



**Sefu v Haji (Environment & Land Case 183 of 2017)
[2023] KEELC 19893 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 19893 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 183 OF 2017**

EK MAKORI, J

SEPTEMBER 22, 2023

**IN THE MATTER OF LAND PARCEL NO. KILIFI/JIMBA/318
REGISTERED UNDER CAP 300 (REPEALED) LAWS OF KENYA**

AND

**IN THE MATTER OF SECTION 38 OF THE LIMITATION
OF ACTIONS ACT CAP.22 LAWS OF KENYA**

AND

**THE MATTER IN OF AN APPLICATION FOR DECLARATION
THAT THE APPLICANT HAS OBTAINED TITLE OVER THE SAID
LAND PARCEL NO. KILIFI/JIMBA/318 BY ADVERSE POSSESSION**

BETWEEN

KAZUNGU CHENGO SEFU APPLICANT

AND

AHMED MADHI HAJI RESPONDENT

JUDGMENT

1. The Applicant filed this suit by way of Originating Summons stating that his constitutional right under Article 40 was under threat by the Respondent - the suit premises being Kilifi/Jimba/318 measuring approximately 0.7 hectares.
2. It was the Applicant's evidence in chief that he had acquired the suit property by way of adverse possession having lived therein for a period spanning over 23 years well beyond the statutory period of 12 years as required under the *Limitation of Actions Act*.
3. The Applicant sought 4 prayers:



- a. That the Applicant is entitled to be declared as proprietor of the land parcel known as Kilifi/Jimba/318 which he acquired by adverse possession, having lived and worked thereon for over 23 years since late 1993 well beyond the statutory 12 years and used it peacefully and uninterrupted without any interference from the Respondent and in particular his agents/ predecessors.
 - b. That the Applicant is entitled to be registered and issued with a certificate of title over the same in place of the Respondent.
 - c. That in the interim the Respondent be restrained by way of injunction from alienating, subdividing, taking possession, or in any manner, whatsoever interfering with the said parcel of land until the suit herein is determined (spent).
 - d. That the Applicants be granted costs of the suit.
4. The Applicant particularized his activities on the suit premises through his 25-paragraph supporting affidavit dated 15th August 2017 and relied on documents annexed thereto.
 5. The Plaintiff deponed that he had gathered and developed the suit premises some 23 years before - up to the time of filing this matter in 2017. The Applicant stated that he gave vacant possession to the Respondent through duress and or undue influence by way of a compensation note dated 17th August 2009 which was executed at Watamu Police Station.
 6. That the following day i.e. 18th August 2009 the Applicant sought quality professional services of the current counsel to have the sum of Kshs. 40,000/= paid by the Respondent to the Applicant on 17th August 2009 refunded from the said Advocates (who are still holding the said amount to date).
 7. It is the Applicant's evidence in chief that his name was indeed captured in several land committees established by at least three Ministers courtesy of the Jimba Land Committee's recommendation. He questioned how the Respondent obtained his title to the land in question and attributed it to fraud. He asserted that he was the one who ought to have been allocated the land in question.
 8. The Respondent testified and said that he purchased the land in question as evidenced by a sale agreement dated 24th March 2009 from one Chagawa Kahindi Jefwa. The Applicant who was a squatter in that land was compensated as evidenced by a note dated 17th August 2009 whereby it was agreed he be compensated for the temporary structure placed on the land in question. Thereafter the land was transferred into his name and the title was issued in the year 2010 and he took vacant possession of the land without let or hindrance. Since then he has been in quiet possession of the same.
 9. The Respondent averred that other squatters on the land were equally compensated and left never to return to the land to date.
 10. That after he was compensated, the Applicant has never returned to the suit land having removed his structures.
 11. In his submissions, the Applicant averred that one acquires land through adverse possession when one gains stays, or occupies land without opposition for 12 years. The Law requires that the occupation must be open and notorious, exclusive, hostile and continuous, and uninterrupted for the said



prescribed period. The Applicant cited the case of *Bendera Karisa Karima (Suing as the Administrator of Samson David Magambo) v Kenya Airways Limited* [2017] eKLR where Angote J. stated that:

“The respondent has admitted that indeed the late Samson Magambo was on the land as at the time the land was registered in his favor in 1994.”

He further said:

“If the Applicant proves that she has been occupying the land for more than twelve years without the permission of the Respondent since 1994, then the Court will declare her the owner of the property.”

12. The Respondent submitted that the doctrine of adverse possession is encapsulated in Section 7 and Section 17 of the *Limitation of Actions Act* Chapter 22 of the Laws of Kenya. Section 7 of the Act provides as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

While Section 17 of the Act provides as follows:

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”

13. The Respondent submitted that given the provisions of Sections 7 and 17 of the *Limitation of Actions Act* Chapter 22 of the laws of Kenya as read with the provisions of Sections 107, 108, and 109 of the *Evidence Act* Chapter 80 of the Laws of Kenya the onus is on the Applicant to demonstrate that the Respondent had lost the right to bring an action to recover the suit land on account of the Applicant being in quiet and continuous occupation and use of the suit land in a manner inconsistent with the Respondent's title for 12 years or more.
14. That it is also the law that for an Applicant to succeed in a claim for adverse possession of land the Applicant must first recognize that the registered owner of the suit land is the true owner. For this proposition of the law, the Respondent relied on the decision in the case of *Ravindranath Dabybbai Bhagat v Hamisi Harod & 5 others* [2014]eKLR in which the Court held that an Applicant could not succeed in a claim for adverse possession of land if he does not recognize the title of the Respondent as the registered owner.
15. The Applicant must also prove that he entered the land as a trespasser to hold the land as the owner to the exclusion of the actual owner. He must have animus possidendi over the land. For this proposition of the law, the Respondent placed reliance on the decision in the case of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR where the Court held that adverse possession is a hostile possession by clearly asserting a hostile title in denial of the title of the true owner. It must start with the wrongful disposition of the rightful owner.
16. The Respondent also relied on the decision in the case of *Kweyu v Omutut* [1990] KLR 709, quoted with approval in the case of *Ravji Karsan Sanghani v Pamur Investment Limited* [2021]eKLR for the proposition that the Applicant must prove that he entered the suit land under a claim of right with intent to hold the suit land adversely.



