



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC (OS) CASE NO. 44 OF 2020

LUCY MUTHONI MBABU.....PLAINTIFF

VERSUS

SEBASTIAN PAUL MUINDE KATHILU.....DEFENDANT

JUDGMENT

INTRODUCTION

1. Lucy Muthoni Mbabu, the Plaintiff in this matter took out an originating summons pursuant to provisions of Sections 37 and 38 of the Limitation of Actions Act Cap 22 Laws of Kenya as well as Order 37 Rule 7 of the Civil Procedure Rules against Sebastian Paul Muinde Kathilu, the Defendant in this suit in which she sought for the determination of the following questions;

- a) Whether the Plaintiff is entitled by virtue of adverse possession to half acre of that parcel of land Reference number 12883/9 which is registered in the name of the defendant.**
- b) Whether the Plaintiff should be registered as proprietor of half acre of that parcel of land situate in Mavoko of Machakos County and known as Land Reference number 12883/9 which is registered in the name of the defendant.**
- c) If answers to (a) and (b) above are in the affirmative, whether the court should make declarations and orders directed to the chief lands Registrar to give effect to the said findings.**
- d) Whether the Plaintiff should be paid costs of this suit.**

2. The originating summons is premised on the affidavit sworn by the Plaintiff on 12th March 2020 where she has deposed that on 30th June 2003 and 30th October 2005 the Plaintiff and one Mugambi Muthamia purchased ½ acre of land from the defendant being part of Parcel Number L. R. No. 12883/9 (hereinafter referred to as the suit land); that the defendant did not transfer the purchased land to the plaintiff and her co-purchaser; that the Plaintiff entered the suit land on 1st December 2007 and began constructing a home thereon; that on 7th December 2007, the defendant served the plaintiff with a notice to stop constructing on the suit land; that subsequently Mugambi Muthamia and the plaintiff sued the defendant vide Nairobi ELC Case Number 2339 of 2007 and subsequently in this court vide case number 228 of 2008; that the plaintiff withdrew and or abandoned the two aforesaid suits; that the defendant did not stop or interrupt the plaintiff's occupation of the suit land; that the plaintiff lives on the suit land with her children and workers to date; that the defendant used to live in another portion next to the portion occupied by the plaintiff; but now the defendant's son lives on the portion owned by the defendant; that the defendant has always been aware of the plaintiff's occupation but has not taken any step to interrupt the plaintiff's occupation neither has he evicted the plaintiff.

3. The plaintiff further contended that the defendant never filed any counter claim in the plaintiff's suits which were later withdrawn; that on 25th February 2008, the defendant swore an affidavit to the effect that he was unable to complete the sale to the plaintiff and her co-purchaser; that twelve years have lapsed since the plaintiff entered the suit land and when the defendant served the plaintiff with a notice to vacate; that the plaintiff has been in continuous uninterrupted use of the suit land since 1st December 2007 and has therefore acquired the same by adverse possession and that the defendant's rights to the suit land have been extinguished in respect of half an acre of Land Parcel Number L.R. No. 12883/9.

4. The defendant was served but he did not file any response, therefore this matter proceeded ex parte. On 23rd June 2021, directions were given by this court to have this matter heard by way of written submissions. Counsel for the plaintiff filed their submissions on 17th August 2021 while no submissions were filed on the part of the defendant.

PLAINTIFF'S SUBMISSIONS

5. Counsel for the Plaintiff submitted that having purchased half an acre of land Parcel Number 12883/9 on 30th June 2003 and 30th October 2005, the defendant was not willing to complete the transaction, whereof he issued a letter dated 7th December 2007 to the plaintiff demanding that the plaintiff ought to remove her construction material from the suit property. She contended that she filed suits namely Nairobi HCCC Number 2339 of 2007 and Machakos HCCC Number 228 of 2008, which suits were abandoned, although the defendant did not make any counterclaim in the two suits. She contended that she went on with the construction which she completed in 2013. She argues that she has satisfied all the conditions for adverse possession. She relied on the case of *Celina Muthoni Kithinji vs. Safiya Binti Swaleh & 8 Others [2008] eKLR*, where the court cited with approval the decision in *Mbira vs. Gichuhi [2002] IEALR 137* as follows;

“.....a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual, actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption.”

6. Counsel argued that the defendant was the owner of the suit property as demonstrated by the deed plan annexed to the plaintiff's affidavit. The plaintiff also refers to a letter dated 7th December 2007 which was alleged to have been authored by the plaintiff where the defendant alleges that the land belongs to him. Counsel argued that there was no denial of ownership that the land belongs to the defendant and urged the court to find that the land belongs to the defendant.

7. Counsel for the plaintiff further submitted that the plaintiff was in occupation of the suit land as demonstrated by the defendant's own letter of 7th December 2007. Counsel argued that though the defendant served the plaintiff with notice to vacate, the plaintiff did not vacate as demanded. It was contended for the plaintiff that time began running in November 2007 and therefore twelve years lapsed on 30th November 2019. Having filed the suit on 23rd June 2020, counsel argued that the same was filed after the expiry of the statutory period of twelve years. Counsel asserted that the plaintiff's occupation of the suit land was active and against the defendant's will, as demonstrated by photographs of the plaintiff's house. Counsel further argued that apart from the notice dated 7th December 2007, no overt act was taken by the defendant to interrupt the plaintiff's occupation of the suit land.

