



**Tsuwi & 2 others v Ngari (Environment & Land Case 35 of 2020)
[2023] KEELC 19125 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19125 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 35 OF 2020**

NA MATHEKA, J

JULY 26, 2023

BETWEEN

MARTIN KENGA TSUWI 1ST PLAINTIFF

JOHN KITSAO NGUMBAO 2ND PLAINTIFF

KALOLENI SOCIAL HALL CBO 3RD PLAINTIFF

AND

KARISA NGARI DEFENDANT

JUDGMENT

1. This is an application by Martin E Kenga Tsuwi, John Kitsao Ngumbao & Kaloleni Social Hall CBC who claim to be the proprietors of all that land known as, Land Reference No 32/Kaloleni/Vishakani situated in Kaloleni Vishakani sub location Kaloleni Sub County, Kilifi, for the determination of the following questions;
 1. Whether the Plaintiffs have acquired the said property by reason of adverse possession against the Respondent herein.
 2. Whether the Plaintiffs should be registered as the proprietors of the land known as Land Reference No 32/Kalolen1/Vishakani on the grounds that they have been openly and peacefully enjoying occupation for over twelve (12) years preceding the presentation of this summons.
 3. Whether the Respondent should execute a transfer and all acts necessary to convey the said title to the Plaintiffs as the rightful proprietors and enable it to be registered as such and in default the Deputy Registrar be authorized to sign the relevant documents on behalf of the Defendant.
 4. Whether the Plaintiffs are entitled to cost of the suit.



2. This court has considered the originating summons and the submissions therein. The Defendant was served by way of substituted service but failed to attend court or file any documents in defence. 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.”
3. 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)”.

So the Plaintiffs must show that the Defendant 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 Plaintiffs state that they have been on the land for some 50 years and that they have dispossessed the Defendant of the land. Their occupation was open, exclusive and uninterrupted possession for over 12 years. The PW1 testified that they came into possession of the suit land in 1969 and constructed the social hall that has been used by the community ever since.
4. From the documentary evidence before court it is evident that the Defendant became the registered proprietor of the suit land on June 26, 1990, the Plaintiffs were still in possession at that time. His registration as the owner of the suit land did not discontinue the possession of the suit land by the Plaintiffs. Since the Defendant became the registered owner, while the Plaintiffs were still in possession I find that the Plaintiffs' occupation of the suit land was open, uninterrupted, adverse to the title of the owner, adequate, continuous and at the exclusion of the registered owner.



Since this registration no evidence has been adduced by the Defendant that he tried to evict the Plaintiffs. When this suit was instituted against him, he did not enter appearance despite being served by way of substituted service. The Plaintiffs went ahead and constructed an office for the Assistant Chief, a social hall as well as commercial stalls which have been let out to small businesses. 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.”

5. The Defendant has not demonstrated that he has ever had exclusive and used to exercise as well as enjoy proprietary rights over the suit land. As the registered proprietor of the suit land, the Defendant had no use of the suit land and had lost his rights to the suit land by either being dispossessed or by having discontinued possession of the suit land for a continuous statutory period of 12 years. The Plaintiffs have demonstrated that they have exclusive and peaceful possession of the suit land and this court finds that they are entitled to the title of the suit land by way of adverse possession. I find that the Plaintiffs have proved their case on a balance of probabilities and grant the following orders;
 1. A declaration that the Defendant’s right over the whole of land parcel No Kaloleni/Vishakani/32 has been extinguished by adverse possession upon expiration of 12 years when the Plaintiffs were in possession.
 2. A declaration that upon expiration of 12 years when the Plaintiffs were in open, peaceful and continuous occupation and use of the whole of land parcel No S. Kaloleni/Vishakani/32 was held and is currently held in trust for the Plaintiffs.
 3. That the whole of land parcel No Kaloleni/Vishakani/32 vests in the Plaintiffs and that they be registered under section 38 of the *Limitation of Actions Act* Cap 22 Laws of Kenya.
 4. That the Defendant is hereby ordered to sign all relevant documents to facilitate transfer of the whole of land parcel No Kaloleni/Vishakani/32 to the Plaintiffs within the next 30 (thirty) days from the date of this judgement and that in default, the Deputy Registrar of this honourable court be at liberty to sign the same.
 5. No orders as to costs as the suit was undefended.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF JULY 2023.

N.A. MATHEKA

JUDGE

