting the right to title by physically entering into the suit property and evicting or ejecting the trespasser from the suit property, or in the



- alternative by instituting a suit against the trespasser for vacant possession and eviction by which action time stops running and must start all over again.
24. From the records produced herein it is clear the plaintiff's father in 2007 was basing his claim on inheritance. In the instant suit the plaintiff suing on behalf of the estate of his late father has changed tune to plead adverse possession which his late father raised until a suit for vacant possession had been instituted against him in 2019.
  25. The law is that a claim for adverse possession must be lodged against the registered owner of the suit land. P. Exh 2 shows the defendant became the registered owner on January 19, 2015 and acquired a title deed on 17.2.2016. So by the time this suit was filed on September 10, 2020, the defendant had only been a registered owner for five years. This would be below 12 years as required to found a claim of adverse possession.
  26. Section 38 of the *Limitation of Actions Act* requires the land be registered under any statute as per section 37 thereof. This was the position taken in *Amos Weru Murigu v Martha Wangari Kambi & another* HCCC No 33 of 2002 OS at Kakamega that where the property is not registered the doctrine of adverse possession could not be invoked against him and time could not run against him. See *Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees* [2016] eKLR.
  27. Further the suit for eviction was filed on April 4, 2019 after the defendant became the registered owner on January 19, 2015. This was about 4 years afterwards. The filing of the suit interfered with the alleged peaceful, open and uninterrupted occupation of the suit land by the deceased plaintiff's father. See *Saraphine Mbae Rithaa v Faustino Kangori M'Nairobi* [2020] eKLR.
  28. Given adverse possession does not apply over unregistered land the alleged time the deceased and the plaintiff may have been on the land prior to 2015 cannot be added up to make the minimum 12 years.
  29. The photos produced by the plaintiff do not indicate the date in which they were taken. There was no print certificate accompanying them. Adverse possession cannot merely be established because the owner has abandoned possession of his land and ceased to use it. There must be the intention to possess and assert ownership rights that are inconsistent with those of the registered owner. The evidence by the plaintiff did not point into any animus possidendi. In *Wambugu v Njuguna* [1983] KLR 173, the court held adverse possession contemplates the possession and discontinuance of possession which the proper way of proof, is whether or not the title holder has been disposed 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.
  30. In my view the plaintiff has failed to prove on what exact date he came into possession, the nature of his possession; whether the fact of possession, was known to the owner; for how long his possession has continued and lastly whether the possession was open and undisturbed for the requisite 12 years.
  31. Similarly there is strong evidence that the alleged occupation by the plaintiff has been under constant challenge by the defendant going through by the oral claims prior to and after registration of the land in 2015 and documentary testimony by the defendant. The plaintiff knew the occupation was under such attack up to and including a case of eviction guided by the reasoning in *Richard Wefwafwa Songoi v Ben Munyi Songoi* [2020] eKLR.
  32. I come to the conclusion that the plaintiff has failed to prove the suit to the required standards. The same is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 11<sup>TH</sup> DAY OF MAY, 2022**



**In presence of:**

Muriira for defendant

Gatari Ringera for plaintiff

**HON. C.K. NZILI**

**ELC JUDGE**

