



Gichimu & 3 others v Sterling Developers Limited (Environment and Land Case Civil Suit 422 of 2018) [2022] KEELC 2844 (KLR) (11 May 2022) (Judgment)

Neutral citation: [2022] KEELC 2844 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 422 OF 2018**

JA MOGENI, J

MAY 11, 2022

IN THE MATTER OF LIMITATIONS OF ACTIONS ACT CAP 2 LAWS OF KENYA

AND

IN THE MATTER OF THE LAND PARCEL NO. L.R. 18111/47 NAIROBI

BETWEEN

JULIUS PETER MIGWI GICHIMU 1ST APPLICANT

CURTIS MOMANYI 2ND APPLICANT

JOYCE NYOKABI 3RD APPLICANT

NICHOLAS KAMAU MUREITHI 4TH APPLICANT

AND

STERLING DEVELOPERS LIMITED RESPONDENT

JUDGMENT

Introduction

1. The Applicants commenced this suit through Originating Summons dated 25/05/2018 against Sterling Developers Limited, claiming to have acquired the parcel of land LR 18111/470 Nairobi by adverse possession. They therefore seek determination against the Respondent of the issue of ownership and for the following Orders: -

1. Whether having been in continuous and uninterrupted possession and occupation of the suit land LR 18111/470 Nairobi for a period in excess of 12 years the plaintiffs have now acquired prescriptive rights to title thereto by adverse possession.
2. Whether the Land Registrar at Nairobi should be ordered and directed to delete the name of the Defendant and register the names of the plaintiffs herein in the place thereof absolutely.



3. Whether the defendant should meet the costs of the suit.
2. The Originating Summons is brought under section 38 of the *Limitation of Actions Act* and order 37 of *Civil Procedure Rules 2010*.
3. The summons is premised on the grounds cited in the application and particularly in the Supporting Affidavit of Julius Peter Migwi Gichimu, the 1st Applicant herein, sworn on 25/05/2018. The Applicants filed an Authority to Act on 2/10/2018 authorizing the 1st Applicant to represent them on the suit on their behalf.
4. From the record, the service of summons was effected on the Respondent through the Star Local Newspaper on 15/11/2021 as evidenced by the affidavit of service dated 10/12/2021. The Respondent has not entered appearance or filed a defence in opposition to the Originating Summons.

Applicants Case

5. It was the 1st Applicant's contention that in the beginning of the year 1990, the Applicants occupied the suit land and put up semi-permanent structure therein since the land was unoccupied at the time.
6. He contends that at the time of their occupation they found that the suit land was unoccupied, and nobody has ever attempted to evict them from the said suit land.
7. The Applicant avers that they have since put up permanent structures on the said parcel of land and even planted trees which have since matured.
8. The Applicant avers that they have since learnt that the Respondent herein has acquired title to the said parcel of land, and they are apprehensive that he might evict them any time.
9. It is his contention that since they took possession and occupied the said portion of land, they have been in quiet and undisturbed occupation of the said portion of land for a period of 28 years.
10. That since the Respondent acquired title to the said suit land, he has never attempted to evict the Applicants from the said property, and they have had quiet and undisturbed occupation of the said portion of Land for a period of over 12 years. That they have been advised by their advocates that they are entitled to be registered as proprietors of the said land by reason of adverse possession.
11. The Applicant contends that they have never had any problems with the Respondent over the Applicants' occupancy of the said parcel of the land.
12. The Applicant avers that there is a danger that the Respondent may decide at any moment to evict the Applicants and their families for the suit land, yet this is the place they have called home since they moved in for a long period of time and they stand to suffer an irreparable loss if them and their families are evicted from the suit land as they shall be rendered homeless and thus destitute.
13. The Applicant prays that the Courts determines their interests in the suit land.

Evidence by the Applicant

14. At the hearing, the Applicant gave his evidence. PW1 – Peter Migwi informed the court that he was one of the plaintiffs' and that he had the authority to swear documents that were filed together with the Originating Summons on 20/10/2018. He adopted the affidavit dated 2/10/2018 and sworn on 25/05/2018. He also adopted documents and photos and marked them as Plaintiff's exhibit No. 1 and the Certificate of Title marked as Plaintiff's exhibit No. 2. He thereafter asked the Court to grant the prayers in the Originating Summons.



15. The evidence of the Applicants is uncontroverted by the Respondent.
16. With that evidence, the 1st Applicant closed his case.

Respondent's Case

17. The Applicants' suit is uncontroverted.
18. At the close of the Applicants' case, the Applicants tendered final written submissions.

