



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ELC NO (OS)2 OF 2021

MOHAMMED RUWA MARIDADI.....1ST PLAINTIFFS

ANTHONY MICHAEL MWANZIA MULWA.....2ND PLAINTIFFS

AHMED OUMA RANDA.....3RD PLAINTIFFS

VERSUS

PRITAM SINGH PANESAR.....RESPONDENT

JUDGEMENT

1. The Plaintiffs herein Mohamed Ruwa Maridadi, Anthony Michael Mwanza Mukwa and Ahmed Ouma Randa approached the court by way of Originating Summons dated 12th May 2021. The Originating Summons is filed pursuant to the provisions of Sections 37 and 38 of the Limitation of Actions Act Chapter 22 of the Laws of Kenya, Order 37 Rule 3D of the Civil Procedure Rules 2010 and all other enabling provisions of the law.

2. The Originating Summons is taken against Pritam Singh Panesar the Defendant herein. The Plaintiffs seek to be declared as proprietors in common of the land parcel No Kwale/Msambweni A/3390 measuring 21.40 Ha (suit property) under the doctrine of adverse possession. The Plaintiffs claim that they have been living on the suit parcel herein for a period of more than 12 years. That title is in the registered name of the Defendant. It is pleaded that in the interest of justice the court should grant the orders that;

a. The Plaintiffs be registered as the proprietors in common of the property known as Kwale/Msambweni A/3390 in the place of the defendant.

b. That the Defendant, his agents, servants and/or any other authorised independent contractor be restrained by a permanent injunction from entering the suit land or demolishing the plaintiffs houses and /or properties, structures thereon and /or evicting the plaintiffs and/or their families or any other manner whatsoever interfering with the plaintiffs and their families peaceful occupation of the suit land.

c. That the costs of this suit be provided for.

3. The Originating Summons is supported by an affidavit sworn by Mohamed Ruwa Maridadi with the authority of his Co-Plaintiffs to plead, appear and sign all court pleadings, affidavits and or documents on their behalf. That he was born on the suit land which had previously been occupied by his parents together with his family. He stated that their stay had been continuous and uninterrupted. It was further stated that of recent times the Defendant has had intentions to dispose of the suit property. Several people who unknown to him and the co-plaintiffs have been visiting the suit property with threats of evicting the Plaintiffs hence this suit.

4. The Originating summons is unopposed. On 5th October 2021 this court granted orders that the Defendants be served by way of substituted service through advertisement in one local daily of wide circulation following the Plaintiffs application dated 17th July 2021. Subsequently the Defendant was served through the Standard Newspaper on 9th October 2021. They failed to enter appearance as well as file defence, the Plaintiffs filed a request for judgement against the defendant. The matter was then set for hearing on 20th December 2021 and the Plaintiff was represented by Ms. Mwenje.

5. PW1 is the 1st Plaintiff, Mohammed Ruwa Maridadi and testified on behalf the rest of the Plaintiffs and also filed a witness statement dated 12th May 2021. He produced four (4) copies of documents namely the Plaintiffs Identity cards, authority to swear, Photographs in evidence of occupation and copy of the suit property title deed marked as PEX 1-4. PW1 informed the court that he has been living on the suit land together with the rest of the Plaintiffs and their families from the time they were born. He also testified that the land was registered in the name of the defendant herein. Further that from the time he was born upto to date he has never seen the Defendant who has also not

come to remove them from the land.

