



1. Adverse Possession

2. Whether adverse possession

can be claimed against SFT

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL SUIT NO. 163 OF 2012 (OS)

IN THE MATTER OF: PARCEL NO. LAMU/HINDI MAGOGONI/384

IN THE MATTER OF: AN APPLICATION FOR A DECLARATION

**THAT THE PLAINTIFF HAS OBTAINED OWNERSHIP OF 3.8HA OF
THE ABOVE SAID**

LAND BY WAY OF ADVERSE POSSESSION

ANN ITUMBI KISELI.....PLAINTIFF

=VERSUS=

JAMES MURIUKI MURIITHI.....DEFENDANT

J U D G M E N T

Introduction

1. The Plaintiff moved this court by way of an Originating Summons dated 10th October 2012 and filed on 11th October 2012.
2. In the Originating Summons, the Plaintiff has framed the following questions for determination-
 - a. **Whether the Plaintiff has acquired plot number Lamu/Hindi Magogoni/384 by reason of adverse possession against the Respondent;**
 - b. **Whether the Plaintiff should be registered as the proprietor of the land known as Lamu/Hindi/Magogoni/384 on the ground that since 1976, the Plaintiff has been openly and peacefully enjoying occupation for over twelve (12) years preceding the presentation of Summons;**

- c. **Whether the Respondent should execute a transfer and all acts necessary to convey the said title to the Plaintiff as the rightful proprietor and enable it to be registered as such and in default the Deputy Registrar to be authorised to sign the relevant documents on behalf of the Respondent and**
 - d. **Whether the Plaintiff is entitled to the cost of the suit.**
3. According to the Plaintiff's Originating Summons, she started occupying the suit property way back in the year 1976 while the suit property was registered in the name of Edward Macharia on 10th June 1999 before it was transferred to the Respondent on 13th July 2011.
 4. The Defendant filed a Replying Affidavit and deponed that the Plaintiff's occupation of the land was not adverse to his title because she has never known him and could thus not acquire prescriptive rights; that he is a purchaser for value and that the Plaintiff seeks to frustrate his proprietorship rights over the suit property.
 5. The matter proceeded for hearing by way of viva voce evidence.

The Plaintiff's case

6. The Plaintiff testified on 23rd July 2013. She informed the court that she hails from Hindi Magogoni where she has been living since 1976 having come from Machakos.
7. According to the Plaintiff, she cleared the suit property and started staying on it without the consent of anybody. The Plaintiff stated that she saw the Defendant for the first time in the year 2010 when he wanted to buy parcel of land number 384 (the suit property). The Defendant informed the Plaintiff that he had bought the property from Edward Macharia, whom, according to the Plaintiff, she had never seen.
8. The Plaintiff did not see the Respondent again until the year 2012 when he went back to the suit property demanding for the land.
9. The Plaintiff informed the court that on the land, she has planted orange trees and guavas amongst other crops. The Plaintiff produced in evidence photographs showing her homestead as exhibit number 1. The Plaintiff also produced the copy of the official search and the green card as Plaintiff's exhibit number 2 and 3 respectively.
10. In cross examination, the Plaintiff stated that her husband has another piece of land being parcel of land number 373 which neighbours the suit property.
11. According to the Plaintiff, the suit property did not have an owner and she therefore occupied it. She denied knowing Mr. Macharia and only saw the Defendant in the year 2010.
12. PW2 informed the court that the Plaintiff has been her neighbour in Hindi Settlement Scheme since the year 1980, which is the year PW2 settled in the area.
13. According to the witness, before one could identify the land to settle on, one was required to see the village elder who would show him/her where to settle and cultivate. The witness stated that when the settlement programme began, they were allocated land in the scheme. He was allocated parcel of land number 372 by the Settlement office. The witness testified that he did not know the Defendant.
14. In cross examination, the witness stated that he was allocated parcel of land number 372 by the government and was issued with a title deed by the Settlement Fund Trustees.
15. PW3 informed the court that he stays in Lamu Hindi Settlement Scheme and the Plaintiff is his mother.
16. According to the witness, the village elders gave his parents land within the scheme and they have been staying there since 1976. He stated that he did not know the Defendant until three years ago when he was informed by the Plaintiff that the Defendant had purchased the suit property.
17. In cross examination, PW3 admitted that his father had been allocated a different portion of land abutting the suit property. His father is in possession of the documents in relation to parcel of land number 373 which he is occupying.

