



REPUBLIC OF KENYA



**Getonga v Karuri (Environment and Land Case E011 of 2022)
[2024] KEELC 1591 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1591 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND CASE E011 OF 2022
LN GACHERU, J
MARCH 14, 2024**

BETWEEN

JOACHIM GETONGA APPLICANT

AND

KIMITI KARURI RESPONDENT

JUDGMENT

1. The Applicant herein Fr Joachim Getonga, filed this Originating Summons dated 9th May 2022, brought under Order 37 Rule 1, and Order 51 Rule 1 of the Civil Procedure Rules, and sought the following orders; -
 1. That the Applicant having been in continuous uninterrupted occupation and possession of the whole land parcel No. LOC.9/Kiruri/tuso T.14, for a period in excess of 12 years have acquired the title thereto by adverse possession.
 2. That the Land Registrar Murang'a, be ordered and directed to deleted the name of the Respondent and register the name of the Applicant in the place thereof.
 3. That the Deputy Registrar of this Honourable court do execute all documents necessary to effect transfer.
 4. That the costs of this suit be borne by the Respondent.
 5. That such further reliefs and other orders be made as this Honourable Court deems fit".
2. The Originating Summons is supported by the Affidavit of Fr.joachim Getonga, sworn on 9th May, 2022, wherein, he averred to have been in continuous and uninterrupted occupation, of the suit property, Loc 9/ Kiruri/ Tuso T.14, which occupation and possession has entitled him to the ownership of the same, pursuant to the doctrine of adverse possession.



3. The deponent further claimed that he purchased the suit land from the Respondent in 1986, and he attached a copy of the title deed thereof, showing “Kimiti Karuri” the Respondent herein as the registered proprietor. The acreage of the suit property is indicated as 0.13 Hectares.
4. He attached an application to Land Control Board for its Consent, which form was signed by both the Applicant and the Respondent. However, the Applicant alleged that the Respondent declined to attend the Land Control Board to give his consent for transfer of the suit property to the Applicant herein, or to execute transfer documents in the Applicant’s name.
5. It was the Applicant’s further averments that he has been in occupation and exclusive possession of the suit land since 1986, and has carried out some developments thereon namely, three permanent and semi-permanent houses. The deponent attached photographs of the said developments.
6. He contended that the Respondent has never set foot on the suit land since 1986, nor interfered with the Applicant’s quiet possession of the suit land for a period of time in excess of 12 years.
7. The Respondent was served with summons to enter appearance as is evident from the Affidavit of Service of Alice Kanini Wachira, dated 27th April 2023, but he did not enter Appearance nor filed a Reply to the Originating Summons. The matter proceeded for hearing exparte.
8. The Applicant filed a written statement dated 26th June 2023, wherein he reiterated that the Respondent declined to execute the necessary documents for transfer of the suit land despite receiving the full purchase price from the Applicant in 1986.
9. Further, the Applicant reiterated that during the last 37 years, he has been residing on the suit property together with his workers, he has cultivated the said land, and built both permanent and semi-permanent houses thereon.
10. On 26th July 2023, the court was satisfied that the Respondent was served with the mention notice for pre-trial directions, but he failed to turn up in court. Consequently, the matter was certified ready for hearing in the absence of the Respondent.
11. Thereafter, the matter proceeded for formal proof hearing, via viva voce evidence, wherein, the Applicant gave evidence for himself and called no witness.
12. PW 1 FR. Joachim Getonga, adopted his written statement dated 26th June 2023, as his evidence in chief, together with a list of documents which he produced as exhibits marked as “P Exhibit1.
13. In his witness statement, which was adopted as his evidence in chief, the Applicant reiterated the contents of his claim, and averred that he has been in exclusive possession and occupation of the suit land for the last 37 years, with the Knowledge of the Respondent herein. Further that the Respondent has never set foot on the suit land or interfered with her occupation.
14. Thereafter, the Applicant filed his written submission on 17th October 2023, through R.M Kimani & Co Advocates. It was the Applicant’s submissions that he has satisfied the requirements for one to be declared to have acquired a parcel of land by dint of adverse possession.
15. For this submissions, he relied on the case of *Richard Wefwafwa Vs Ben Munyifiwa Songoi* [2020]e KLR, on the requirements for one to acquire land through adverse possession. The Applicants enumerated five elements that such claimant needs to establish. These are;
 - i. On what date he came into possession.
 - ii. What was the nature of his possession?



