



Mramba & 3 others v Cannon Assurance (Kenya) Ltd (Environment & Land Case 207 of 2017) [2023] KEELC 21917 (KLR) (29 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21917 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 207 OF 2017
NA MATHEKA, J
NOVEMBER 29, 2023**

BETWEEN

**MWENDA KAHINDI MRAMBA 1ST APPLICANT
CHRISTOPHER CHANGAWA KAHINDI SUIG ON BEHALF OF THE ESTATE
OF KAHINDI MRAMBA MWENI - DECEASED) 2ND APPLICANT
KAI MRIHE KAI 3RD APPLICANT
HARO MRIHE KAI (SUIG ON HIS OWN BEHALF AND ON BEHALF OF THE
ESTATE OF CHIHUNGA MRIHE KAI) 4TH APPLICANT**

AND

CANNON ASSURANCE (KENYA) LTD RESPONDENT

JUDGMENT

1. The application is brought under Sections 7,37 and 38 of the *Limitation of Actions Act*, Chapter 22, Laws of Kenya, Section 7 of the *Land Act* No.6 of 2012, Section 101 of the *Land Registration Act*, No.3 of 2012, Order 37 Rule 7 of the Civil Procedure Rules 2010 Act (Cap 21) Laws of Kenya seeking the following orders;
 1. The Respondent's interest in the portion of land measuring 2.5 acres comprised in being Plot No.MN/SEC.111/13, CR occupied by the applicants comprised in a certificate of ownership dated the 26th day of June, 1924 registered in the Land Title Registry at Mombasa as C.R No.5692 and is delineated, demarcated and described on the Land Survey Plan No.20800 has been extinguished.
 2. The 1st and 2nd Applicants be registered jointly as the proprietors a portion of Land by measurement two and a half acres of the Plot No. MN/SEC 111/13 in place of Cannon



Assurance (Kenya) Ltd by reason of the fact that the applicant share becomes entitled to the portion of land by adverse possession.

3. That the, 3rd and 4th applicants be registered as the proprietors of four acres of Plot No. MN/SEC 111/13.
 4. That the Registrar of Titles, Mombasa do issue a certificate of Titles for the portion of land measuring two and a half (2 1/2) acres or thereabouts and four (4) acres or thereabouts of Plot No. MN/SEC 111/13 situated at Kikambala, Kilifi County in the names of Mwenda Kahindi Mramba and Christopher Changawa Kahindi.
 5. That the Registrar of Titles, Mombasa do issue a certificate of Titles for the portion of land measuring four (4) acres or thereabouts of Plot No. MN/SEC 111/13 situated at Kikambala, Kilifi County in the names of Kai Mrihe Kai and Haro Mrihe Kai the applicants herein.
 6. The Order referred in paragraph 2, 3 and 4 above be registered against all that parcel of land containing by measuring over 206 acres and being Plot No. MN/SEC 111/13 at in terms of section 38(2) of the *Limitation of Actions Act*, Chapter 22, Laws of Kenya.
 7. The costs of this originating summons be provided for:
2. The case is based on the grounds that the applicants have been in uninterrupted and exclusive physical possession of the portion of Suit Land for a continuous period of more than 12 years. That the applicants have developed the portions of the suit land and have been and are residing on the respective portions of land. The respondent's rights and/or interest on the portions of the suit land vis-a-vis those of the applicants' have been extinguished. That it is fair and just that the applicants be registered of the owners of the portions of the land so that they may stop living in fear that they and their families may wake up to an eviction one day which eviction the respondent has attempted. That the portions of suit property is the only known home for the applicants and their families.
 3. This court has carefully considered the evidence and the submissions therein. The respondent is the registered owner of Plot No 13/III/MN CR 55692 measuring 206.0 acres as seen from the Certificate of Postal Search dated 21st April 2016. The applicants are seeking to be registered as the registered owners of certain portions of the suit property by virtue of adverse possession. In particular, the 1st and 2nd applicants seek to be jointly registered as the proprietors of a portion of the suit property measuring 2.5 acres, while the 3rd and 4th applicants seek to be jointly registered as the proprietors of a portion of the suit property measuring 4 acres. The applicants claim to have occupied the said portions of the suit property uninterrupted and exclusively for more than 12 years and as such the rights of the respondent to these portions of the suit property have been extinguished.
 4. It is the respondent's case that it is the registered proprietor of Title No. 5692 Plot No. 1589/13/III/MN having been registered as so on 30th December 1999 (DEX-1). The applicants and other squatters invaded the suit property in 2012 and started erecting structures, cultivating, felling trees and subdividing portions of the suit property. DW1 informed court during trial that on 25th January 2015, the National Land Commission wrote to the respondent seeking intervention in the dispute between the respondent and the squatters (DEX-). On 16th December 2015, the National Land Commission wrote to the respondent confirming the settlement reached by the parties. It was agreed that the respondent would settle 125 families squatting on the suit property by allocating a quarter acre to each and issuing titles to them (DEX-3). The respondent produced a list of squatters residing in the suit property DEX-6 where the applicants herein were among others identified as the 125 families to be allocated a quarter of an acre as part of the settlement between the respondent and the squatters. On the said list the 1st, 2nd, 3rd and 4th applicants have been listed as numbers 128, 139, 154 and 175



respectively, to be allocated Plots No. 70, 76, 89 and 98 respectively. The respondent maintained that the applicants herein have been allocated land by the respondent and the claim herein is a fraudulent attempt to unjustly enrich themselves with the respondent's suit property.

