



**Karianjahi t/a Pata Commercial Enterprises v Waweru (Environment & Land
Case 281 of 2018) [2022] KEELC 3130 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3130 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 281 OF 2018
JM MUTUNGI, J
MAY 31, 2022
IN THE MATTER OF THE LIMITATION OF ACTIONS ACT
AND
IN THE MATTER OF LAND PARCEL KNOWN AS DUNDORI/MIRORENI BLOCK 2/1405

BETWEEN
GILBERT KABAGE KARIANJAH T/A PATA COMMERCIAL
ENTERPRISES PLAINTIFF

AND
JANE WANGARI WAWERU DEFENDANT

JUDGMENT

1. The Plaintiff by an amended originating summons dated 20th December 2020 filed in court on 5th February 2021 brought under Sections 17, 18, 37 and 38 of the *Limitations of Actions Act* Cap 22 Laws of Kenya and Order 37 Rule 7 of the *Civil Procedure Rules* 2010 sought for *inter alia* the determination of the following questions by the court:
 - a. That the Plaintiff be declared to have become the legal owner entitled by adverse possession having occupied and developed the parcel of land known as Dundori/Miroreni Block 2/1405 continuously and uninterrupted for over fifteen years since 2002 and as the sole proprietor of all that parcel of land comprised in Dundori/Miroreni Block 2/1405 situated within Nakuru County.
 - b. That this Honorable court do direct that Nakuru District Land Registrar rectify the land register accordingly and the Plaintiff be registered as the sole proprietor of the said parcel of land namely Dundori/Miroreni Block 2/1405 in place of the above named Defendant in whose favour the land is currently registered.



- c. That costs of this application be provided for.
2. The originating summons was supported by the supporting affidavit sworn by Gilbert Kabage on 16th December 2020. He averred that he was the managing director of the plaintiff herein and had been in occupation of the suit property since the year 2002.
 3. The plaintiff averred that the defendant had given him the original title to the suit property to stand as security for a debt owed to the plaintiff by the defendant and that the defendant henceforth disappeared and never made any repayments towards the debt.
 4. The plaintiff further averred that he had been in continuous uninterrupted possession of the suit property for over fifteen years although the defendant was the registered owner of the same. The plaintiff stated that he had never received any communication from the defendant seeking for vacant possession of the land for the entire period he had been in occupation. He averred that his possession was open and known to the defendant and was adverse to the defendant's interests on the suit property and therefore sought to be declared as the owner on account of being an adverse possessor.
 5. The Plaintiff in support of his application annexed photographs, a copy of the title deed for land parcel No. Dundori/Miroreni Block 2/1405 and a certificate of official search dated 8th December 2016.
 6. The originating summons was served by way of substituted service with the leave of court following an application by the plaintiff. The defendant did not enter appearance and neither did she file a response to the originating summons. The originating summons was therefore not defended and the court on 2nd February 2022 gave directions that the originating Summons be determined on the basis of affidavit evidence and written submissions.
 7. The plaintiff filed his submissions on 11th February 2022 where he submitted that the respondent had been a tenant in one of his properties and was unable to pay rent for a period of two years. He submitted that the respondent pledged her title deed to him as a form of security for the debt. The plaintiff occupied the suit property and started cultivating while awaiting the defendant to repay the debt but the defendant disappeared and could not be traced and that he had been occupation of the suit property for a period of over twelve years without the authority of the registered owner. The plaintiff in his submissions relied on the case of *Mbira v Gachubi* [2002] 1EALR 137 which was cited with approval in the case of *Celina Muthoni Kithinji v Safiya Binti Swaleh & 2 Others* [2018] eKLR where the court observed 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...”
 8. The plaintiff submitted that though the title was deposited with him, he was not allowed to occupy or use the land but that the title was placed as security for unpaid rent and he therefore prayed that the orders sought be granted.
 10. After reviewing the pleadings, evidence and submissions, the issue for determination is whether or not the plaintiff has acquired the suit property by way of adverse possession.
 9. The plaintiff assertion that he entered into possession and occupation of the suit property in the year 2002 without the permission of the defendant and that he had been in occupation of the suit property for a period of over fifteen years with no interruption.