- iii. Whether the fact of his possession was known to the other party.
 - iv. For how long his possession has continued and
 - v. That the possession was open and undisturbed for the requisite 12 years.
16. It was his further submissions that although there is no sale agreement in existence concerning the suit land, there is an application for the Land Control Board's consent, which is signed by both the Applicant and Respondent herein and the same is a confirmation of an intention to transfer the suit property to the Applicant, by the Respondent.
 17. Reliance was placed in the case of *Gideon Mwangi Chege Vs Joseph Gachanja Gituto* [2015]e KLR, where it was held that to claim under Section 38 of the *Limitation of Actions Act*, a person must adduce evidence to show that he became entitled to the land on account of occupation of the land, which occupation of the suit land has been openly, continuously and without interruption and with the knowledge of the registered owner for a period exceeding 12 years.
 18. The court has considered the pleadings herein, which contain the claim by the Applicant, the exhibits attached such as the photos of developments which are allegedly on the suit land. The court too has considered the other exhibits , the written submissions and the cited cases and finds the issue for determination is ; whether the Applicant herein is entitled to the orders sought in his Originating Summons.
 19. It is evident that the suit herein is unopposed and proceeded by way of formal proof, and therefore, the Applicants evidence remain uncontroverted. However, that does not mean that the court will accept uncontroverted evidence as automatic proof of the case. The Applicant still had the usual burden of proof to discharge. See the case of *Gichinga Kibutha Vs Caroline Nduku* (2018) eKLR the Court held that;

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”
 20. It is not less that legal requirement, just because the Respondent did not enter appearance, nor file his defence. See section 107 of the *Evidence Act* which states;

“ 107.

 - (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
 21. It is also trite that adverse possession is one of the ways of acquiring land as provided by Section 7 of the *Land Act*. Further, Adverse possession dispossesses the actual owner of his land parcel, and therefore, sufficient evidence must be availed before a court can declare one to have acquired the suit land claimed, by adverse possession.
 22. The issues of adverse possession is not novel in our courts, as several decisions have been issued by various courts. It is evident that a claim for land cannot be brought against another person after a period of 12 years. However, the court cannot just declare one to be an owner of a suit property just because



one has been on the suit land for a period of over 12 years. The person claiming such must assert such a right. See the case of *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR, where it held;

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. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.

23. The principles to be considered in determining a claim for adverse possession were set out in the case of *Wambugu vs Njuguna* [1983] KLR 172, where the Court held that:

“In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.”

And that:

“The proper way of assessing proof of adverse possession would then be 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 has been in possession of the requisite number of years.”

24. Further, the entry into the suit land must be without force or secrecy, and without permission of the owner. See the case of *Samuel Kibamba vs Mary Mbaisi*(2015) eKLR, where the court held;-

“Strictly, 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 force, without secrecy, 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 phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land”

25. Therefore, for a claim of adverse possession, the manner of entry and possession are crucial See the case of *Gabriel Mbui v Mukindia Maranya* [1993] Eklr; where the Court held;

“Throughout the decided cases, the recurrent theme is that possession to be adverse must be actual, open, notorious, regular, continuously uninterrupted, hostile, exclusive occupancy held with a cherished animus possidendi under a claim of right held in good faith, without any form of permission from a knowing rightful owner entitled to immediate possession, for the statutory period. Out of these cases, the typical formulation of the classical requirements for adverse possession to be claimed, has been, that in order to acquire title to land without buying or paying for it in the traditional sense, or through some other legal disposition such as by inheritance or trust, there must be proved or established the elements of actual possession or occupancy of the land that is, (b) hostile to the current owner with a right to immediate possession, (c) which is visible, open, notorious, and exclusive, (d) exercised



continuously and uninterrupted for a statutorily defined number of years, (e) maintain under some colour of right as against everyone else, (f) with an evinced unmistakable animus possidendi, (g) held in good faith, without fraud.

