



REPUBLIC OF KENYA



**Jumah v Jethwa & 2 others (Environment & Land Case 1 of 2022)
[2022] KEELC 2906 (KLR) (13 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2906 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 1 OF 2022**

**A OMBWAYO, J
MAY 13, 2022**

BETWEEN

KEVIN NYAKAKO JUMAH PLAINTIFF

AND

VALLABHADA RAGHAVJI JETHWA 1ST DEFENDANT

LAND REGISTRAR KISUMU 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

JUDGMENT

1. The Plaintiff herein filed this Originating Summons on 13th January 2022 under Sections 1A,1B,3 &3A of the *Civil Procedure Act* and Order 37 Rule 7 of the *Civil Procedure Rules*, Section 28 of the *Land Registration Act* and section 37 (a) and 38 (1) & (2) of the *Limitations of Actions Act* Cap 22 Laws of Kenya for a claim to be entitled to the whole of parcel number Kisumu/Dago/478 by way of adverse possession for the determination and granting of the following orders:
 - 1) An order that the Plaintiff has been in adverse possession of the whole of Kisumu/dago/478 for a period of over 12 years.
 - 2) An order that upon the expiry of 12 years since the Plaintiff was in possession of Kisumu/dago/478, the 1st Defendant's rights over the land got extinguished by the operation of the law.
 - 3) An order that the Defendant holds the title to plot No. Kisumu/dago/478 in trust for the Plaintiff.
 - 4) An order that the said parcel of land no. Kisumu/dago/478 be transferred to the Plaintiff and the Plaintiff be registered as the owner thereof.



- 5) An order that the Defendant do execute all transfer documents in favour of the Plaintiff and in the event of default the executive officer of this court herein be empowered to execute the same to give effect to the aforesaid orders.
 - 6) An order that the Defendant do remove any person he may place therein by an order of eviction from Kisumu/dago.478.
 - 7) An order that the Defendant do meet the costs of this suit.
 - 8) Such order or further relief this Honourable court may grant in the circumstances.
2. The Application was supported by the Affidavit of Kevin Nyakako Jumah who stated that land parcel number Kisumu/dago/478 was left to him by the Defendant to take care of in the year 2006 as his worker in his transport business.
 3. That he has been living in the suit property with his family without any interference from the owner and he has constructed his house on the suit property and even farmed on it for agricultural purposes with the full knowledge and views of the registered owner.
 4. He stated that since he started living in the suit property, he has tried to trace the owner but to no avail and the owner had moved to out of his residence in Tom Mboya Estate Kisumu and his business had also collapsed. It is the Plaintiff's case that there have been several attempts by fraudsters to fraudulently take over the title to the land as a someone whom he doesn't know purported to have charged the land to KCB for a loan of Kshs. 90,000/= and the same was mysteriously discharged and a lady by the name Mary Njoki Muraya purported to transfer the land to herself and later sold it to one Stephen Opondo Ragama. That police had the said lady arrested and was charged vide Kisumu CMC CR 358/2013 and that she has never been traced to date. The alleged transfer was cancelled by the land registrar.
 5. The Plaintiff prayed that he be declared the owner by adverse possession and in the event the Defendant refuses to sign the transfer documents, the executive officer of this court be authorized to sign the transfer forms. That there is need for the Land Registrar to remove entries No. 7 and 8 in the Register as the fraudster Mary Njoki Muraya jumped bail and has never been traced to date. That the land in question belongs to him by way of adverse possession and he needs protection of this court by way of orders sought herein granted to him.
 6. The matter came up for mention on 16th March 2022 before the Deputy Registrar and parties were absent. On 23rd March 2022, the Plaintiff filed a Notice of Motion Application under Certificate of Urgency seeking for orders that this court do allow the Plaintiff to serve summons upon the Defendants by way of substituted service in a newspaper with national circulation and the costs of the Application be provided for. The matter was placed before me and I allowed the Application as prayed.
 7. The Plaintiff filed a Request for Interlocutory Judgment to be entered against the 1st Defendant on grounds that the 1st Defendant had failed to enter appearance and/or file his Defence within the time stipulated by law. On 28th April 2022, the matter came up for Mention before the Deputy Registrar who gave directions that the matter shall be heard on 9th May 2022.
 8. On 9th May 2022 when the matter came up for Hearing, the Plaintiff PW1 was sworn and his Witness Statement was adopted as evidence in chief and prayed that the court do grant the orders sought. The Defendants were not present in court when the matter came up for Hearing.



