



Kitsao & 43 others v Gidoomal & 2 others (Environment & Land Case 332 of 2009) [2023] KEELC 18133 (KLR) (19 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18133 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 332 OF 2009**

NA MATHEKA, J

JUNE 19, 2023

BETWEEN

MATHEW M. KITSAO & 43 OTHERS PLAINTIFF

AND

CHANDAN JETHANAND GIDOOMAL 1ST DEFENDANT

PREMI JEHANAND GIDOOMAL 2ND DEFENDANT

MUNICIPAL COUNCIL OF MOMBASA 3RD DEFENDANT

JUDGMENT

1. The Application is brought by the plaintiffs/applicants under Order XXXVI Rule 3d (1), (2) and (3) section 3A of the *Civil Procedure Act* who claim to be entitled to the Parcel of land known as Plot no. IX/49 and IX/50 Mombasa Island by virtue of adverse possession for determination of following questions;
 1. Whether the applicants be declared to have become entitled by virtue of adverse possession of 30 years all that piece of land containing around 0.811 & 0.4003 acres respectively or thereabouts and comprised in title No. IX/49 and IX/50 and situate at Makaa Village in Tudor Mombasa District.
 2. Whether the plaintiffs/applicants are entitled to be duly registered as proprietors of the suit lands by virtue of adverse possession of the same.
 3. That costs of this application be provided for.
2. The application is based on the grounds that the plaintiffs/applicants herein have been in occupation/possession of Plot No. IX/49 and IX/50 situated in Tudor Mombasa for over 30 years. The respondent is a registered proprietor of the said parcel of land. the plaintiffs/applicants have duly developed the said parcel of land by building their residential structures and carrying on other business activities on



the said land. The plaintiffs/applicants are thus duly and legally entitled to the said land by virtue of adverse possession. In support of their claim the plaintiff filed witness statements by to Mathew Mutisya Kisau, Paul Ndia Molo, David Mutua Malil, Salim Kea Ali, Mutemi Mukiti, and Fadzi Karema Mulewa all dated February 26, 2019. On the day of hearing only Mathew Mutisya Kisau, Fadze Karema Mlema testified. The plaintiffs submit that from the foregoing evidence it is quite clear that the plaintiffs have been on the suit property for a period spanning over 30 years such evidence has not been challenged by the defendant. That the evidence of the 3rd defendant clearly shows that they were people residing on the land and carrying on business. The businesses they are carrying on were licensed by the 3rd defendant from way back in the 1980s and it is only in 2009 that the plaintiffs were harassed by one Kigo Ng'ang'a and it goes without saying that the plaintiffs have disposed the 1st and 2nd defendants by way of adverse possession.

