



MONTHLY **NEWSLETTER**

Issue 1



KIPKENDA



^{*} LL.B (Moi University), PGD (KSL), Associate, Kipkenda & Company Advocates, Advocate of the High Court of Kenya.

An Overview of The Doctrine of Adverse Possession in Kenya

BY KENNEDY KIPKOSGEI MAIYO*

1. Introduction

Adverse possession, often known as squatter's rights, is a well-established doctrine in law that allows a person who has unlawfully inhabited another person's land for a continuous period of at least 12 years to legitimately petition for registration rights over the property subject to proof. Professor Tom O. Ojienda, in "Principles of Conveyancing in Kenya", gives the threshold of proof in alleging adverse possession as dispossession and discontinuance of possession.¹

The doctrine of adverse possession from the first instance raises an ethical dilemma. One might ponder, how does the law authorize a trespasser to mutate into the owner of the land, by the mere advance of time? A first timer may think the doctrine allows one to acquire the title of land without paying for it. Is it equitable? And if so, on what grounds can one justify the transformation of trespassers into owners of the land?

This article looks at the doctrine of adverse possession in depth citing its origin, history, legal framework, and principles. We bring to light various precedents by judges over the years, their impact, how we understand the doctrine, and whether the set principles are equitable. We explain why adverse possession is not a legal avenue to steal land, but rather an equitable principle on land possession.

2. Origin of Adverse Possession

We trace the doctrine of adverse possession to a collection of 282 rules written by the Babylonian king Hammurabi.² The code explained that if a man left his house, garden, or field and another person possessed and used it for three years, the newcomer retained the land.³

The code resembles early English laws, where, when two parties disputed over land, actual possession was used to determine ownership. In that context, the statute of limitations for this type of suits in England was 20 years.⁴ Kenya borrowed largely from England.

¹ Prof Tom Ojienda, 'Principles of Conveyancing in Kenya'

² 'Code of Hammurabi: Laws & Facts - HISTORY' <<https://www.history.com/topics/ancient-history/hammurabi>> accessed 7 June 2022.

³ 'The Strange Doctrine of Adverse Possession and Its Origins|Racine Olson' <<https://www.racinelaw.net/blog/strange-doctrine-adverse-possession-origins/>> accessed 7 June 2022.

⁴ Ibid.

3. Legal Framework

In Kenya, the Certificate of Title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. This is according to **Section 26 of the Land Registration Act No. 3 of 2012 Laws of Kenya**. However, these “absolute” rights are subject to be challenge. **Section 28(h) of the Land Registration Act** gives a leeway for challenging absolute ownership. It states:

“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; rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription”

⁵ Gitu v Ndungu (2001) 2 EA 376

When read together with the **Limitation of Action Act Cap 22 Laws of Kenya**, this provision makes adverse possession an overriding interest.

The Limitation of Actions Act cap 22 laws of Kenya sets the limit for anyone to bring an action for the recovery of land to 12 years. Section 17 specifically extinguishes the title of a person upon the expiry of the said period should the owner fail to bring any action.

Section 13 of Limitation of Actions Act gives a threshold for the right to action to continue. There must be the possession of that land by the person who the adverse possession favours at the time of action. The time of action stops accruing once the squatter vacates the property. There must be an adverse possessor in the land for the time of limitation to run against the registered proprietor of the land.

One cannot sustain a claim for adverse possession on government land, and land vested under the county councils as per Section 41 of the Limitations of Actions Act. The reasoning for this is that for a claim of adverse possession to be successful, the said land needs to be registered, yet in Kenya, unregistered land is inevitably unalienated government land or trust land. The learned Judge in **Gitu v Ndungu (2001) 2 EA 376** settled:

“One cannot allege adverse possession on land that is registered under the SFT (Settlement Fund Trustees) and that time for calculating possession for purposes of founding a claim on adverse possession does not begin to run so long as the land is still under the SFT which is a government entity.”⁵

Further, a licence cannot give rise to adverse possession. The Land Act defines a licence as permission given by the Commission in respect of public land or proprietor in respect of private or community land or a lease which allows the

licensee to do some act concerning the land or the land comprised in the lease which would otherwise be trespass but does not include an easement or a profit. **Asike-Makhandia, JA in Mtana Lewa v Kahindi Ngala Mwagandi** stated:

*“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 the extent to show that possession is adverse to the title owner”.*⁶

4. Elements of Adverse Possession

In **Mate Gitabi Vs. Jane Kabubu Muga & Others** the court stated:

*“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 secrecy, without force, and without license or permission of the landowner, intending to have the land. There must be apparent dispossession of the land from the landowner. These elements are contained in the Latin maxim nec vi, nec clam, nec precario.”*⁷

It is from the above precedent that we derive elements of the doctrine. Having looked at the statutory provisions on Adverse Possession, it is prudent to capture its elements and principles. These elements must be proved for a claim for adverse possession to succeed.

The Limitations of Actions Act is to limit the assertion of a given right after a set period lapses. As stated earlier, the time set for bringing up a claim of adverse possession is 12 years. Section 17 as read with section 18 of the Limitations of Actions Act extinguishes the title to a person's land upon the expiry of the set time. This applies to all registered land under the **Government Land Act, Registration of Titles Act**, and the **Land Titles Act**. Section 38 of the Limitations of Actions Act gives any claimant with registered land in the above Acts of Parliament the right to apply to the high court for an order that he be registered as the proprietor of the land.

The claim for adverse possession must meet 4 conditions:

1. Factual Possession

In the case of **Munyaka Kuna Company Limited- Vs- Bernado Vicezo De Masi (The Administrator of The Estate of Domenico De Masi (Deceased))** the court stated:

“To establish adverse possession, a litigant must prove that he has both the factual possession of the land and the requisite intention to possess the land (animus possidendi)”

Factual possession requires that the possessor must enter and make actual use of the land. There must be evidence of the physical use of the land. In **James Maina**

⁶Mtana Lewa v Kahindi Ngala Mwagandi [2015] eKLR

⁷Mate Gitabi Vs. Jane Kabubu Muga & Others (Nyeri Civil Appeal No. 43 Of 2015 (Unreported))

Kinya v Gerald Kwendaka the court established that the fact that the Plaintiff extensively developed the suit property was a demonstration of animus possidendi, (intention to possess) to the exclusion of the defendant.⁸

Factual possession implies a level of substantial control over the land. It comprises exclusive possession.⁹ In **Buckinghamshire County Council v Moran** the court established that the defendant's action of securing a complete enclosure of the plot, trimming the hedges, and maintaining the land quietly, openly and interrupted for the set period was enough proof of factual possession.¹⁰

When does time begin to accrue?

In a claim for adverse possession, time begins to run when the registered proprietor has discontinued the possession of the land and the claimant has now started possession of the land. The possession must be inconsistent with the registered proprietor and does not take effect upon the consent of the proprietor or through a licence. It must be adverse.¹¹

2. Animus Possidendi

In **Haro Yonda Juaie v Sadaka Dzengo Mbauro & another** the court stated:

*"It not whether or not the claimant has proved that he has been in possession for the requisite number of years but whether he had the animus possidendi to acquire the land by way of adverse possession. The Claimant can only prove that he had the requisite animus possidendi by showing the circumstances under which he dispossessed the true owner of the land or the circumstances under which the true owner discontinued his possession."*¹²

Therefore, Animus Possidendi can be defined as an intention to possess land to the omission of all other persons including the owner. Only the adverse possessor's intent matters. However, it must not necessarily mean that other people cannot enjoy other proprietary rights such as leases etc. the only solid requirement is that during the time the person claiming adverse possession was on the land, he must have been the only one who was treating the land in a manner that depicted him as the owner.¹³

In Kenya, squatters mostly get a portion of their employee's land during the employment period. This is only an occupational licence, and one cannot claim adverse possession from it. In the case **Wambugu-vs-Njuguna**, the court stated:

"To acquire adverse possession the owner of the land must have lost his right to the land by either being dispossessed of it or by discontinuing his possession of it. Occupation arising from employment would only be an occupational license; a licensee cannot claim adverse possession"

⁸James Maina Kinya v Gerald Kwendaka [2018] eKLR

⁹Slade L J; Buckinghamshire County Council v Moran, in 1955,

¹⁰Ibid.

¹¹'Adverse Possession in Kenya.Pdf | Patrick Kilonzo - Academia.Edu' <https://www.academia.edu/36647654/Adverse_possession_in_Kenya_pdf> accessed 8 June 2022.