Analysis and Determination

9. I have noted that the Defendants in this matter failed to file any response to the Originating Summons nor enter appearance. However, I have considered the pleadings and the evidence of the Plaintiff and the main issue for determination is whether the Plaintiff is entitled to be registered as the proprietor of land parcel number Kisumu/Dago/478 by virtue of the doctrine of Adverse Possession.
10. The Limitations of Actions Act provides for the statutory provisions that govern the doctrine of Adverse Possession which include the following:

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;

“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 37: -

“

“(1) (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, to land or easement or land comprised in a lease registered under any of those Acts, 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.”

Section 38(1) and (2);

(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.”

It is the Plaintiff’s case that he has been living on the suit property from the year 2006 together with his family. The Plaintiff has not only been living on the suit property but also carried out farming activities. The question that this court needs to establish is whether the Plaintiff has met the threshold for granting the orders of Adverse Possession.”

11. The Court of Appeal in the case of *Mtana Lewa v Kahindi Ngala Mwangandi* [2005] eKLR held that:

“Adverse Possession is essentially a situation where a person takes Possession of land, 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 12 years.’

12. In the case of *Gabriel Mbuvi v Mukindia Maranya* [1993] eKLR, the doctrine of Adverse Possession was defined as follows:

“...It is possible to define “adverse possession” more fully, as the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owners enjoyment of the land for the purposes for which the owner intended to use it.’

in the case of *Mbira v Gachubi* [2002] IEALR 137 in which the court held that:

“.....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. I have looked at the copy of the Green Card and do confirm that the suit property was registered in the names of the 1st Defendant herein and a title issued to him on 8th April 1980. The Green Card also indicates that several entries have been made in the land register and that entry number 6 shows that there was a charge over the suit property to KCB bank for a loan amount of Kshs. 90,000/= . Entry number 7 shows that the suit property was transferred to Mary Njoki Muraya and a title deed issued while entry number 8 shows that the suit property was transferred to Stephen Opondo Ragama.

14. It is the Plaintiff’s case that there were several attempts by fraudsters who fraudulently and illegally transferred the suit property to their names as indicated in the green card. As regards the issue of the loan charged to KCB bank, the charge is not known and the same was discharged on 14th August 1997. The Plaintiff alleged that one Mary Njoki Muraya transferred the suit property to herself and later on sold and transferred it to Stephen Opondo Ragama.



15. The Plaintiff reported the purported transfer by Mary Njoki Muraya to the police who was arrested and charged in Kisumu CMC CR 358 /2013 and the said Mary Njoki Muraya jumped bail and has never been traced to date and that the alleged transfer was cancelled. It is my view that if the alleged transfer was cancelled, then the suit property is still registered in the names of the 1st Defendant whose whereabouts are unknown.
16. The Plaintiff has been in possession of the suit property for a period of 16 years and has been in actual possession of the suit property, used it openly and without any interruption. The Plaintiff's continuous use and occupation of the suit property was confirmed vide a letter dated 2nd December 2020 from the office of the Chief, Kisumu East Location.
17. I am satisfied that the Plaintiff has proved his case on adverse possession on a balance of probabilities and Judgment is therefore entered in his favour as follows:
 - a) That the Plaintiff has been in adverse possession of the whole of Kisumu/dago/478 for a period of over 12 years.
 - b) That the 1st Defendant's rights over the land got extinguished by the operation of the law.
 - c) That land parcel number Kisumu/dago/478 be transferred to the Plaintiff and the Plaintiff be registered as the owner thereof.
 - d) That the 1st Defendant do execute all transfer documents in favour of the Plaintiff and in the event of default the Deputy Registrar of this court herein be empowered to execute the same to give effect to the aforesaid orders.
 - e) That the 1st Defendant do remove any person he may place therein by an order of eviction from Kisumu/dago/478.
 - f) An order that the 1st Defendant do meet the costs of this suit.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 13TH DAY OF MAY, 2022

ANTONY OMBWAYO

JUDGE

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