3. They submit that the plaintiffs in their evidence have shown that they have been in continuous occupation of the said parcel of land and they did not enter by force or by stealth but have been in occupation publicly and carrying out legal business licenced by the 3rd defendant the defunct Municipal Council of Mombasa. Thus the Title of the 1st and 2nd defendants is extinguished.
4. Section 17 of the *Limitations of Actions Act* provides that upon expiry of the period of 12 years prescribed in the Act for a person to bring an action to recover land, the title of that person to the land stands extinguished. Thus the 1st and 2nd defendants Herein have never brought such an action to recover the suit property. that from the totality of the evidence adduced herein the quiet possession for a period of over 30 years has not been challenged by the 1st and 2nd defendants and their title to the suit property has been extinguished. From the totality of the evidence adduced it answers in the affirmative that the plaintiffs be declared the owners by adverse possession over Parcel No. IX/49 and IX/50 and the proprietary rights of the 1st and 2nd defendant has been extinguished.
5. The 1st and 2nd defendant responded in opposition to the Originating Summons vide further supplementary affidavit dated May 19, 2017 sworn by Prem Jethanand Gidomal. In defense to the plaintiffs claim, Mr. Kigo Ngang'a on behalf of the 1st and 2nd defendant gave evidence by consent of all the parties vide power of attorney dated April 25, 2022 and Registered on May 18, 2022. Further, the 3rd defendant on the date of hearing, called one witness, Mr. John Wambua, in defense to the claim by the plaintiffs. the 1st and 2nd defendant relied on the Supplementary Affidavit dated May 19, 2017 sworn by Prem Jethanand Gidomal, the 1st and 2nd defendants list of documents filed on November 4, 2021 and produced as exhibits in court on July 25, 2022, the 1st and 2nd defendants witness statement filed on November 4, 2021, the 1st and 2nd defendants further witness statement filed on July 14, 2022 and the 1st and 2nd defendant further list of documents filed on July 14, 2022.
6. The defendants submit that the plaintiff who sues on behalf of 43 others does not actually live on the suit property and is not in actual possession of the same. The plaintiffs have also failed in their oral evidence, to discharge the burden of identifying the portions of land they claim to occupy. The originating summons as well as supporting affidavit do not provide any specific details of the portions of land they purportedly occupy, and no extract of title is attached contrary to the mandatory provisions of order 37 rule 7 of the *Civil Procedure Rules*. Finally, even if it assumed that the Plaintiffs occupy the suit premises, the oral evidence and proceedings show that the same has been permissively allowed by the 3rd defendant through the issuance of business licenses to allow the plaintiffs to carry out small business on the suit property.

This court has considered the evidence and the submissions therein. The 1st and 2nd respondents are the registered proprietors of Land Parcel Mombasa/Block IX/49 and Land Parcel Mombasa/Block IX/50 (DEX-1). The defendants are seeking to be declared to be entitled to be registered as proprietors



of the suit properties by virtue of adverse possession. They claim to have lived on the suit properties peacefully since 1974 until 2009 when Kigo Ng'ang'a came and demolished their structures that's when they learnt that the 1st and 2nd defendants were the registered proprietors.

7. PW1, Mathew Kisau the 1st plaintiff claimed to have lived on the suit property since 1974, where he has built residential houses where he lives, rents out some houses as well as run a business on Plot Mombasa/Block IX/49. He claimed his grandmother also lived on the suit property where she sold charcoal, and currently his children and grandchildren live on the suit property. On cross-examination, he, however, admitted that he lives in a second house where he pays rent to the 3rd defendant, while his children still live on Plot 49. While PW2 Faidzi Karema Mulewa testified that he moved into the suit property in 1970 and has been selling charcoal ever since until their eviction in 2009. However, on cross-examination, he admitted that he neither knows the parcel number nor the acreage of the suit property he was seeking to adversely possess. Further, he revealed that PW1, the 1st applicant did not live on the suit property but somewhere else. Both PW1 and PW2 stated that they did know the proprietors of the suit property until when they were evicted in 2009 by one Kigo Ng'ang'a, only then did they become aware that the 1st and 2nd defendants were the registered owners of the suit properties. The plaintiffs occupied the suit land on the assumption that their parents were in occupation and not on the basis that the occupation was adverse to the interest of the 1st and 2nd defendants. All along they were oblivious of the defendants' title to the suit property until their structures were demolished and they were evicted in 2009, that's when they discovered the defendants were the registered owners.
8. The occupation of the property by the plaintiffs has been disputed by the defendants. PW1 testified that he has a second home where he lives, while his children live on the suit property, this was confirmed by PW2 who stated that PW1 does not live on the suit property. The 1st and 2nd defendants adduced proceedings in Mombasa Criminal Case No. 2194 of 2011 (DEX-12), where Mathew Kisau the 1st plaintiff was the 1st prosecution witness. He stated that he did business at the port for 19 years and lives in a one bedroomed rented house in Tudor estate. He stated that he previously lived in Kwa Makaa Tudor slums with his family and tenants, where the suit properties are located.