17. I have considered the evidence. Material and submissions by the parties in this case. The issues to decide are whether the Applicant has proved a claim under the doctrine of adverse possession to merit the orders sought in the instant Originating Summons.
18. There has been quite a lot litigated in our courts touching on adverse possession, particularly from our coastal region given absent property owners. The law seems to have crystallized what one needs to prove to succeed in a claim of adverse possession. As correctly submitted by both counsel for the parties, the burden of proof in a claim of adverse possession rests with the Applicant I place my reliance on the sentiments of Kuloba J. (as he then was,) in *Gabriel Mbuvi v Mukindia Maranya* [1993]eKLR, where the Court held:

“The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use and de facto occupation must be shown”

19. The principle of adverse possession is well captured under the *Limitation of Actions Act*. Section 7 of the said Act places a bar on actions to recover land after 12 years from the date on which the right accrued. Further section 13 of the same Act, provides that adverse possession is the exception to this limitation:

- “(1) (1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.
- (2) Where a right of action to recover land has accrued and thereafter before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
- (3) For this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.”

Finally, Section 38 of the Act provides that:

“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 proprietor of the land.”

20. The principle of adverse possession was more elaborately set out in yet another case - *Wambugu v Njuguna* [1983] KLR 172, where the Court held that:

“To acquire by the statute of limitations 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. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.”

In addition:

“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 whether or not the claimant has proved that he has been in possession of the requisite number of years.”

21. In this case the Applicant although claiming adverse possession tends to suggest in evidence that he ought to have been registered as the rightful owner of the land in question having been recognized variously as the occupant of the land as averred in his affidavit in support of his claim. It will seem originally this was government land and there was a process undertaken to alienate the same to private individuals and the Applicant has a strong belief he was shortchanged in this process.
22. He admitted that the initial allottee of the land in question – David Changawa, got the title ahead of him and that in the year 2009, he was compensated as evidenced by the agreement produced in this matter. He was actually paid Kshs 40,000/= and as stated by the Respondent he together with other squatters left the suit land. The money he was paid, it is admitted in evidence, lies with his advocate – for whatever reasons! Since he was compensated, he left the land in the year 2009 and filed this matter in the year 2017. It is therefore not true that he has been living on the land in question for the uninterrupted period of 23 years. His undoing or Waterloo is when he agreed to be compensated and left the suit land cutting the cord of continuous and uninterrupted stay on the land in question.
23. Even after filing this suit, he still did not recognize the title of the Respondent because, in paragraph 9 of his supporting affidavit, he stated that the task force ought to have recorded his rights to the suit property. While in paragraph 17 of his supporting affidavit, he stated as follows:

‘That the respondent may have unlawfully and/or fraudulently obtained his title.’

24. That since the Applicant does not recognize the validity of the Respondent's title to the suit property then his claim lies in a suit for cancellation of the title. As held in the case of *Ravindranath Dabybbai Bhagat v Hamisi Harod & 5 others* [2014] eKLR, as per Angote J:

“A squatter occupying government land is not entitled as of right to the piece of land that he occupies although he is supposed to be given the first priority during the demarcation and surveying process. The Defendants were not given title documents by the Settlement Fund Trustees although they say they were on the piece of land during the demarcation and surveying process. Instead, it is Mr. Mughanga who was allocated the suit property and he went ahead to charge it to the Bank of Baroda.

A situation like the current one arose in the case of Michael Githinji Kimotho vs. Nicholas Murathe Mugo, Civil Appeal No. 53 of 1995 in which the Court of Appeal held as follows:

“If the appellant had been in occupation of the suit land as a squatter without any right or title to the suit land in his favour, he was obviously in no position to resist the respondent's claim. Though the Appellant had a long time been in occupation of the suit land which was government land before it was allocated to the Respondent, this would not have helped him in resisting the Respondent's claim where the latter is registered as owner of the land. Similarly, if he, the



Appellant, had carried out any development on the suit land, he did so at his own peril and he could not expect any compensation in that respect. Even if for argument's sake the suit land had been erroneously allocated to the Respondent, the Appellant as a squatter in the suit land had no locus standi and the so-called erroneous allocation could not be an answer to the Respondent's claim for his eviction. His position as a trespasser could not have given him any protection against the respondent's claim for possession as the registered owner of the suit land.”

I am in agreement with the holding in the above case. Indeed I am bound by the decision save to say that if a party proves that a title document was issued unlawfully then the court is duty-bound pursuant to the provisions of Article 40(6) of *the Constitution* to nullify such a title.”

25. We have the same scenario here. The Applicant seeks to challenge the title held by the Respondent and thinks it was fraudulently obtained in the process of demarcation and surveying. If the Applicant thinks the process was flawed - a suit to cancel the title held by the Respondent would have been appropriate and not an Originating Summons claiming adverse possession.
26. The Applicant concisely has not shown that he has been in the suit land nec vi, nec clam, nec precario, meaning 'without force, without secrecy, without permission.' See also 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.”

In *Mbira v Gachubi* [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....”

27. The Applicant's claim is hereby dismissed with costs.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS
22ND DAY OF SEPTEMBER, 2023**

E. K. MAKORI

JUDGE