26. From the above case law, it is evident that it is not the possession for 12 years that will guarantee the claimant the ownership of the suit land by adverse possession, but the manner of entry, that is without permission of the owner. See the case of *Chevron (K) Ltd v Harrison Charo Wa Shutu* [2016] eKLR stated as follows: -

“At the expiration of the twelve-year period the proprietor’s title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land. Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period, but also that his possession was without the true owner’s permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner’s enjoyment of the soil for the purpose for which he intended to use it. See *Littledale v Liverpool College* (1900)1 Ch.19, 21.”

27. Being guided as above, has the Applicant herein established the above criteria, through availing of evidence? It was the Applicant’s assertion that he purchased the suit land in 1986 from the Respondent. Further, it is evident that the suit land is registered in the name of the Respondent Kimiti Karuri, wherein, he was registered on 5th February, 1963. This is a first registration, and the title is registered under The *Registered Land Act*, Cap 300(repealed).

28. Under the above regime of registration, section 27 provides that a person who is registered on the certificate of title is deemed to be the absolute and indefeasible owner of such land with all rights and privileges appurtenant thereto.

29. Therefore, Kimiti Karuri, is the registered owner of the suit land, and is deemed to be the absolute owner. The ownership of such absolute proprietor can only be challenged as provided by Act. This is stated so in section 28 of the said repealed *Cap 300* Laws of Kenya.

30. Section 30 of the repealed Cap, 300 Laws of Kenya, provides instances when title of a proprietor can be defeated. These instances where title of a registered owner can be defeated are evidence of overriding interests, which attaches to land. Section 30(g) of CAP 300 LOK(repealed), provides;

30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register -

“(g) the rights of a person in possession or actual occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;”



31. The above provisions of law are mirrored in section 28 of the *Land Registration Act* 2012, which provides;

“(28). Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

- (a) spousal rights over matrimonial property;
- (b) trusts including customary trusts;
- (c) rights of way, rights of water and profits subsisting at the time of first registration under this Act;
- (d) natural rights of light, air, water and support;
- (e) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law;
- (f) leases or agreements for leases for a term not exceeding two years, periodic tenancies and indeterminate tenancies;
- (g) charges for unpaid rates and other funds which, without reference to registration under this Act, are expressly declared by any written law to be a charge upon land;
- (h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;
- (i) electric supply lines, telephone and telegraph lines or poles, pipelines, aqueducts, canals, weirs and dams erected, constructed or laid in pursuance or by virtue of any power conferred by any written law; and
- (j) any other rights provided under any written law”.

32. Therefore, it is evident that if the Applicant herein avails sufficient evidence, then the title of the Respondent herein. Kimiti Karuri, will be defeated, and the Applicant will be declared to have acquired the suit property by virtue of adverse possession.

33. So, is the available evidence sufficient to prove his claim? It is evident that the entry of the Applicant was through purchase, and thus permissive. However, the moment the Respondent failed to sign the Land transfer forms, then his holding became adverse, and time started running. Further, the Applicant stated that he paid the full purchase price to the Respondent herein in respect of the suit land in 1986. The Court finds and holds that adverse possession crystallized on the suit land in 1998, that is twelve (12) years, from the time when the Applicant moved into and settled on the suit property, after payment of the full purchase price.

34. For the purpose of this suit, immediately after the Land Control Board Application was signed, and Consent granted, then the Respondent as a VENDOR ought to have signed the transfer form. The Applicant has alleged that even after request, the Respondent declined to sign the said transfer forms. The Respondent did not attend court, and so the Applicant’s allegation was not controverted.