¹²Haro Yonda Juaie v Sadaka Dzengo Mbauro & another [2014] eKLR

¹³'Adverse Possession in Kenya.Pdf | Patrick Kilonzo - Academia.Edu' (n 11).

3. Open, Notorious and Hostile Use of the Property

As a condition to prove adverse possession, one must have been in open and notorious possession of the property. The possession should not be a secret. The registered owner must be aware of the occupation and that's when time starts running against the paper owner. This means that the possession must be visible in that the owner must realize inconsistencies in his land.

“To constitute dispossession, acts must have been done inconsistent with the enjoyment of the soil by a person entitled for the purpose for which he had a right to use it (q). Fencing off is the best evidence of possession of surface land, but the cultivation of the surface without fencing off has been held sufficient to prove possession.”¹⁴

This is equitable in the sense that should the registered owner ignore the presence of the adverse owner for 12 years and does not take any action to evict the possessor, then the right to title ceases to exist.

4. Continuous Use of the Land

Continuous use of the land means that the adverse possessor must not be dispossessed of the land during the 12 years. Time will stop accruing against the paper owner once the adverse possessor vacates the land. Should the possessor be dispossessed of the property, time will start accruing afresh against the registered owner.

Musinga J in **HCCC NO. 514 of 1993** found that while some of the appellants had occasionally crossed into and grown some crops or grazed animals on the disputed land, it was neither continuous for 12 years nor dispossessive of the respondent's rights; that the temporary and periodic possession was not peaceful since there were several cases of criminal and civil nature aimed at evicting the appellants; that the appellants were not in possession when they filed the Originating summons.

Therefore, Should the registered owner file a suit for repossession, time stops running, also See **Githu vs Ndeete**.¹⁵ Further, the registered owner giving notice to the adverse possessor alone is not enough to stop the time. This was the case in **Mbogo v Ngugi** where the court set a precedent that the registered owner can only retake possession by forceful means or by instituting a suit for repossession.

5. The Ethical Dilemma – Is Adverse Possession Justified?

Adverse possession has its pros and cons. On the pros side, adverse possession is an especially valuable tool for protecting private property. The fact that the Limitations of Actions Act sets the time limit to 12 years does not mean that the registered owner's rights have been infringed. A reasonable person will take a course of action against a trespasser within a reasonable time the moment they notice a notorious entry into their property. This is provided for under **Section 38**

¹⁴ Halsbury's Laws of England, 3rd Edn. Vol 24 at page 252.

¹⁵ Githu vs Ndeete [1984] KLR 776

(1) of the Limitations of Actions Act CAP 22 states:

“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 the proprietor of the land”

Even though **Article 40 of the Constitution** protects the proprietary rights of every citizen, that does not however mean that owners should abandon their properties and let trespassers on them without acting. In addition to encouraging responsibility, it also ensures that land is used equitably. Equitable use of land is a principle enshrined in Article 60 of the constitution.

Further, adverse possession encourages title owners to bring suits to evict trespassers as early as possible. This nurtures accountability in registered owners and allows them to argue their case when they still have enough evidence.

Finally, adverse possession encourages the productive use of land. Without adverse possession, unalienated land will remain vacant and unproductive. It is prudent to have such property utilized towards a productive economy.

On the contrary, the doctrine of adverse possession defeats the indefeasibility of title to land that is the backbone of land tenure systems in Kenya. It presents a quandary on the exclusive land rights.

6. Conclusion

The conflict surrounding the ethical nature of Adverse Possession arises among other things from the distinct definitions of ‘Owner of the land’ and a ‘Possessor of the land’. The doctrine tries to strike an equal between the rights of the two disputing parties. They both have invested in the piece of property, however, from our perspective, one is more vested in the interests the land comes with. One of them can be seen investing in managing and controlling the land as their own while the other sits and ignores the adverse possessor.

From this article, one can see the difference between the owner and the adverse possessor. It is our view that the doctrine when read with statutory provisions provided, equitably allows the owner and the adverse possessor to take action over what they claim is rightfully theirs. The procedures are well provided for in law. The law, therefore, tries to maintain an equilibrium between protecting land ownership and the utilization of idle land.