6. I stood down the witness and ordered for the District Land Surveyor Kwale to visit the suit property and file with the court a ground status report. I pointed that land was a very sensitive subject and there was need for the court to satisfy itself on the ground status. This was also in view of the nature of the reliefs sought against the Defendants and the implications as earlier stated herein. On 17th February 2022, PW1 was recalled to testify and produced a ground status report dated 7th February 2022 as PEXH5. He asked the court to consider the findings in the report and prayed to the court to render justice

7. With the above evidence the Plaintiff's closed his case.

SUBMISSIONS

8. The Plaintiffs filed their submissions on 16th February 2022. The same reiterated most of the averments in the Originating Summons and the Plaintiffs oral testimony before court. Counsel framed three issues for determination as follows; -

- a. *What is the suit property and its owners?*
- b. *Whether the Plaintiffs occupation of the suit property has been adverse to the Defendant*
- c. *Whether the cost should follow the event*

9. It was submitted that the Plaintiffs had proved to court that even though they have been in occupation of the suit land, the same is registered in the names of the Defendant. That the Plaintiffs use of the suit property had extinguished the Defendant's right to title of the same. It was contended that the Plaintiffs had proved several facts before court and which had not been rebutted by the Defendant. These included a) That they had been on the suit property for more than 12 years, b) The Defendant did not invite or permit them to use and occupy the land, c) The Plaintiffs use of the land has been open, continuous and uninterrupted from the year 1962, d) The Defendant has not taken any action against the Plaintiff to extinguish their occupation of the suit land or interrupt the same over the minimum statutory period of 12 years and e) The Plaintiff had annexed photos in evidence of their occupation of the suit land use of the same.

10. Counsel cited the cases of **Wambugu Vs. Njuguna (1983) KLR 172** on principles applicable in a claim for adverse possession in relation to registered land, **Chevron (K) Ltd Vs. Harrison Charo Wa Shutu (2016)eKLR** on the rationale of the method of acquiring land by adverse possession in support of the Plaintiffs claim.

11. It was lastly submitted that in the event that judgement was entered in favour of the Plaintiffs then the Defendant was to bear the costs of the suit.

ANALYSIS AND DETERMINATION

12. The governing law applicable for a claim of land by way of adverse possession is the Limitation of Actions Act Chapter 22 Laws of Kenya. Section 7, 38[1] and 37 of the Act are material. These provide as follows; -

Section 7 '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'

38(1) "Where a person claims to have become entitled by Adverse Possession to land registered under any of the Acts cited in section 37 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 land or lease in place of the person then registered as proprietor of land".

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

37 This Act applies to land registered under the Government Lands Act (Cap. 280), the Registration of Titles Act (Cap. 281), the Land Titles Act (Cap. 282) or the Registered Land Act (Cap. 300), in the same manner and to the same extent as it applies to land not so registered, except that—

13. From the facts placed before me and the provisions of the law the issues that emerge for determination in this case are; -

- 1) whether the Plaintiffs have proved a case for adverse possession.
- 2) Who should bear the costs.

14. As enumerated earlier this suit is not defended, however this is not a basis for automatic grant of the reliefs. The Plaintiffs are still obligated to prove the facts alleged as required by section 107 of the Evidence Act Chapter 80 of the Laws of Kenya on a balance of probabilities. I have read the court of appeal decision in, **Chevron (K) Ltd Vs. Harrison Charo Wa Shutu (2016)eKLR** which has enumerated with clarity the guiding principles in determining a claim for adverse possession. I have also read the decision of **Wambugu Vs. Njuguna (1983) KLR 172** and I do not see the need to reinvent the wheel. This is of course read together with the provisions cited herein under Limitations of Actions Act. The party claiming adverse possession must therefore prove the following; -

- 1) That the suit property has a known owner.
- 2) That the said known owner lost his right to the land by being dispossessed by the applicant.
- 3) That the discontinuance of possession has been open for a continuous period of 12 years.
- 4) That his possession of the land was without the true owner's permission.
- 5) That he has done acts on the land which are inconsistent with the owners enjoyment of the soil for the purpose for which he intended to use it.

I will therefore proceed to analyse each of the above points to arrive at an answer to the issue whether the Plaintiffs have proved a case for adverse possession.

