



Moonbeam Properties and Investments Ltd & 2 others v Mwachote & 2 others; Nzinga & another (Intended Defendant) (Environment & Land Case E101 of 2021) [2023] KEELC 17638 (KLR) (30 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17638 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE E101 OF 2021**

EK MAKORI, J

MAY 30, 2023

BETWEEN

MOONBEAM PROPERTIES AND INVESTMENTS LTD 1ST PLAINTIFF

JAY PROPERTIES LIMITED 2ND PLAINTIFF

SHAPPARD PROPERTIES LIMITED 3RD PLAINTIFF

AND

FRANCIS MAZIA MWACHOTE 1ST DEFENDANT

MANZIA MWACHOME MAKAME 2ND DEFENDANT

BENDERA WILSON CHARO 3RD DEFENDANT

AND

COSMAS NYALE NZINGA INTENDED DEFENDANT

KAPULANGA MWALAA DUNI INTENDED DEFENDANT

RULING

1. Notice of Motion dated February 21, 2022 seeks joinder of the 4th and 5th Interested Parties to these proceedings. The motion is opposed; the plaintiffs have filed a detailed replying affidavit deposed on April 4, 2022.
2. The applicant has filed written submissions while the Respondent has elected to rely on the affidavit on record; the other parties have not joined in this phase of the proceedings.
3. It is the averment by the applicants that whereas the plaintiffs are the registered proprietors of the land parcel known as Plot No. MN/III/1115 and have brought a suit against the mentioned Defendants



- excluding the 4th and 5th Intended defendants /applicants from the suit, the 4th and 5th intended defendants allege that they have been in occupation of the said land for over 12 years whereby they have even been contracting people to extract marram. Their occupation on the land has been open, uninterrupted and unchallenged.
4. The applicants submitted that their claim is anchored on adverse possession citing the case of *Celina Muthoni Kitbinji v Safiya Binti Swaleh & 8 others* [2018] eKLR, which illustrates how the law on adverse possession is now well settled and the essential requirements that one has to meet in order to succeed in an application for adverse possession.
 5. The applicants cite the cases of *Jadhu v Kirpal & another* [1975] EA 225, *Mbira v Gachuhi* [2002] IEARL 137 and *Mtana Lewa v Kabindi Ngala Mwangandi* [2005] eKLR as the lead decisions on the guiding principles governing the prove of adverse possession. That to prove ownership by adverse possession, it is sufficient to show that some acts of adverse possession must be adequate in continuity, in publicity and in extent to show that, it is adverse to the owner. It must be actual, visible, exclusive, open and notorious. That 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 statutory prescribed period without interruption
 6. The 4th intended defendant has stated that he has been in occupation of the said land for over 37 uninterrupted years and nobody has ever laid a claim of ownership on the land nor challenged his possession over the said land, leasing out or in any way stopping him from cultivating it. The report prepared by the Deputy Registrar of this court on April 20, 2022 confirm the presence of the Intended Defendants and their aforesaid activities on the suit property.
 7. From the foregoing, the 4th and 5th Intended defendants are entitled to claim adverse possession rights as stated in the *Limitations of Actions Act*, Cap 22 section 38 (1).
 8. The applicants/ intended defendants allege that the plaintiffs' claim to the suit property designated as Plot No. MN/III/1115 has been extinguished; according to them, they must therefore be joined in these proceedings. This will allow the court to decide whether their claim of adverse possession is lawful.
 9. Whether it is necessary to join the 4th and 5th intended defendants to the suit, it's the applicants contended that the same is provided under Order 1 Rule 2 of the *Civil Procedure Rules*. It is also as enunciated in *JMK v MWM & another* [2015] eKLR.
 10. The intended defendants conclude that since they claim adverse possession of the property known as Plot No. MN/III/1115, which is one of the suit properties herein, it is necessary that they be joined in these proceedings so that the court can determine the plaintiffs' claim as against them and the other defendants herein on merits and conclusively.
 6. The plaintiffs/respondents oppose the application. As stated, they rely on the replying affidavit in place stating that they have no claim against them. The law does not envisage them being 'forced' to sue a party they think is not the real defendant.
 6. The suit property is not in the hands of the intended defendants or at all. They are on a fishing expedition in these proceedings. All trespassers were removed from this property back in 2020 which is shown in Mtwapa Police Station OB No.17/3/12/2020.