5. A claim for adverse possession must be unequivocal, and exclusive and must exclude the owner as well as other people. The applicant must demonstrate that besides, the respondent being the registered owner of the suit premises that they were in an open and exclusive possession of the suit premises in an adverse manner to the title of the respondent. The Court of Appeal in *Richard Wefwafwa Songoi vs Ben Munyifwa Songoi* (2020) eKLR held that:

" a 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."

6. The applicants ought to establish that they were in occupation for a period of more than 12 years having dispossessed the respondent or there having been discontinuance of possession by the title holder. It is said that the owner has ceased to be in occupation by reason of dispossession or discontinuance of possession. In *Gabriel Mbui vs Mukindia Maranya* (1993) eKLR, it was held that,

" Dispossession is where a person comes in and drives another out of the land; discontinuance of possession is where the person in possession goes out and another person takes possession. The term "dispossession" imports ouster, i.e. a driving out of possession against the will of the person in actual possession; there is no driving out where the transfer of possession was voluntary, not against the will of the person in possession but in accordance with his wishes and active consent. There must be some element of force or fraud, with some positive and unequivocal acts, on the part of the person dispossessing, which can be referred only to the intention of obtaining exclusive control over the property."

7. From the evidence on record the dispute had been ranging for some time and there have been interventions to settle the applicants together with other squatters on the land. The respondents are the registered owners of the expansive suit property measuring 206 acres. Both PW1 and PW3 claim to have been born on the suit property in the 1970s and 1950s respectively and have been squatting on small portions of the suit property ever since. From the letter dated 16th December 2015, the respondent was willing to part with 32 acres to settle 125 families of squatters living on the suit property. The applicants acknowledged during cross examination the existence of negotiations between themselves and the respondent spearheaded by the National Land Commission. In particular, the PW1 admitted on cross-examination that the respondent had agreed to settle the squatters what was contentious was that they did not agree with the allocated portion of a quarter acre for each family, also PW3 admitted on cross-examination that the respondent gave the squatters 32 acres to settle in. It is therefore evident that the applicants have failed to demonstrate to the court that the respondent had discontinued possession of the suit property by either giving it up, ceasing to use or abandoning the land. It is therefore clear to the court that at all material times, the respondent had possession of the suit property and continued to exercise and enjoy proprietary rights over the suit premises.



8. The mere fact that the applicants have lived on the suit property for 12 years and more does not make it enough for the Limitation of Actions Act to be operative and acquire land by adverse possession. The applicants must have been in exclusive possession for the statutory period and demonstrate that the registered proprietor had been dispossessed or had discontinued possession of the land for the statutory period. The applicants have failed to demonstrate to the court that they were in exclusive possession and that the respondent was out of possession. It is clear to the court that the applicants have lived and used the suit property in common with the respondent. The applicant's possession was not exclusive, besides the presence of other squatters on the suit land, the respondent was free to use the title of the suit land.
9. The applicants failed to identify the land in possession, which is an integral part of the process of proving adverse possession. The applicants might have produced the title to the suit premises (DEX-5) which measures 206 acres. They are not laying claim to the whole suit property, but rather portions of the same, they ought to have therefore identified, described the portions, sizes and locations of those they believed were in their respective possession from the larger suit premises that they lay claim to. This position was held by the Court of Appeal in *Wilson Kazungu Katana & 101 others vs Salim Abdalla Bakshwein & another* (2015) eKLR that;

" The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of *Githu v Ndele* [1984] KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them."
10. The applicants have produced pictures (DEX-6) to demonstrate to the court the use they had on different portions of the suit land. Unfortunately, the same cannot suffice as the court is not able to identify the exact occupation of the applicants out of the entire suit premises, both PW1 and PW3 acknowledged during cross-examination that they did not present to the court a survey report to identify the exact portions of the suit land they were in occupation as claimed.
11. Consequently, the court finds that the applicants have not discharged their burden of proving their case on a balance of probabilities. This court finds that the applicants' claim in their amended originating summons dated 16th February 2023 is not merited and proceeds to dismiss it with costs to the respondent.
12. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 29TH DAY OF NOVEMBER 2023.

N.A. MATHEKA

JUDGE