35. However, the application for the Land Control Board's consent attached by the Applicant in his bundle of documents is too darkened and barely legible. Upon examining the same, the Court could barely read the writings thereon, but could only pick 3rd October 86. The court finds and holds that the date of the consent from Land Control Board is 3rd October 86. The Applicant's counsel is admonished and cautioned not to attach such a darkened document in future as exhibit. The counsel has an obligation to avail the best evidence for her client, given that the Applicant as her client, has entrusted her to prosecute the case to her best ability. It is also her professional duty to do so.
36. Be that as it may, the Applicant also produced photos of development that are on the suit land. He alleged that he developed the suit land without any opposition from the Respondent. Further, he alleged that the Respondent has never set foot on the suit land from 1986, and has never interfered with his possession. This piece of evidence was also not controverted by the Respondent. The suit land is a T. Plot, and the court confirms the development thereon are of commercial nature.
37. This kind of developments cannot be hidden, and therefore, the Respondent must have seen them, and continues to see them. Therefore, the Applicant's occupation and possession is open, with no secrecy. There was no evidence that the Respondent has ever asserted his right from 1986, and therefore, the Applicant's possession is exclusive, and has dispossessed the title holder, who is the Respondent of this suit land.
38. It is evident that the suit land is in the name of the Respondent herein Kimiti Karuri as from 5th February 1963. Further, it is trite that adverse possession runs with the land and not with the title. In Civil Appeal No 164 of 2011 *Gachuma Gacheru Vs Maina Kabuchwa* [2016] eKLR the Court held that "Adverse possession is a fact to be observed upon the land. It is not to be seen in a title".
39. The Court of Appeal in the case of *Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others* [2018] eKLR, elaborated on the required elements to prove adverse possession thus:
- "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 12 years as espoused in the Latin maxim, nec vi nec clam nec precario. See *Jandu vs. Kirplal & Another* (1975) EA 225. In other words, a party relying on the doctrine bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. See this Court's decision in *Wambugu vs. Njuguna* [1983] KLR 173."
40. Further, in the case *Mbira v. Gachubi* (2002) 1 EALR 137: the court stated as follows;
- "... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period, must prove non permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutorily prescribed period without interruption..."
41. Having analysed the evidence as above and given that the principle of adverse possession is well settled, the Court considers Section 7 *Limitation of Actions Act*, which places a bar on actions to recover land



after 12 years from the date on which the right accrued. Further Section 13 of the same Act, provides that adverse possession is the exception to this limitation:

- “(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 of this Act 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 a fresh 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) of this Act, the land in reversion is taken to be adverse possession of the land.”

42. A claim for adverse possession is anchored under Section 38 of the Act provides 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.”

43. The Applicant testified that he paid the full purchase price, and does not owe the Respondent any amount of money. This court will rely in the case *Hosea v Njiru & Others* [1974] EA 526, where Simpson J, following the reasoning of the Court in the case of *Bridges v Mees* [1957] 2 All ER 577, held that once payment of the last installment of the purchase price had been paid, the purchaser’s possession became adverse to the vendor and that he hence put, by occupation for twelve years, was entitled to become registered as proprietor of it.
44. The Applicant has availed evidence of his occupation of the suit land and developments thereon. The buildings shown on the aforesaid pictures reveal well-worn structures with aged iron sheets which is evidence that the buildings were put not less than 12 years ago. The Court is satisfied that the Applicant has demonstrated open and continuous occupation of the suit premises for a period of twelve (12) years.
45. On the question of the Respondent not appearing to defend the Applicants claim, the Court has considered its record, and has noted its directives of 11th July 2023, that proper service needed to be effected upon the Respondent herein personally. The said directives were fulfilled to the satisfaction of the Court as attested by the Affidavit of Service sworn by James Ndung’u Mbau (Court Process Server) dated 18th December 2023. The Court is satisfied that personal service of the proceedings in this matter was effected upon the Respondent herein, and he failed to defend the suit.
46. This Court has considered the available evidence, the relevant provisions of land, the decided cases, and it is its considered view that the Applicant herein has proved his claim on the required standard of balance of probabilities.



47. The upshot of the foregoing is the Applicant's claim is found merited and consequently judgment is entered for the Applicant herein against the Respondent in terms of the prayers No1, 2 and 3 of the Originating Summons dated 9th May 2022. Since the suit is not defended, there are no orders as to costs.

It is so delivered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 14TH DAY OF MARCH 2024

L. Gacheru

Judge

Delivered online in the presence of:

M/s Kimani for Applicant.

Absent - Respondent.

Joel Njonjo – Court Assistant.

L. Gacheru

Judge

14/3/2024