8. In placing reliance on the case of *Manason Ogendo Afwanda vs. Alice Awiti Orendo & Another [2020] eKLR*, counsel argued that failure to complete a sale is no bar to adverse possession as long as the claimant's occupation is not interruption in the statutory period of twelve years. Counsel concluded by urging this court to find that the plaintiff had been in open, notorious, active and continuous use of half acre of L. R. Number 12883/9 for a period of over twelve years and grant the prayers sought in the originating summons.

ANALYSIS AND DETERMINATION

9. I have considered the pleadings together with submissions on record. The issues that arise for determination is whether the plaintiff is entitled to be registered as proprietor of half an acre of Land Reference Number 12883/9 by virtue of the doctrine of adverse possession.

10. Adverse possession is governed by statutory provisions. Sections 7, 13, 17 and 38 of the Limitation of Actions Act Cap 22 Laws of Kenya are some of the statutory provisions upon which the doctrine of Adverse Possession is anchored. The said provisions provide as follows;

Section 7 states as follows;

“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.”

Section 13 provides as follows;

(1) A right of action to recover land does not accrue unless the land is in the possession of some persons 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 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.”

Section 17 provides that;

“Subject to Section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”

Section 38(1) and (2) provides as follows;

(1) 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 these 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.

(2) An order made under sub-section (1) of this Section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”

11. The import of the above provisions is that on the expiry of 12 years, a person who has adversely possessed land registered in the name of another person may apply to this court for an order that he has become entitled to that land by adverse possession.

12. The principles of establishing adverse possession are now well settled. In the case of *Mbira vs. Gachuhi [2002] IEALR 137*, the court held as follows;

“.....a person who seeks to acquire title to land by the method of Adverse Possession for the applicable Statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and Adverse use by him or those under whom he claims for the statutory prescribed period without interruption.”

13. Similarly, in *Mtana Lewa vs. Kahindi Ngala Mwangandi [2015] eKLR*, the court described adverse possession in the following terms;

“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 Possession is neither by force or stealth or 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. This doctrine in Kenya is embodied in Section 7 of the Limitation of Actions Act, which is in these terms;

“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.”

14. Essentially, for a person to claim to be entitled to land under the doctrine of Adverse Possession he/she must demonstrate that they have occupied or possessed the land in issue peacefully, openly, continuously, without force, publicly and not in secrecy for a period of over 12 years. The claim must be against the title holder and the Adverse Possessor’s claim ought to have been hostile to the title holder.

15. The plaintiff in this case has stated that she has been in adverse possession of half an acre part of Land Reference Number 12883/9, which belongs to the defendant, having purchased it jointly with one Mugambi Muthamia in the years 2003 and 2005, although she only paid part of the purchase price. She further states that she entered the suit property on 1st December 2007 and therefore when she filed this suit on 23rd June 2020, she had been in occupation of the suit property for over 12 years, openly continuously and publicly as the defendant is her neighbour. She produced sale agreements, a deed plan and photographs to show that indeed she had occupied the suit land for over 12 years. She also produced pleadings in Nairobi HCCC No. 2339 of 2007 and Machakos HCCC NO. 228 of 2008 to demonstrate that she filed suits to enforce her rights but at no time did the defendant file suit or counterclaim to enforce his rights as the owner of the suit land. She also referred to the deed plan together with the pleadings in the two suits stated above and a letter from the Defendant dated 7th December 2007, to demonstrate that the defendant was the registered owner of the suit land and argued that the ownership of the suit land by the defendant was not in dispute.

16. I note that while the plaintiff has demonstrated that she has indeed been in occupation of the suit land for over 12 years, she relies on the deed plan, the sale agreements, pleadings in two cases and a letter by the defendant dated 7th December 2007, to demonstrate that the suit land is registered in the name of the defendant.

17. I understand section 38 (1) of the Limitation of Actions Act to mean that for registered land, an adverse possessor’s claim is only valid if made against the registered proprietor of the land in question, which entitles the adverse possessor to be registered as proprietor in the place of the registered proprietor. That means that a claimant for adverse possession in respect of registered land, must prove that the land is registered in the name of the defendant, for his claim to be successful. See *Mtana Lewa vs. Kahindi Ngala Mwangandi* (supra). It is strange that the Plaintiff would seek to prove registration of the suit land in the Defendant’s names by producing every other document, save the official search certificate. My considered view is that a deed plan, sale agreement, pleadings and the letter by the defendant presented by the Plaintiff are not proof that the suit land is registered in the name of the defendant. The plaintiff has not produced an official search certificate to prove that land Reference Number 12883/9, was at the time of filing this suit, registered in the name of the defendant. Allegations of ownership cannot be equated to registration; they can only be confirmed by evidence of registration.

18. For the above reasons, I am not satisfied that the plaintiff has acquired title of the suit land by way of adverse possession. I therefore dismiss the plaintiff’s suit with no order as to costs.

19. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 10TH DAY OF FEBRUARY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. B. M. Musyoki for the Plaintiff

No appearance for the Defendant

Ms Josephine Misigo- Court Assistant