The Defendant's case

18. DW1 informed the court that he was allocated the suit land within the settlement Scheme in 1992 by which time the land was not occupied by anybody.

19. He was given an allotment letter and he paid the requisite 10% deposit for the land. The witness produced in evidence the receipts showing the money he paid to the Settlement Fund Trustees in respect to the suit property. The receipts were produced as defence exhibit number 1.
20. DW1 stated that he surrendered the original Title Deed that was issued to him which he produced as defence exhibit number 2. The witness informed the court that he sold the suit property to the Defendant and a title deed was issued in his name.
21. In cross-examination; DW1 stated that he used to stay in Thika. He stated that the land was allocated to him by the Settlement Fund Trustees which he sold after obtaining the title. He was granted a title in the year 2006.
22. The Defendant, DW2, stated that he bought the suit property from DW1. When he went to the suit property after the said purchase, he found somebody was cultivating it.
23. DW2 stated that he sub-divided the land despite the Plaintiff's resistance. The Plaintiff produced the title deed as defence exhibit number 3 which was issued to him on 13th July, 2013. The Defendant stated that he was given the consent to sub-divide the suit property by the Land Control Board. DW2 produced the consent of the Board as defence exhibit number 4.
24. In cross-examination, DW2 informed the court that he went to the site in the year 2006 before buying the land and nobody was residing on it.

Submissions

25. The parties filed their respective written submissions.
26. The Plaintiff's counsel submitted that the suit property should be registered in the Plaintiff's name because she has been in actual, open, hostile, exclusive and continuous possession since 1976.
27. The Plaintiff's counsel further submitted that the suit property was first registered on the 10th June 1999 to the Settlement Fund Trustees and then transferred to DW1 on 28th August 2006. According to counsel, time started running from 1999 when the property was registered in favour of the Settlement Fund Trustees.
28. The Plaintiff's counsel submitted that land registered under the Settlement Fund Trustees is not Government Land. Counsel relied on the case of **Eliud Nyongesa Lusenaka Vs Nathan Wekesa Omacha, Civil Appeal No. 134 of 1993.**
29. The Defendant's counsel submitted that the Originating Summons does not comply with the requirements of Order 36 of the Civil Procedure Rules because it is not accompanied by a certified extract of the title of the land.
30. The Defendant's counsel also submitted that pursuant to the provisions of Section 41 of the Limitation of Actions Act, one cannot claim adverse possession over Government Land.
31. It is the Defendant's counsel position that the suit property was Government Land until 28th August 2006 when the first Title Deed was issued to DW1 by the Government. Counsel relied on the case of **Faraj Maharus V J. B. Martin Glass**

Analysis

32. The law of adverse possession is now settled.
33. Adverse Possession has been defined as a **method of gaining legal title to real property by the actual, open, hostile and continuous possession of it to the exclusion of its true owner for the period prescribed by state law.**
34. The Period prescribed by the Limitation of Actions Act, cap. 22 for one to acquire legal title over land in Kenya by way of adverse possession is twelve (12) years.
35. According to **Halbury's Laws of England, 4th Edition, Volume 28, paragraph 768, no right to recover land accrues unless the land is in the possession of some person in whose favour the period of limitation can run. What constitutes such possession is a question of fact and degree. Time begins to run when the true owner ceases to be in possession of his land.**
36. To constitute dispossession, the acts must have been done which are inconsistent with the enjoyment of the soil by the person entitled for the purposes for which he had a right to use it, thus the term "adverse".
37. Section 38(1) of the Limitation of Actions Act provides that where a person claims to have

