



**Francis v Estate of Ceri Vaughan Thomas & 2 others (Environment & Land
Case 87 of 2021) [2023] KEELC 19127 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19127 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 87 OF 2021**

**NA MATHEKA, J
JULY 27, 2023**

BETWEEN

SAMWEL KATANA FRANCIS PLAINTIFF

AND

ESTATE OF CERI VAUGHAN THOMAS 1ST DEFENDANT

JOAN ATIENO DIMA 2ND DEFENDANT

MICHAEL A OCHOK 3RD DEFENDANT

JUDGMENT

1. The suit is brought under Section 7, 37, 38 of the Limitations of Actions Act Cap 22, Section IA, 1B & 3 A of the *Civil Procedure Act* seeking the following orders;
 1. That the Title of Mr. Ceri Vaughan Thomas to Parcel No. 2445/V1/MN CR No. 14503 and Plot No. 2446/V1/MN CR No. 13504 has been extinguished by the Plaintiff Adverse possession thereof for a period of 12 years in terms of the Limitation of Actions Act.
 2. The Applicant become entitled to the suit land (No. 2445/VI/MN CR No. 14503 and Plot No. 2446/V1/MN CR No. 13504) by way of Adverse Possession as against the original owner Mr. Ceri Vaughan Thomas.
 3. An order directing the Land Registrar, Mombasa to register the Applicant as the lawful owner of the Plot No. 2445/VI/MN CR NO. 14503 and Plot No. 2446/V1/MN CR no. 13504.
 4. Cost of the suit be paid by the Respondent.
2. The Plaintiff/Applicant testified that the initial owner of the suit property Mr. Ceri Vaughan Thomas died on 8th July 1991 at Mombasa Hospital. The Plaintiff was the care taker employed by the late Ceri Vaughan Thomas. Before his death, the deceased had expressly given out the two properties to the



Plaintiff but was unable to effect transfer due to his death. The Applicant took possession of the suit properties while waiting for communication from the beneficiaries of the late Ceri Vaughan Thomas but none came forth. The Plaintiff did a search of the property and was surprised to find that the Respondents herein purportedly effect a transfer in their favour sometimes in 19th October 2012. That the original owner died on 8th July 1991 and therefore he could not execute a transfer in 2012. That the Plaintiff had been in possession of the suit land since 8th July 1991 and have enjoyed quiet and peaceful possession uninterrupted for more than 12 years. That on 6th July 2011, being 12 years after death of the Deceased, the Deceased title to the suit property was extinguished and there was no title to be passed to the Defendants herein. That in the circumstance, the Plaintiff acquired title by way of adverse possession and should therefore be registered as the lawful owner.

3. The 3rd Respondent stated that together with the 2nd Respondent herein they are the lawful registered owners of Plot Nos. 2445/V1/MN and 2446/V1/MN and marked DEx1 are copies of Title Deed and Searches. That it is bewildering for the Plaintiff to purport that the suit properties were expressly given or allocated to him by one Mr. Ceri Vaughan Thomas without tendering any proof of the allegation and which if true then defeats the legal purpose and threshold of adverse possession. That the Plaintiff is not in possession or occupation of the suit properties and photographs taken from the said are properties marked as DEx 2 That the Plaintiff's claim for adverse possession is unsustainable in view of his claim that he was allegedly expressly given the suit properties by the then registered owner Ceri Vaughan Thomas. That they have all along enjoyed quiet possession and occupation and without any interruption from any person including the Plaintiff and a copy of survey Report dated 26th October 2021 marked DEx 3. That the Applicant has never been in actual, real, or imagined possession or occupation of the suit properties and the application before Court is an illusionary "trial and error" meant to mislead and abuse the Court process. That the Plaintiff has not tendered any evidence of acquisition, occupation and or possession of the suit properties to substantiate any legal and or equitable ownership of the same and what he has done thereon and accordingly there is no title to be extinguished as they are in occupation and possession and enjoying quiet possession and occupation to date. That the Plaintiff together with other powerful individuals are attempting to abuse the judicial process in order to disenfranchise them from their lawful registered properties. That the Plaintiff does not reside, stay, occupy and or possess the suit properties.
4. Be that as it may, in determining whether or not to declare that a party has acquired land by adverse possession, there are certain principles which must be met as quoted by Seron J in the case of *Gerald Muriithi v Wamugunda Muriuki & Another* [2010] eKLR while referring to the case of *Wambugu v Njuguna* [1983] KLR page 172 the Court of Appeal held as follows;
 1. In order to acquire by statute of limitations title to land which has a known owner the owner must have lost his right to the land either by being dispossessed of it or by having continued 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 for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed of the suit land for a continuous period of twelve years as to entitle him, the respondent to title to the land by adverse possession.
 2. The limitation of Actions Act, on adverse possession contemplates two concepts: dispossession and discontinuance of possession. 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 the claimant has proved that he has been in possession for the requisite number of years.



3. Where a claimant pleads the right to land under an agreement and in the alternative seeks adverse possession, the rule is: the claimant's possession is deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least 12 years after such payment."
5. The Court was also guided by the case of *Francis Gicharu Kariri v Peter Njoroge Mairu*, Civil Appeal No. 293 of 2002 (Nairobi) the Court of Appeal approved the decision of the High Court in the case of *Kimani Ruchire v Swift Rutherford & Co. Ltd.* [1980] KLR 10 where Kneller J, held that:

The Plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion)".
6. So the Plaintiff must show that the Defendants had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it. In applying these principles to the present case, the Plaintiff/Applicant stated that he was given the land by the 1st Defendant when he was the caretaker. He testified that they came into possession of the suit land in 1987 and constructed a foundation which was later removed. He later found out that the land was sold in 2020 while the 1st Defendant died in 1991.
7. From the documentary evidence before Court it is evident that the 2nd and 3rd Defendants are the registered proprietors of the suit land and are in possession. DW1 the 3rd Defendant testified that they are bonafide purchasers for value. The Court of Appeal in *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another* [2015] eKLR stated that:

“In order to acquire by statute of limitations a 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 and that what constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use. A person who occupies another's persons land with that person's consent cannot be said to be in adverse possession as in reality he has not dispossessed the owner of the land and the possession is not illegal. ...In other words his entry must be adverse to the title of the owner of the land. ...Besides adversal entry into the land, the applicant must also demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner. The occupation must be open, uninterrupted, adverse to the title of the owner, adequate, continuous and exclusive as already stated. The burden of proving all these is on the person asserting adverse possession.”
8. I find that the Plaintiff was an employee of the 1st Defendant and had permission from the latter to reside there. The Defendant alleges that one Mr. Ceri Vaughan Thomas expressly gave him the suit properties although he has not tendered any evidence in support of this allegation. Even if there was such evidence it would then have been a gift and not a claim under adverse possession. Secondly, I find that the Plaintiff has failed to establish that he has been in occupation of the suit property openly and uninterrupted, adverse to the title of the owner for a period of over 12 years. From the foregoing I find that the Plaintiff has failed to prove his case on a balance of probabilities and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF JULY 2023.



N.A. MATHEKA
JUDGE