6. The plaintiffs/respondents aver that the applicants are at one point challenging the sanctity of the title held by the respondents and at the same time pleading adverse possession. They have to choose what to plead.
6. I have gone through the material and submissions presented before me on the application to have the applicants joined in this suit as 4th and 5th defendants. The issue, which I have to settle, is whether at this point it will be appropriate to have the two Applicants joined as parties to these proceedings.
6. The applicants buttress their claim under the doctrine of adverse possession. They averred that when joined, they would prove how they acquired the suit property through the said method. The plaintiff thinks otherwise and insisted that they were evicted from the suit property in 2020 as trespassers and cannot plead adverse possession at this point.
6. The several authorities quoted to me on adverse possession are relevant for example the holding in *Mtana Lewa v Kabindi Ngala Mwangandi* [2005] eKLR:

“Adverse Possession is essentially a situation where a person takes Possession of land, 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 12 years.”
6. In *Mbira v Gachuki* [2002] IEARL 137:

“...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 statutory prescribed period without interruption....”
6. The applicants’ joinder rests on the notion that the court will as it arbitrates the case between the plaintiffs and the defendants, it also ought to adjudicate on their plea on the thinking that adverse possession is available to them as against the plaintiffs.
7. In their own admissions, and the evidence available, the two Applicants and others were displaced from the suit property in the year 2020. They are no longer on the ground. This can be confirmed by the report by the Deputy Registrar of this court upon her visit to the suit property Plot No. MN/III/1115 on May 6, 2022. Her findings are that the plot consists of excavated quarries with no signs of habitation. That the entry to the quarries was for purposes of excavation only. This sounds more of use than occupation. They have not pleaded prescriptive easement rights over the suit land but rather they have besought adverse possession.
6. It cannot be known backwards when the intended defendants started to use the quarries and whether that period aggregates to more than 12 years. The plaintiffs /respondent asserts they have no claim against the intended 4th and 5th defendants /applicants and cannot be ‘forced’ by fiat of the orders of this court to sue them as defendants.
6. As correctly pointed out by the applicants, the powers to order for joinder of a party in ordinary civil suits is as provided under Order 1 rule 2 of the *Civil Procedure Rules*:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiffs or defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiffs or defendant,



or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

11. It is further enunciated in the case of *JMK v MWM & another* [2015] eKLR, as follows:

“Commenting on this provision, the learned authors of *Sarkar’s Code of Civil Procedure* (11th Ed Reprint, 2011, Vol 1 P 887), state that:

“The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties”

.....

We would however agree with the respondent that Order 1 Rule (10)(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the court. *Sarkar’s Code*, (*supra*) quoting as authority, decisions of Indian courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10 (2) of our Civil Procedure Rules, in *Tang Gas Distributors Ltd v Said & others* [2014] EA 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.

12. Considering the joinder of the applicants in this proceeding as Defendants, in my opinion, will not accomplish what the law intends. This court has the authority to add or remove a party from proceedings, and to do so, a party must be necessary for the issues at hand to be fully and finally resolved in order to avoid a proliferation of lawsuits. The Applicants are no longer in the suit property to enjoy the doctrine of adverse possession. They are already out and do not claim to have title document to the suit property. Their stay in the suit property cannot be said to have been uninterrupted - nec vi, nec clam, nec precario, meaning 'without force, without secrecy, without permission'. Their joinder in these proceedings in my view will convolute the same and blur the real issues for determination.

13. The upshot is that the application dated February 21, 2022 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 30TH DAY OF MAY 2023.

E. K. MAKORI

Judge

In the Presence of: -

Mr. Njeru for the 1st and 2nd Defendants

Ms Gatimu holding brief for Mr. Mwanzia for the 4th and 5th Intended Defendants

Mr. Lijoodi for the Plaintiffs

Court Clerk: Happy

