



REPUBLIC OF KENYA



**Mbaruku v Shah & 3 others (Environment & Land Case 103 of 2019)
[2023] KEELC 21822 (KLR) (21 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21822 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 103 OF 2019
MAO ODENY, J
NOVEMBER 21, 2023**

BETWEEN

TSUMA NDARO MBARUKU PLAINTIFF

AND

VIPIN SHANICAL SHAH 1ST DEFENDANT

NOORIN FAZAL HUSSEIN 2ND DEFENDANT

RAJABALI 3RD DEFENDANT

MUZAFER MUSAJEE ESSAJEE 4TH DEFENDANT

JUDGMENT

1. By an Origination Summons dated 4th December 2019, the Applicant sued the Respondents seeking the following orders;
 - a. Spent
 - b. That the Respondents' interest in all that piece of land situated in Kilifi County and known as Kilifi / Kijipwa/31 Measuring approximately 0.976 Ha has been extinguished.
 - c. That the Registrar of Titles, Kilifi County do delete entry in favour of the Respondents in the title of land described in paragraph 2 above or register appropriate discharge in respect of the Applicant thereof without gazettelement.
 - d. That the Applicant be registered as the proprietor of all that parcel land situated in Kilifi County and known as Kilifi / Kijipwa/31 Measuring approximately 0.976 Ha which said piece of land is comprised in a Certificate of title registered in the Land Titles Registry at Kilifi in place of Vipin Shantical Shah, Noorin Fazalhussein, Rajabali And Muzafer Musajee Essajee by reason of the fact that the Applicant has become entitled to the said land by adverse possession.



- e. That the Registrar of Titles, Kilifi do issue certificate of Title for the parcel situated in Kilifi County and known as Kilifi / Kijipwa/31 Measuring approximately 0.976 Ha which said piece of land is comprised in a Certificate of title registered in the land Titles Registry at Kilifi, in the names of the Applicant Tsuma Ndaru Mbaruku.
 - f. That the Orders referred to in paragraph 2, 3, 4 and 5 above be registered against the Titles to all the parcel land situated in Kilifi County and known as Kilifi / Kijipwa/31 Measuring approximately 0.976 Ha which said piece of land is comprised in a Certificate of Title registered in the Land Titles Registry at Kilifi in terms of section 38 (2) of the *Limitation Action Act*, Chapter 22, Laws of Kenya.
 - g. That the costs of this Originating Summons be provided for.
2. The Originating Summons was served vide substituted service by way of advertisement in a Nationwide newspaper but the Respondents did not file a response within the stipulated time.
 3. The Respondents later vide a consent dated 13th June 2022 were allowed to file their documents upon payment of thrown away costs to the Applicant.
 4. On 24th January, 2023 counsel for the Applicant made an oral application to rectify the typographical error to amend the plot No. from Kilifi/Mtwapa/31 measuring approximately 0.976 Hectares to Kilifi / Kijipwa/31 measuring approximately 0.976 Hectares which was allowed accordingly.

Applicant's Case

5. PW1 adopted his affidavit in support of the application dated 2nd December 2019 as his evidence and stated that he has been in occupation of the suit land together with his family for a period of over 50 years.
6. PW1 also produced a list of documents as PEX No 1 to 7 which included a copy of official search, photos, and correspondences from the National Land Commission.
7. It was PW1's testimony that he has been cultivating the land, planted mango trees, coconuts, cashew nuts and has built 2 houses on the suit land where he resides with his 12 children who were born there. He further stated that there are 3 graves where he buried his two children and his brother Ali.
8. According to PW1, he has been living peacefully with his family without interruption for a period of over 50 years and nobody has ever claimed the suit land. He further stated that his father was cultivating the land but was not residing on the land but that he later moved in with his family without the permission of anybody.
9. PW1 stated that he tried to get help from the National Land Commission but he did not get any help and he therefore moved to court as he has no alternative land to occupy.
10. PW1 also stated that they have had no dispute in respect of the suit land and prayed that the court finds that he has acquired the suit land by way of adverse possession.
11. On cross examination by counsel for the Defendants, PW1 stated that he knew that the land was registered in the defendants' names after conducting a search and that NLC did not assist him to get the title to the suit land.



Respondents' Case

12. DW1 who had authority to give evidence on behalf of the other 2 Respondents dated 4th August 2022 adopted his affidavit together with the annexures as his evidence in court.
13. DW1 stated that the Applicant entered the suit property after they bought it in 2008 from Helmet Shultz, carried out a survey and placed beacons. He also stated that he has been paying Land rates and that there has been no case or cases in respect of the suit land.
14. It was DW1's testimony that he had approached the Area chief as some people had invaded the land in 2010 and that they have a title deed in respect of the suit land but not in occupation of the same.

Applicant's Submissions

15. Counsel for the Applicant reiterated the evidence of the parties and submitted that the Respondents have not rebutted the Applicant's evidence that he has been in occupation of the suit land peacefully.
16. It was counsel's submission that the Applicant has proved that he has acquired the suit land by way of adverse possession having been in occupation for a period of over 50 years. That the defendant confirmed in his evidence that he has never been in occupation of the suit land and produced a copy of a title deed indicating that the land is in their names.
17. Counsel relied on the case of *Celina Muthoni Kitbinji v Safiya Binti Swaleh & 8 Others* [2018] eKLR and submitted that the court held in favour of the Plaintiffs after they established that they were in use and occupation of the suit property in excess of 12 years.
18. Ms Omollo submitted that the Applicant has met the criteria of an adverse possession as he has been in use and possession of the land continuously, open, notorious and uninterrupted for a period exceeding 12 years; that the Applicant's possession is inconsistent with and denial of the true owner and it was without legal title.
19. Counsel urged the court to grant the orders as prayed.

