



**Abeid v Abdulhussein (Environment & Land Case 31 (OS) of 2022)
[2023] KEELC 20777 (KLR) (17 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20777 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 31 (OS) OF 2022
MAO ODENY, J
OCTOBER 17, 2023**

BETWEEN

SALIM ISLAM ABEID APPLICANT

AND

IMRANALI CHANDABHAI ABDULHUSSEIN RESPONDENT

JUDGMENT

1. By an Originating Summons dated May 11, 2022, the Applicant herein sued the Respondent claiming that he had acquired parcel No MN/III/2483 containing by measurement 2.000Ha or thereabouts, situated in South of Takaungu Township within Kilifi District by way of adverse possession. The Applicant sought for the following orders:
 - a. Spent.
 - b. That the Respondent's interest in all that piece of land situated in South of Takaungu Township Kilifi District, containing by measurement two decimal nought nought nought hectares (2.000 Ha) or thereabouts that is to say LR No MN/III/2483 being Plot No MN/III/2483 be extinguished.
 - c. That the Registrar of titles, Kilifi County do delete entries in favor of the Respondent if any on the green card/register and/or register the appropriate discharge in respect thereof without gazettelement.
 - d. That the Applicant Salim Islam Abeid be registered as the proprietor of all that piece of land situated in South of Takaungu Township Kilifi District, containing by measurement two decimal nought nought nought hectares (2.000 Ha) or thereabouts that is to say LR No MN/III/2483 being Plot No MN/III/2483 in place of Imranali Chandabhai Abdulhussein by reason of the fact that the Applicant have become entitled to the said land by adverse possession.



- e. That the Lands Registrar-Kilifi without gazettelement do proceed and issue a title document for parcel of land situated in South of Takaungu Township Kilifi District, containing by measurement two decimal nought nought nought hectares (2.000 Ha) or thereabouts that is to say LR No MN/III/2483 being Plot No MN/III/2483 in the name of the Applicant Salim Islam Abeid.
 - f. That the orders referred to in paragraphs 2, 3, 4 and 5 above be registered against the title to property known as the parcel of land situated in South of Takaungu Township Kilifi District, containing by measurement two decimal nought nought nought hectares (2.000 Ha) or thereabouts that is to say LR No MN/III/2483 being Plot No MN/III/2483 in terms of Section 38 (2) of the Limitation Actions Act, Chapter 22, Laws of Kenya.
 - g. That the Land Registrar, Kilifi, do dispense with the production of the original title document and all other legal documents to be produced by Salim Islam Abeid.
 - h. That the costs of this Originating Summons be provided for.
2. The Originating Summons were served on the Respondent by way of advertisement on Nation Newspaper on July 19, 2022 but neither entered appearance nor filed a response.

Applicant's Case

3. The Applicant gave evidence as PW1 and relied on his statement dated May 11, 2022 as evidence in chief and told the court he has been on the suit property since 1998 doing farming activities and that there has been no other claim over the suit property. He also produced the documents in the list of documents as PEXH 1-7 showing the developments on the suit land being permanent buildings, perimeter wall with electric fence, 12 cottages, 6 open air halls, a swimming pool and a kitchen

Applicant's Submissions

4. Ms. Onyango, counsel for the Applicant identified three issues for determination namely:
 - a. Whether the Plaintiff has acquired rights over the suit property?
 - b. Whether the Defendant's rights jointly and severally over the suit property have been extinguished.
 - c. Whether the Plaintiffs has any other remedies available to him or not?
5. On the first issue as to whether the Plaintiff has acquired rights over the suit property, counsel relied on the ingredients for adverse possession established in the case of *Tabitha Waittherero Kimani v Joshua Ng'ang'a* [2017] eKLR. Counsel submitted that the Applicant has been in exclusive, actual, open, free and continuous use of the suit property in manner adverse to the Respondent's title for a period exceeding 12 years, thus entitled to the orders sought.
6. Ms Onyango further submitted that the Plaintiff led evidence to show that he has developed the suit property by construction of permanent buildings which he exhibited by producing photographs and a ground status report.
7. On the second issue as to whether the Respondent's rights over the suit property have been extinguished. Ms. Onyango submitted that as per Article 40 (2) (a) of *the Constitution* of Kenya, the right to own property is not absolute as the same may be limited albeit not arbitrarily.



8. Counsel stated that the provisions of Article 60 (1) of *the Constitution* ensure that land is utilized and managed in a manner that is equitable, efficient and productive. That the Respondent's act of abandoning the suit property for over a period of 12 years was contrary to the above principle. Counsel relied on the case of *Kabindi Ngala Mwagandi v Mtana Lewa* [2014] eKLR.
9. Further, counsel submitted that by virtue of Section 7, 9, 13, 17, 37 and 38 of the *Limitation of Actions Act*, and the fact that the Respondent failed to defend this suit, his title became extinct. That the Applicant risks eviction unless the suit property is registered in his name as prayed.

Analysis And Determination

10. The law in respect to adverse possession is now settled. For one to succeed in a claim of adverse possession he must meet the criteria stated in the case *Kimani Ruchine & Another v Swift, Rutherford Co Ltd. & another* (1977) KLR 10 Kneller J. stated as follows at page 16:

“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 evasion).....The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”
11. These principles were restated by the Court of Appeal in the case of *Samuel Kihamba -v- Mary Mbaisi*, KSM CA No 27 of 2013 as follows:-

“Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario The additional requirement is that of animus possidendi, or intention to have the land.”
12. Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya provides;

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.
13. Section 17 further provides;

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.
14. The Respondent neither filed a replying affidavit nor appeared in court to give evidence in his defence. The suit was therefore undefended. The evidence that was tendered by the Applicant as to when and how he entered the suit property was not controverted. The same applies to the evidence that he led regarding the developments that he has carried out on the suit property since he took possession thereof in the year 1998.
15. In the case of *Titus Kigoro Munyi vs Peter Mburu Kimani* Civil Appeal no 28 of 2014, the court held that a title of a registered owner of land will be extinguished and vested in a third party who proves they have been in occupation of the land continuously and uninterrupted for twelve years, such occupation



has been open and notorious to the owner and without permission of the said owner, and that this third party has asserted a hostile title and dispossessed the true owner.

16. The Applicant stated that his occupation of the suit property had been open, uninterrupted, and produced in evidence photographs of the developments on the suit property to demonstrate that he has been in occupation of the property for several years. This was supported by the ground report dated March 4, 2021 and February 7, 2022.
17. Therefore, having considered the pleadings, evidence, submissions and the relevant authorities, I find that the Applicant has proved his claim for adverse possession and is entitled to the orders sought.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 17TH DAY OF OCTOBER 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