- become entitled by adverse possession to registered land, he may apply to the High Court for an order that he be registered as the proprietor of the land in place of the person then registered as proprietor of the land.
38. Order 37 Rule 7 of the Civil Procedure Rules, 2010 on the other hand provides that an Application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons and the summons shall be supported by an affidavit to which a certified extract of the title of the land in question has been annexed.
39. The above provisions lend credence to one conclusion; an order of adverse possession can only be made against a Respondent who is registered as an owner of land. (see **Wasui Vs Musumba (2002) KLR 396**).
40. It therefore follows that the party claiming for the relief of adverse possession must prove by producing in evidence that the Defendant is the registered proprietor of the suit property.
41. The production of the title or a certified extract of the title, in my view, can either be by way of an affidavit or during the hearing of the viva voce evidence. What is critical is that at the end of the trial, the Plaintiff must place before the court a title document or a certified copy of the extract of the title to prove that the person he has sued is the registered owner.
42. The Plaintiff produced in evidence the official search in respect to the suit property which shows that it is registered in the name of the Defendant. This fact has not been denied by the Defendant. Consequently, the failure to annex a certified extract of the Defendant's title on the supporting affidavit is not fatal to the Plaintiff's Originating Summons.
43. It is not in dispute that the suit property was registered on 10th June 1999 in the name of the Settlement Fund Trustees. According to the copy of the register that was produced by the Plaintiff, the suit property was transferred to DW1 by the Settlement Fund Trustees on 28th August 2006 and charged.
44. The Settlement Fund Trustees discharged the suit property on 13th July 2011 and on the same day, the property was transferred to the Defendant.
45. According to the Plaintiff, the claim for adverse possession commenced on 10th June 1999 when the property was registered in favour of the Settlement Fund Trustee although she claims to have occupied the land since 1976. The Plaintiff averred that the suit property ceased to be government land when it was registered in favour of the Settlement Fund Trustees.
46. The Settlement Fund Trustees is a body of Trustees established pursuant to the provisions of section 167 of the Agriculture Act, Cap 318.
47. The Settlement Fund Trustees, under the said Act, was mandated to settle "settlers" on either un alienated Government land or on land purchased from private owners by the SFT.
48. As was observed by the Court of Appeal in the case of **Eliud Nyongesa Lusenaka & Another Vs Nathan Wekesa Omacha, Kisumu Civil Appeal Number 134 of 1993**, the interest of the Settlement Fund Trustees (SFT) is that of a chargee over the parcel of land that it owns. The court, quoting the case of **Boniface Oredo Vs Wabumba Mukile, Civil Appeal No. 170 of 1989** stated as follows:

“The interest of the Settlement Fund Trustees is really that of a chargee. “It lends money for development to persons to whom it has allocated land and the repayment of such money is secured by a charge upon the property.”

49. Although the Plaintiff has relied heavily on the above Court of Appeal decision to argue that time started running the moment the land was registered in the name of the Settlement Fund Trustees, that decision is distinguishable from the present case.
50. In the said case, the suit property had been transferred to the Appellant by the Settlement Fund Trustees and twelve years had lapsed since the said transfer by the time the Respondent filed the suit for adverse possession in High Court. The Court of Appeal agreed with the judgment of the High Court and held as follows.

“ We think the 1st Appellant had sufficient prescriptive rights through adverse possession and the matter between the 1st Appellant and the Respondent had nothing to do with the interest of the Settlement Fund Trustees in the disputed land.....The 1st

Appellant had no title to pass to anyone, his title having been extinguished by the Respondent's adverse possession.”

51. Although the Court of Appeal in the above matter held that land registered in the name of the Settlement Fund Trustee was not “government land”, it did not make a finding as to whether an individual can indeed lodge a claim for adverse possession against the Settlement Fund Trustee whose only interest in the land is that of a chargee.
52. The definition of what Government land is for the purpose of computing time in a claim for adverse possession should be considered in the light of the Constitution, 2010.
53. Just like state corporations established under specific Acts of Parliament, the Settlement Fund Trustee is in essence a public enterprise. Section 167 of the Agriculture Act, Cap 318 provides that the Settlement Fund Trustee is a body of trustees consisting of the Minister of Agriculture, Minister of Lands and the Minister responsible for Finance.
54. As I have stated above, the Settlement Fund Trustees was mandated to acquire either unalienated Government or private land for the purpose of settling citizens and for resale purposes.
55. The arrangement between the Settlement Fund Trustees and the people to be settled was similar to land which had been purchased on mortgage whereby the individuals, including “squatters” were regarded to have bought the land from the Settlement Fund Trustees through monies loaned to them by the Fund.
56. Through these programmes, the Government was able to establish a number of settlement schemes. Such schemes, in my view, remained “government lands” or “public lands” for the simple reason that the land was either unalienated Government land or was purchased using public funds. It was not land that the Settlement Fund Trustees would deal in any manner they so wished.
57. The history and rationale regarding settlements schemes leaves no doubt that such land is “public land”.
58. The classification of land held by State organs, like the Settlement Fund Trustees, as public land is reinstated in Article 62(i) (b) of the Constitution which provides as follows:

“Public land is land lawfully held, used or occupied by any State organ...”

