



Lions Beach Limited v Kwanza Estate Limited (Environmental and Land Originating Summons 10 of 2022) [2023] KEELC 22286 (KLR) (6 December 2023) (Judgment)

Neutral citation: [2023] KEELC 22286 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 10 OF 2022
EK MAKORI, J
DECEMBER 6, 2023**

BETWEEN

LIONS BEACH LIMITED APPLICANT

AND

KWANZA ESTATE LIMITED RESPONDENT

JUDGMENT

1. This is an O.S. brought by the applicant seeking to be declared by the operations of the doctrine of adverse possession to have acquired $\frac{1}{2}$ an acre of parcel of land described as Plot No. 49 Watamu. An order to issue to the effect that the respondents' title over $\frac{1}{2}$ of Plot No. 49 Watamu has been extinguished. An order directing the Land Register of Titles Mombasa to register $\frac{1}{2}$ an acre of Plot No. 49 Watamu in the names of the applicant herein. Costs be provided.
2. The respondent did not enter an appearance or place a defence after personal service as can be seen from the return of service filed by one Dismas O. Musan. The matter therefore thereafter proceeded ex-parte.
3. The applicant called three witnesses - Tranquilo Saputo PW1, Walter Okoth PW2, and Simom Nyandemo Onchore PW3. Applicant claims the land by way of adverse possession. It is averred through the evidence of one Tranquilo Saputo, one of the Directors of the applicant Company who said that the suit property was adjoining plots No47 and 48. The applicant took possession of those two plots and $\frac{1}{2}$ of an acre of plot No. 49 in 2005. In 2006 a hotel was erected on the two plots and the applicants converted $\frac{1}{2}$ of an acre of plot No. 49 as a football pitch and partly used as a parking lot and a stand for the Hotel's generator. Permission was later granted for the construction of a modern volleyball pitch, car park, and theatre.
4. All the activities have been carried out without any qualms from the current owners of the land or their predecessors, hence the plea for adverse possession.



5. Walter Okoth PW2, did the survey works and testified on the extent to which plot No 49. has been used by the applicants while Simom Nyandemo Onchore PW3 stated that he was engaged in building works for the applicant's hotel in 2006. He averred that the works spread on plot Nos. 47, 48 and 49.
6. I did not see submissions by the applicant despite the Court ordering that the applicant place on record the same.
7. The issue for the determination of this court is whether adverse possession has attached in favour of the applicant.
8. In *Maina Kinya v Gerald Kwendaka* [2018] eKLR for adverse possession to accrue it has to be shown:

“The law in respect to adverse possession is now settled. For one to succeed in a claim of adverse possession he must satisfy the following criteria stated in the case of *Maweu v Liu Ranching and Farming Cooperative Society* 1985 KLR 430 where the Court held;

“Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity, and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”.

9. It was held further in *Murunga Kabangi & 2 others v Hannah Gitau* & [2019] eKLR that:

“As stated earlier, the single issue involved in this appeal is whether the appellants had established that they were entitled to be registered as the owners, by adverse possession, of the disputed land thereby defeating the rights of the registered owners whose title must be cancelled to give way to the registration of the trespasser-turned-owner in the eyes of the law.

In the recent case of *David Munene Wamwati & 4 Others v The Registered Trustees of the Anglican Church of Kenya & Another*, Civil Appeal No. 36 of 2015 (UR), this Court had this to say:-

“The conceptual and ethical dilemma presented by the law on adverse possession has long engaged judicial minds in this Court and we need not rehash it. This Court has on many occasions exposed the morality and justice of a law that permits a trespasser to morph, by mere advance of time, into the owner of land he entered into without permission of the owner and at absolutely no consideration thereby defeating an owner, a registered one at that, who in all likelihood invested funds in the purchase of the land. These concerns have been articulated with firmness and passion but have always borne the impotence of equity in the face of explicit provisions of law which must nonetheless be followed until a legislative intervention should effect much-needed change. See, for a thorough exposition of the controversies aroused by the law on adverse possession, the decision of our learned brothers Makhandia, Ouko, and M’Inoti, JJ.A in *Mtana Lewa v Ngala Mwangandi*[2015] eKLR. For all of its problematic nature, however, the law on adverse possession is itself quite simple. This Court, differently constituted put



it thus in *Mate Gitabi v.s. Jane Kabubu Muga & others* (Nyeri Civil Appeal No. 43 of 2015 (unreported));

“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 secrecy, without force, 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 landowner. These elements are contained in the Latin maxim *nec vi, nec clam, nec precario*. See also *Eliva Nyogesa Lusenaka & another v Nathan Wekesa Omacha* – Kisumu Civil Appeal No. 134 of 1993 and *Kasuve v Mwaani Investments Ltd & 4 others*[2004] KLR 184 at page 188 where this Court stated as follows;

“‘In order to be entitled to land by adverse possession, the claimant must prove that she has been in exclusive possession of land openly and as of right and without interruption for 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.’ See also *Wanje vs Saikwa* [1984] KLR 284.”

And so the law is fairly well settled.”

10. The testimony offered shows that the applicant has been in occupation of ½ an acre of Plot No. 49 Watamu since 2005, which is now over 12 years. It has been open and uninterrupted without secret and aims to dispossess the registered owner. The registered landowner has never set foot on the suit land. Service was effected but the respondent filed no defence to challenge the averments by the applicant.
11. The Originating Summons will succeed with costs in the following manner:
 - a. The applicant be and is hereby declared by the operations of the doctrine of adverse possession to have acquired a parcel of land described as ½ an acre of Plot No. 49 Watamu
 - b. An order does and is hereby issued to the effect that the respondent’s title over ½ of an acre of plot No. 49 Watamu has been extinguished.
 - c. An order does and is hereby issued directing the Land Register of Titles Mombasa to register ½ of an acre of Plot No. 49 Watamu in the names of the applicant herein.
 - d. The applicant will also be entitled to the Costs of this suit.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 6TH DAY OF DECEMBER, 2023.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Nyongesa for the Applicants

Court Clerk: Happy

In the absence of:



The Respondent