Respondents' submissions

20. Counsel for the Respondent's gave a summary of the evidence by the parties and relied on the cases of *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR, *Samuel Kihamba v Mary Mbaisi* [2015] eKLR, *Maweu v Liu Ranching & Farming Cooperative Society* [1985] eKLR, on adverse possession and submitted that it is not enough for the Applicant to state that he has been in occupation for a period of more than 12 years. The Applicant must prove that the Respondent has been ripped off the right by dispossession or discontinuance.
21. Counsel further relied on the provisions of the *Limitation of Actions Act* on adverse possession, the *Constitution* of Kenya on the Bill of rights, *Land Registration Act*, and submitted that the Applicant's right to adverse possession was extinguished when the Respondents bought the property in 2008 and placed beacons and cited the case of *Peter Kamau Njau v Emmanuel Charo Tinga* [2016] eKLR.
22. Counsel further submitted that the fact that the Respondents had not developed the land does not mean that they had given up their entitlement. Counsel relied on the cases of *Chairman, Board of Governors Murang'a College of Technology Primary School v Julius Ngigi Munjuga* [2018] eKLR and *Christopher Kioi & another v Winnie Mukolwe & 4 others* [2018] eKLR and urged the court to dismiss the originating summons with costs to the Respondents.



Analysis and Determination

23. The issues for determination in a claim for adverse possession are well settled. The principles of adverse possession are anchored under the *Limitation of Actions Act*. Section 7 of the *Act* bars actions to recover land after 12 years from the date on which the right accrued.
24. Further Section 13 of the *Act*, provides that adverse possession is the exception to this limitation:
- “(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.”
25. 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.”
26. In the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, the Court held 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”.
27. The Applicant stated that he had been in occupation of the suit land for a period exceeding 12 years, more precisely for over 50 years. It is trite law that the character of adverse possession must be established as a fact.
28. The court cannot assume the possession and occupation as it is incumbent upon the Applicant to prove vide facts the occupation and the intention to hold the land adversely. The Applicant established this by his evidence and the steps that he took to try to register the land in his name. It is on record from the correspondence that the Applicant tried to get assistance from the National Land Commission to be registered as the owner of the suit land.
29. In a claim of adverse possession, the court must determine the following issues; how did the Applicant take possession of the suit property?, when did he/she take possession and occupation of the suit



- property?, what was the nature of his/her possession and occupation?, how long has the Applicant been in possession?
30. The above questions have been answered by the Applicant who stated that he has been in occupation for more than 50 years, got into possession/ occupation without the Respondents' permission and has discontinued or dispossessed the Respondents from the suit land. Therefore the entry was non-permissive, non-consensual.
31. In the case of *Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Mubambi Katana & 15 others* [2018] eKLR, the court held as follows:
- “Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12years as espoused in the Latin maxim, nec vi nec clam nec precario.”
32. The Applicant produced a copy of official search, which shows that the suit land is registered in the name of the Respondents and this was corroborated by the title produced by the Respondents.
33. The act of survey and putting beacons did not amount to assertion of rights by the Respondents as at that time the Applicant's right of adverse possession had accrued. The Respondent did not take any steps to remove the Applicant from the suit land. The Respondent admitted that he had sought the assistance of the Area Chief to help in removing people who were on the suit land. This did not amount to assertion of rights. This is a testament that the Applicant was on the suit land and contrary to the claim by the Respondents that the suit land was vacant when they bought it.
34. In the case of *Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees* [2016] eKLR the court quoted with approval the case of *Amos Weru Murigu v. Marata Wangari Kambi & Another* where the Court held:
- “...as regards assertion of title, it is not enough for a proprietor of land to merely write to the trespasser (to vacate). A letter by the proprietor, even if it be through an advocate or the chief of the area does not amount to assertion of title in law and cannot therefore interrupt the passage of time for the purpose of computing the period of adverse possession. For there to be interruption, the proprietor must evict or eject the trespasser but because eviction is not always possible without breach of peace, institution of suit against a trespasser does interrupt and stop the time from running.”
35. I have considered the pleadings, the evidence by the parties, the submissions by counsel and find that the Applicant has proved that he has acquired the suit land by way of adverse possession. I therefore issue the following specific orders:
- a. An order is hereby issued that the Respondents' interest in all that piece of land situated in Kilifi County and known as Kilifi / Kijipwa/31 Measuring approximately 0.976 Ha has been extinguished.
 - b. An order is hereby issued to the Land Registrar Kilifi County to delete entry in favour of the Respondents in the title of the suit land and register in the Applicant's name without gazettelement.
 - c. An order is hereby issued that the Applicant Tsuma Ndaro Mbaruku be registered as the proprietor of all that parcel land situated in Kilifi County and known as Kilifi / Kijipwa/31



Measuring approximately 0.976 Ha which said piece of land is comprised in a Certificate of title registered in the Land Titles Registry at Kilifi in place of Vipin Shantical Shah, Noorin Fazalhussein, Rajabali And Muzafer Musajee Essajee by reason of the fact that the Applicant has become entitled to the said land by adverse possession.

e) Costs of the suit.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST 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.