59. In view of the above observation, I am of the considered view that land registered in favour of the Settlement Fund Trustees with a view of allocating it to allottees and then charging it is and remains public land until a title deed is issued to an allottee.
60. In the circumstances, the fact that the register shows that the suit property, which is within a settlement scheme, was registered in favour of the Settlement Fund Trustees on 10th June 1999 does not entitle the Plaintiff to lay a claim over the property for adverse possession from the said date. In my view, the claim for adverse possession could only run as from 28th August 2006 when the Title Deed was issued for the first time in the name of DW1 who eventually sold the land to the Plaintiff.
61. Before the suit property was transferred to DW1 by the SFT, the suit property was public land. Public land, in my view, is synonymous with Government land for purposes of section 41 of the Limitation of Actions Act and Article 62(1)(b) of the Constitution. Indeed, the marginal notes of Section 41 of the Limitation of Actions Act have used the words “exclusion of public land” although the section itself talks of “Government land.”
62. Consequently, a suit for the recovery of public land, which includes land registered in favour of a State organ, pursuant to the provisions of section 38 cannot survive in view of the provisions of section 41 of the Limitation of Actions as read together with Article 62 (1) (b) of the Constitution.
63. Even if the Plaintiff was right that a claim for adverse possession pursuant to the provisions of section 38 of the Limitation of Actions Act can be brought as against the Settlement Fund Trustees, the Plaintiff is under an obligation to prove that she was using the land in a manner that was inconsistent with the enjoyment of the soil by the person entitled for the purposes for which he had a right to use it. That is a cardinal element that a claimant must prove for a claim of adverse possession to succeed.
64. In **WAMBUGU VS NJUGUNA (1983) KLR 173**, the Court of Appeal held as follows:

“For an 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 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 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.”

65. The Plaintiff stated in her evidence that she has been cultivating the suit property since 1976 and even after the property was registered in the name of the Settlement Fund Trustees in the year 1999.
66. The Plaintiff did not prove that the Settlement Fund Trustees acquired the land in 1999 for the purpose of cultivating it for her action to be said to be adverse to those of the Settlement Fund Trustees.
67. The Settlement Fund Trustees, as I have already stated above is a public body whose sole responsibility and interest is that of a chargee over the parcel of land that it owns. It cannot therefore be said that the suit property was registered in its name in 1999 for the purpose of cultivating it.
68. The Plaintiff has not proved that she dispossessed the Settlement Fund Trustees the land in 1999 or that the Settlement Fund Trustees discontinued the possession of its land in 1999.
69. All the Plaintiff has shown is that she has been in possession of the land since 1999 when the land was first registered. In the circumstances, the Plaintiff has not proved that her claim over the suit property was adverse to the interests of the Settlement Fund Trustees. Time could not have started running in favour of the Plaintiff in 1999 when the suit property was registered in favour of the Settlement Fund Trustees.
70. For the above reason, I find and hold that the Plaintiff has not proved on a balance of probabilities that her right of action as against the Defendant had accrued as at the time of filing this suit for the suit property to be said to have fallen into her possession pursuant to the provisions of section 38 as read together with sections 7, 9 and 13 of the Limitation of Actions Act.
71. In any event the Plaintiff admitted that her husband has another piece of land which was allocated to him by the Settlement Fund Trustees being parcel of land number 373. The said land abuts the suit property. That is the parcel of land that she should occupy with her husband.
72. In the circumstances, and for the reasons I have given above, I therefore dismiss the Plaintiff's Originating Summons dated 10th October, 2012 with costs to the Defendant.

Dated and Delivered in Malindi this **31st** day of **October**, 2013

O. A. Angote

Judge