



REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE NO. 155 OF 2013

MASH BIRYA DENA.....PLAINTIFF

versus

FRED KARL SCHUMACHER.....1ST DEFENDANT

HANS KOSCHANY.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiff brought this case via Originating Summons dated 25th July 2013 and filed on 12th August 2013. The Plaintiff seeks an order that the Respondents' interest in the land known as **Subdivision Number 1318 (Original No. 743/2) of Section III Mainland North** (hereinafter referred to as "the suit property") comprised in Certificate of Title dated 18th February 1991, Registered in the Land Titles Registry at Mombasa as Number CR 21202/1 and is described on Land Survey Plan Number 145924 as an entry number 1, has been extinguished. The Plaintiff seeks an order that he be registered as the proprietor of the suit property and that a certificate of title be issued in his name.
2. The summons is supported by the Plaintiff's affidavit sworn on 25th July 2013. Pursuant to the leave granted by the court on 16th December 2013, the Defendants were served through advertisement in the newspaper which advertisement was published in the *Standard* Newspaper on 27th January 2014. The Defendants did not enter appearance within the stipulated time or at all. The case therefore proceeded *ex parte* and the Plaintiff testified on 29th February 2016.
3. The Plaintiff stated that he lives on the suit property. That he knows the Defendants as he used to work for them as a fisherman around the year 1991. He continued that in 1992, the Defendants asked the Plaintiff to take care of the suit property as they left for Germany. The Plaintiff stated that he has lived on the suit property with his family to date without any communication from the Defendants. He asked this court to grant him the prayers declaring him as the owner of the land by virtue of adverse possession.
4. It is a legal requirement that a copy of the title to property being claimed by adverse possession or a certificate of search be annexed to the application. Although mentioned as an annexure to the affidavit in support of the Originating Summons, the Plaintiff did not attach an actual copy of the title. However, a copy of the title was attached to the Plaintiff's further affidavit sworn and filed on 19th February 2015 thus curing the omission.
5. The law on adverse possession is now well settled and the essential requirements that one has to meet in order to succeed in an application for adverse possession have been discussed by the courts. In KWEYU V. OMUTO [1990] KLR 709, the Court of Appeal (Gicheru JA) stated at page 716 that:

"By adverse possession is meant a possession which is hostile, under a claim or colour of

title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (Colour of title is that which a title in appearance, but not in reality). Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford colour; and, second, such possession under it as will be adverse to the right of the true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms (“claim or colour of title”) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land for the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant’s use, done publicly and notoriously.”

6. In the case of **MARGARET NYAKINYUA MURIGU V. CHARLES WAHOME Kariuki [2014] eKLR**, this court (Sergon, J.) stated that:

“Having set out in detail the evidence tendered, let me now restate the ingredients needed to apply the doctrine of adverse possession. In **Wambugu =Vs= Njuguna (1983) K.L.R 173**, the Court of Appeal restated those principles when it held inter alia as follows:

1. ***The general principle is that until the contrary is proved, possession in law follows the right of possess.***
2. ***In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed or had discontinued possession of the suit land for a continuous statutory period of twelve years as to entitle him, the respondent, to title to that land by adverse possession.***
3. ***The Limitation of Actions Act, on adverse possession, contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.***
4. ***Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence the occupation is not adverse but with permission. The occupation can only be either with permission or adverse; the two concepts cannot co-exist. The respondent occupied the suit land originally under an agreement for sale of land being a licence from the appellant, although the respondent's possession was exclusive and continuous but was not adverse; it only became adverse after the licence was determined.***
5. ***The rule on “permissive possession” is that possession does not become adverse before the end of the period during which the possessor is permitted to occupy the land. For the respondent's claim for adverse possession to succeed, he must have an effective right to make entry and recover possession of land. He could not have that effective right because the occupation was under a contract, or licence, which had not been determined.***

6. ***Adverse possession means that a person is in possession, in whose favour time can run. Not all persons in possession can have time run in their favour. For example, time can run in favour of a tenant at will by virtue of section 12 of the limitation of actions act but time cannot run in favour of a licensee. A licensee therefore has no adverse possession (Hughes v Griffin (1969) 1 WLR 23).***

7. The ingredients were recently discussed by the Court of Appeal in the case of **MTANA LEWA V. KAHINDI NGALA MWAGANDI [2015] eKLR** where Makhandia, JA stated as follows:

*“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth **not under the licence of the owner.** It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”* (underline mine for emphasis).”

8. Is the Plaintiff entitled to the suit property by virtue of adverse possession? The Plaintiff testified that he came into possession of the suit property when he was asked by the Defendants to take care of the same. His evidence is as follows:

“I used to work for the Defendants as a fisherman around 1991. In 1992, they told me [that] they were going to Germany. They asked me to [take] care of the land.”

9. Clearly, from the Plaintiff’s own pleadings, evidence and written submissions, he was in the suit property by permission of the registered owners, the Defendants. The law on adverse possession is that a person who enters the land through a license or permission of the registered owner cannot be entitled to the land by adverse possession. This was observed by Lenaola, J. in the case of **BEATRICE SYOKAU GATHUMBA V KENYA AIRPORTS AUTHORITY & 2 OTHERS [2012] eKLR** where the learned judge stated as follows:

*“I must emphasise that it is an element of adverse possession that it ought to be **‘hostile’ and without permission from the true owner of the land.** The fact that the petitioner’s husband was permitted occupancy of the suit premises at one time as a manager of the animals and in the second time as a licensee is inconsistent with the doctrine of adverse possession because an intruder who is given permission or a license has no cause of action during the period of his permission or license. This position was stated in the case of Wanje v Saikwa, Civil Appeal No. 72 of 1982 (1984) KLR Pg. 284, wherein the Court of Appeal held that; **‘A person who occupies another person’s land with that person’s consent cannot be said to be in adverse possession as in the reality he has not dispossessed the owner of the land and the possession is not illegal.’** This was also confirmed in the case of Wambugu v Njuguna, Civil Appeal No 10 of 1992 where it was stated that;*

“...an appellant must have an effective right to make entry and to recover possession of the land in order that the statute may begin to run. He cannot have that effective right if the person in occupation is there under a contract, or other valid permission or licence, which has not been determined.” (underline for emphasis mine)

10. The Plaintiff was invited into the suit property by the owners to take care of the same. My understanding is that he was to be a caretaker until his engagement is terminated or until such time as when the Defendants return to the land. Generally, when one person leaves his property under the care of another, it is expected that he will return and take over his property from that person under whose care he had left it. In the instant case, although the Plaintiff stated that the Defendants left for Germany way back in 1992, the possibility of them, or another person claiming under their

title, returning to take over the land from the Plaintiff cannot be totally ruled out. A caretaker cannot turn around and assert his right as against the owners who permitted him to be on the land. The Plaintiff, therefore, in my considered view, is not entitled to the suit property by adverse possession because he gained entry into it through the permission of the owners.

11. For the foregoing reasons, the Plaintiff's case should be dismissed and I hereby dismiss it with no order as to costs because the Defendants did not participate.

JUDGEMENT Signed, Dated & Delivered at Mombasa this 20th Day of May 2016

A.OMOLLO

JUDGE