10. The averments by the plaintiff were not challenged as the defendant did not appear and/or file a response. The Court in the case of *Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another* [2015] eKLR sought to define what constitutes adverse possession as follows:

“From all these provisions, what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.”
11. In order for a party to prove adverse possession, they must establish that they have been in exclusive and continuous possession of the suit property without interruption for a period of over twelve years without the permission of the owner. The Plaintiff must prove that the owner of the land had been dispossessed or had discontinued possession of the property. This was held in the case of *Kasuve v Mwaani Investments Limited & 4 others* 1 KLR 184 where the court stated as follows:

“In order to be entitled to land by Adverse Possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.
12. In this matter, the plaintiff alleges that he was given the original title deed of the suit property by the defendant to stand as security for a debt owed to him by the defendant. No evidence of such debt was adduced. The plaintiff exhibited some black and white photographs which on their own and without being explained cannot tell a story. If the photographs were intended to prove possession, I am afraid that did not come out only by merely trusting the photographs before the court. It is not clear what the photographs represent and /or depict.
13. Whether or not a party has become entitled to be registered as owner of a parcel of land by reason of being an adverse possessor is a matter of evidence and such a party is required to prove through evidence that he had occupied and/or possessed the land adversely for a continuous and uninterrupted period of twelve years before the institution of the suit. For the adverse possession doctrine, to be held to be applicable, an applicant must prove that he had been in possession and has exercised rights analogous to ownership rights inconsistent with ownership rights of the registered owner for an interrupted period of 12 years prior to the institution of the suit. In the eyes of the public, the adverse possessor has to be seen and presumed to be the owner of the land. The possession has to be visible, open and not secretive.
14. In the present suit, the plaintiff claims the defendant owned him a debt that allegedly accrued by reason of nonpayment of rent. The plaintiff did not adduce any evidence of any tenancy agreement and it is not clear whether the tenancy was in respect of a building or a parcel of land. The terms of any such tenancy were also not provided. The plaintiff admitted he was offered the title to the suit property as security for the debt just like there was lack of details relating to the terms of the alleged tenancy between the plaintiff and the defendant, there were no details provided as relates to the agreement by the defendant to offer to the plaintiff his title to the suit property as security. Apart from the plaintiff stating that the defendant left him with the original title in the year 2002 there was no other evidence to support this assertion.
15. What is however evident is that the plaintiff was handed the original title of the suit property in 2002 to stand as security for a debt. The plaintiff thus acknowledged the title of the defendant and accepted to take the original title to stand as security for the debt owed to him by the defendant. The plaintiff



by acknowledging the defendant's title and agreeing to accept the title as security for his debt cannot at the same time claim to have been adversely in possession of the same land. The plaintiff had the option to take action for the recovery of his debt if the defendant failed to honour the repayment arrangement that they had made. If the defendant acknowledged the indebtedness in 2002 as the plaintiff claims, then the plaintiff could institute action for the recovery of the debt within six (6) years from the date of the acknowledgment.

16. In my view, and having assessed and evaluated the evidence, I am not satisfied the plaintiff has proved his case on a balance of probabilities. I am not persuaded the circumstances under which the plaintiff may be in possession of the suit property constitute adverse possession. The plaintiff has failed to prove that adverse possession, if at all there was any, commenced in 2002. Adverse possession in my view could not run against a title that the plaintiff had accepted to take as security for a debt owed to him by the defendant. If the plaintiff had been paid the debt he would not have taken possession and/or occupation of the suit property. In the case of *Wambugu v Njuguna* (1983) KLR 173 the Court of Appeal held as follows:-

“In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his rights to the land either 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 purposes of which he intended to use it.

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 of the requisite number of years”.

17. In the case of *Haro Yonda Juaje v Sadaka Dzengo Mbauro & Another* (2014) eKLR Angote, J referring to the above case succinctly summed up the position thus:-

“19. The position, as was held in the above case, is therefore not whether or not the claimant has proved that he was been in possession for the requisite period number of years but whether he had the “animus possidendi” to acquire the land by way of adverse possession. The claimant can only prove that he had the requisite animus possidendi by showing the circumstances under which he dispossessed the true owner of the land or the circumstances under which the true owner discontinued his possession”

18. In the present case it is evident the plaintiff only came to be in possession of the suit land ostensibly because the defendant owed him a debt. The plaintiff never had the animus possidendi to acquire the land by way of adverse possession. There is no doubt that had he been paid his debt he would have yielded possession of the suit property to the owner.

19. On those circumstances, the doctrine of adverse possession would be inapplicable.

20. In the result I hold and find that the plaintiff has not proved his case to the required standard and I accordingly dismiss the same. I make no orders for costs, the defendant having not defended the suit.

JUDGMENT DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 31ST DAY OF MAY 2022.

J M MUTUNGI

JUDGE