15. PW1 on behalf of the Plaintiffs told this court that they have lived on the suit property which does not belong to them but to the Defendant. They produced a copy of the title deed for the suit property. This court considered the title deed and noted that it is in respect of Title No. Kwale Msambweni 'A' 3390 with Pritam Panesar ID. No. 4421381, the Defendant herein registered as the absolute proprietor. The title is dated 9th July 2009 and is issued under the Registered Land Act (now repealed). The ground status report dated 7th February 2022 submitted by the District Surveyor Kwale pursuant to this court directive, the topographic survey map attached confirms the suit property as Kwale Msambweni 'A' 3390.

16. The next question is, has the registered owner lost his right to the land by being dispossessed by the applicant. I will first address this from the point of view of actual possession for it is not sufficient to prove that there is a registered owner. In his evidence PW1 informed the court that they together with the other Plaintiffs and their families have lived and are living on the land and produced photographs to prove their occupation. I have considered the photographs presented which show livestock, a house and some bush areas and a makuti thatched boundary. The ground status report herein confirms that three houses were found existing, two boreholes and mature trees. On this basis I'm convinced that there is actual occupation.

17. The above analysis and finding shall also speak to the fact that the occupation and the houses are inconsistent with the owners enjoyment of the soil for the purpose for which he intended to use.

18. The most critical element for proof is the 12 years statutory requirement in terms of this occupation since the title of the registered owner is extinguished by operation of the statute of limitation. This is the critical period to determine whether possession was adverse. According to the evidence led, PW1 told this court that he was born on the suit land which had previously been occupied by his parents together with his family. PW1 produced his identity card No. 2229428 as part of the evidence. A look at the ID card reveals that he was born on 24th December 1962. The Defendant was registered as proprietor on 9th July 2009. They have therefore been in occupation of the suit property from the period of registration of the defendant as proprietor to the time this suit was filed for 13 years. Indeed, the claim for adverse possession has already matured. He stated that since his birth to date he has never seen the Defendant and that he has never come to remove him from the land. This therefore goes to demonstrate that the occupation has been open thus with no secrecy, quiet[peaceful] and uninterrupted. Notably he must be 58 years of age however for this purpose I have computed time from the time of registration of the defendant as owner, since adverse possession can only be maintained against a registered owner – See **Sophie Wanjiku John Vs. Jane Mwihaki Kimani Nairobi ELC Civil Suit No. 490 of 2010** cited by the Court of Appeal in **Chevron (K) Ltd Vs. Harrison Charo Wa Shutu** (supra).

19. Having analyzed the evidence and the relevant law, I am persuaded that the Plaintiffs Mohamed Ruwa Maridadi, Anthony Michael Mwanza Mukwa and Ahmed Ouma Randa have proved adverse possession on a balance of probabilities and in accordance with Section 37(a) of the Limitations of Actions Act the Plaintiffs have acquired title in the land parcel No Kwale/Msambweni A/3390 measuring 21.40 Ha against the Defendant and any person registered as proprietor. In any event the Plaintiffs evidence has not been controverted.

20. I therefore enter judgement for the Plaintiffs against the Defendants and make the following orders; -

1. That the Plaintiffs be declared to have acquired title in the land parcel No Kwale/Msambweni A/3390 by adverse possession.
2. Land Register Kwale be ordered to register land parcel No Kwale/Msambweni A/3390 in the names of the Plaintiffs as proprietors in common.
3. In default of 2 above the Deputy Registrar is hereby ordered to execute all the appropriate documents necessary to effect the transfer to the Plaintiffs.
4. The orders for a permanent injunction are declined for the reason that PW1 during his oral evidence stated that the Defendant has never come to remove them from the suit property.
5. The Defendant shall bear the costs.

DELIVERED AND DATED AT KWALE THIS 21ST DAY OF APRIL 2022

A.E. DENA

JUDGE

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms. Mwenje..... for the Plaintiffs.

Mr. Denis Mwakina.....Court Assistant.