



REPUBLIC OF KENYA



KENYA LAW
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**Charo & another v Corbellaro (Environment & Land Case 11 of 2021)
[2023] KEELC 21818 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21818 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE 11 OF 2021

MAO ODENY, J

NOVEMBER 23, 2023

**IN THE MATTER OF LAND PARCEL KNOWN AS PLOT NO. GEDE/
IJOMBONI/850 REGISTERED UNDER CAP 300 (REPEALED)**

AND

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

AND

**IN THE MATTER OF AN APPLICATION FOR A DECLARATION THAT THE
APPLICANTS HAVE ACQUIRED TITLE OVER PORTION NO. GEDE/ MIJOMBONI/850**

BETWEEN

DAMA CHARO 1ST APPLICANT

JACKSON KALUME 2ND APPLICANT

AND

FRANCO CORBELLARO RESPONDENT

JUDGMENT

1. By an Originating Summons dated 21st June, 2021 the Applicants sought the following orders;
 - 1) That the Applicants be declared as proprietors of all that portion of land measuring 2.42 Ha or thereabouts known as Parcel No. GEDE/MIJOMBONI/850 which they have acquired by adverse possession having lived and worked thereon in their own right for over 12 years from the year 1973 beyond the statutory 12 years, using the same openly, peacefully and uninterrupted without any interference from the Respondent or its predecessors in title.



- 2) That the Applicants are entitled to be registered and issued with a Title Deed over the same in the place of the Respondent.
- 3) That on the premises, the Respondent, his agents and servants be restrained by a permanent injunction order from alienating, sub-dividing, taking possession, selling, transferring, charging or in any manner whatsoever interfere with the said parcel of land occupied by the Applicants.
- 4) That the Applicant be granted the costs of this suit.

Applicant's case

2. The application was supported by the affidavit of DAMA CHARO sworn on 21st June, 2021 who deponed that she was born in 1975 on the suit premises and has lived there since birth. She stated that on 11th June, 2021 conducted a search at the Lands Office, Kilifi and learnt that the Respondent herein was the registered owner of the suit premises.
3. PW1 further stated that she has lived on the suit land together with the co- applicant since 1975, built houses without any interference from the registered proprietor who has never been to the suit land. It her evidence that the title deed to the suit land was issued to the Respondent in 1993 when they were already in occupation. She urged the court to find that they have acquired the suit land vide adverse possession.

Applicant's Submissions

4. Counsel submitted that the Applicants have been in occupation for a period of 28 years hence have met the threshold for adverse possession and cited the case of *Gachuma Gacheru vs Maina Kabuchwa* (2016) eKLR
5. It was counsel's submission that the Applicants' occupation has been open and notorious to the extent that their neighbors identify them as the owners of the same which meets the threshold as set out in the cases of *Mtana Lewa v Kabindi Ngala Mwangandi* (2015) eKLR, *Gabriel Mbui v Mukindia Maranya* (1993) eKLR, *Wambugu v Njuguna* (1983) KLR and *Mbira v Gachubi* (2002) KLR 137 and urged the court to grant the orders as prayed.

Analysis and Determination

6. The issue for determination is whether the Applicants have met the threshold of adverse possession as set out in the *Limitation of Actions Act* and decided cases.
7. Section 7 provides that:

“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”
8. Section 13 further provides that:

“(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 the purposes of 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”.

9. In the case of *Kasuve Vs Mwaani Investments Limited & 4 others* 1 KLR 184, the Court of Appeal restated what a Plaintiff in a claim for Adverse Possession has to prove;

“In order to be entitled to land by Adverse Possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.

10. PW1 stated that they have been in peaceful and uninterrupted occupation of Parcel No. GEDE/MIJOMBONI/850 since the year 1973, a period spanning over thirty years, together with their families hence entitled to be registered as owners of the suit land.

11. The Applicants must establish their occupation and possession of the suit land as a matter of fact. They must establish the adverse character of the possession as was held in the case of *Gabriel Mbui v Mukindia Maranya* (1993) eKLR, that:

“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”

12. The Applicants annexed to the Supporting Affidavit, a copy of official search, a certified extract of the Green Card for Plot No Gede/Mujomboni/850 showing that the suit property is registered in the Respondent’s name.

13. The Applicants further annexed photos coconuts and houses that they have built on the suit land to show their occupation and possession. I therefore find that the Applicants have proved that they have acquired the suit land by way of adverse possession. The Respondent was served by way of substituted service vide daily Nation but he did not file any response. I therefore grant the following specific orders:

- 1) That the Applicants are hereby be declared as proprietors of all that portion of land measuring 2.42 Ha or thereabouts known as Parcel No. GEDE/MIJOMBONI/850 which they have acquired by adverse possession having lived and worked thereon in their own right for over 12 years from the year 1973 beyond the statutory 12 years, using the same openly, peacefully and uninterrupted without any interference from the Respondent or its predecessors in title.
- 2) That the Applicants are entitled to be registered and issued with a Title Deed over the same in the place of the Respondent.
- 3) Costs of the suit.



DATED, SIGNED AND DELIVERED AT MALINDI THIS 23RD DAY OF NOVEMBER 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.