To further support their claim that the Plaintiff were not in possession of the suit properties, the Respondents produced several house payment receipts that were issued to different Applicants upon their payment of rent to the 3rd defendant (DEX-2, 5-9). They include Mathew Mutysa (1st applicant), Paul Molo (2nd applicant), Morris Kalume (5th applicant) and Peter Mave (30th applicant). In addition, the 1st and 2nd respondents produced letters from the Chief's office Tudor (DEX-10), where it was stated that several plaintiffs were living in rented houses within Jua Kali Zone Phase II and not the slums where the suit properties are located. These letters are related to the following Patrick Muriuki (18th applicant) and Mutemi Mukiti (25th applicant). On top of that, the 1st and 2nd defendants produced consent agreements (DEX-11) which were signed by different Applicants who supposedly withdrew their claim of adverse possession over the suit properties. These consent agreements were signed by Kitsao Baya (26th applicant), Musa Kwinga (22nd applicant) and Migwi Mungena (11th applicant).

9. Here the legal issue is whether the plaintiffs' occupation has been adverse to the 1st and 2nd defendants who are the registered proprietor of the suit properties. For the applicants to successfully sustain a claim founded on adverse possession, they must demonstrate that they had a peaceful and uninterrupted use of the land. The plaintiffs ought to establish that they physically and exclusively possessed the suit land at the exclusion of the 1st and 2nd defendants. The Court of Appeal in *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* (2020) eKLR held that:

person who claims adverse possession must inter alia show:



- a. on what date he came into possession.
 - b. what was the nature of his possession?
 - c. whether the fact of his possession was known to the other party.
 - d. or how long his possession has continued and
 - e. that the possession was open and undisturbed for the requisite 12 years.”
10. In my view, the plaintiffs have failed to prove that they collectively and individually occupied and possessed the suit land exclusively at the exclusion of the registered proprietors. Further, the plaintiffs have failed to establish that their possession and occupation were adverse to the defendants’ title and proprietary interest. It must start with the wrongful dispossession of the rightful owner. In this case, PW1 and PW2 admitted that they never knew that the defendants were the true owners of the suit land until 2009 when they were evicted. They have failed to demonstrate at what point in time they dispossessed the true owner of possession.

In the instant case, the plaintiffs submitted that the 1st and 2nd defendants have never been in possession of the suit property. However, the non-use of the property by the true owner even for a long period of time will not affect his title. It can be seen that the defendants’ intention was to develop the suit land, which they did when they sought approval from the 3rd respondent in 2011. The fact that the defendants did little on their land between their registration as the proprietors of the suit land and the approval of their building plans, is in no way a demonstration of dispossession of the title to the suit land. The plaintiffs ought to have proved by evidence that they took possession of the property and asserts a right over it, a fact that has not been asserted by evidence. In *Gabriel Mbu v Mukindia Maranya* (1993) eKLR, it was held;

Acts of user are not enough to take the title out of the true owner unless they are inconsistent with the enjoyment of the soil for the purpose for which he intended to use it. Accordingly, where a true owner of land intends to use it for a particular purpose in the future, but meanwhile has no immediate use for it, and so leaves in unoccupied, he does not lose his title to it simply because some other person enters on it and uses it for some purpose; not even if this purpose continues year after year for 12 years or more.”

11. In a nutshell there is no evidence that the plaintiffs’ occupation of the suit premises was continuous and uninterrupted for a period of 12 years. Evidence has been presented before this court that demonstrates some of the plaintiffs have been paying rent to the 3rd Respondent in other houses other than the ones they claim to have on the suit premises. They have failed to demonstrate at what point did time begin running in their favour, it is therefore quite apparent that they never had exclusive and peaceful possession of the suit premises. The plaintiffs’ claim therefore fails, the originating summons dated July 24, 2009 is dismissed with costs to the 1st and 2nd defendants.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 19TH DAY OF JUNE 2023.

N.A. MATHEKA

JUDGE