The Applicants' Submissions

19. The Applicants' submissions are dated 19/01/2022. His claim is against the Respondent as outlined in the Application dated 25/05/2018 and sought the orders stated therein. The Applicant testified by reiterating what was already captured in the said Application. The Respondent did not enter appearance or defend the suit by filing its response despite being served through the Star Local News Paper.
20. Aside from the summary of the Applicant's case on record, it is his submission that the basic idea behind adverse possession of land is that a person who takes possession of land, albeit wrongfully to begin with, acquires a possessory title to the land which after expiration of a certain period pf time (in this case 12 years) is good against the whole world. He relied on sections 7 and 13 of the Limitation of Actions Act on the statutory framework providing for the doctrine of adverse possession.
21. The Applicant further relied on the case of Celina Muthoni Kitbinji v Safiya Binti Swaleh & 8 others with respect to ingredients of adverse possession. See also Peter Okoth v Ambrose Ochido Andajo & Benedict Odhiambo Oketch (2021) eKLR.
22. The Applicant submits that they have proved that the Respondent discontinued possession of the said land way back in 1994 when the Plaintiffs entered on the suit land and has been in open, continuous, uninterrupted and exclusive possession and occupation of the land, without the consent or permission of the Respondent, for a period of over 12 years.
23. It is their submission that the Respondent who is the registered owner of the subject parcel of land was served with Originating Summons by way of Substituted means through Advertisement in a Local daily as evidenced in the Affidavit of Service filed on 21/12/2020. This is after all efforts to reach him through normal means had failed. The Respondent has since failed/neglected to enter appearance. Furthermore, the Applicant neither filed any documents to his defence, nor appeared to Court to argue his case or present evidence to the contrary of what was deponed by the Applicants. It would therefore follow that an assumption is made that the Plaintiffs case was unchallenged.
24. It is the Applicant's submission that they have proven their case on a balance of probabilities and have acquired adverse interest in the subject land which interest is inconsistent with the title of the registered proprietor and thus should be registered as the proprietors of the subject parcel in place of Saul Chemos Tuka.
25. In conclusion, the Applicant also submits that the costs of the suit be awarded to them.

The Respondent's Submissions

26. The Respondent did not file written submissions.



Issues for Determination

27. The Court has carefully read and considered the pleadings by the parties herein, the evidence adduced, submissions, authorities cited and the relevant provisions of law and finds that the issues for determination are: -
- a. Whether the Applicants have met the threshold for grant of orders for adverse possession.
 - b. Whether the Applicants are entitled to the ownership of land parcel number LR No 10107?

Analysis and Determination

a. Whether the Applicants have met the threshold for the grant of orders for adverse possession.

28. It is the Applicant's case that they have been in continuous uninterrupted occupation and possession of the suit property for a period in excess of 12 years. The burden of leading the Court to ascertaining this lies with the Applicant.
29. Claims for adverse possession are set out in several provisions of the *Limitation of Actions Act*. Section 7 of the said *Act* places a bar on actions to recover land after 12 years from the date on which the right accrued. Further Section 13 of the same *Act* provides that adverse possession as the exception to this limitation:
- (1) A right of action to recover land does not accrue unless the land is in the possession of some person 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 the 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."

30. Finally, section 38 of the *Act* provides that:

"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 those 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."



31. The principles to be considered in case of Adverse Possession were elaborated in the case of *Wambugu vs Njuguna* [1983] KLR 172, where the Court held that:

“In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right 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.”

32. And that:

“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.”

33. This right to be adverse to land does not automatically accrue unless the person in whose this right has accrued takes action. Section 38 of the *Act* gives authority to the claimant to Appeal to Court for orders of adverse possession. The Court in Malindi App No. 56 of 2014: *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR held:

“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 possessor is neither by force or stealth nor 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.”

34. Further, in the case *Mbira v Gachubi* (2002) 1 EALR 137: the court stated 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 statutorily prescribed period without interruption...”

35. Therefore, to determine whether the Applicant’s rights have accrued the Court will seek to answer the following:-

- i. How did the Applicant take possession of the suit property?
- ii. When did they take possession and occupation of the suit property?
- iii. What was the nature of their possession and occupation?
- iv. How long has the Applicant been in possession?

36. On the issue of possession, the Applicant contends that in the beginning of the year 1990, the Applicants occupied the suit land and put up semi-permanent structure therein since the land was unoccupied at the time. That at the time of their occupation they found that the suit land was unoccupied, and nobody has ever attempted to evict them from the said suit land. The 1st Applicant



avers that the Applicants have since put up permanent structures on the said parcel of land and even planted trees which have since matured.

37. From the evidence of the Applicant, this Court is unable to establish when the Applicants took possession of the suit premises. By simply stating that they took possession in 1990 is not enough. There is no evidence before this Court demonstrating that they took possession in 1990.

38. However, all is not lost. It is trite that for a claim for adverse possession to suffice the claimant must demonstrate that the same was non-permissive and non-consensual and without license. (See Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others [2018] eKLR where the Court enumerated the required elements to prove adverse possession as follows:

“Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12years as espoused in the Latin maxim, *nec vi nec clam nec precario*.”

39. This Court will move on to investigate whether the Applicant has been in open, exclusive and uninterrupted possession for a period of at least 12 years from 1990.

40. The Applicant has contended that they have been in possession of the suit land without any interruption for over 28 years. The Applicant adduced evidence to show that they have put up a permanent structure and planted trees thereon.

41. This Court finds that the Applicant has been able to establish open, quiet and uninterrupted possession of the suit land in line with the principles of adverse possession. Time will however not be computed from 1990 as there is no evidence before this Court demonstrating that the Applicants indeed took possession in 1990. A look at the Plaintiff’s exhibit 2 shows that the Respondent was issued with a Title to the suit property on 14/01/2005. The Applicants aver that since the Respondent acquired title to the said suit land, he has never attempted to evict the Applicants from the said property, and they have had quiet and undisturbed occupation of the said portion of Land. The result of the above is that the Applicant has been in possession of the suit premises known as LR 18111/470 Nairobi for a period of 13 years by the time the instant suit was filed.

42. The upshot of the foregoing is that the Applicants have on a balance probability established that they meet the threshold for the grant of orders for adverse possession.

b Whether the Applicants are entitled to the ownership of land parcel number LR No 10107?

43. What flows from the pleadings is that the occupation of the Applicants on the suit property has been confirmed through the Plaintiff’s Exhibit No. 1. From the attached Certificate of Title, it is evident that the land is registered under the name of Sterling Developers Limited, the Respondent herein. What this Court appreciates is that the land can easily be identified.

44. For a claim of adverse possession to issue, it is important that the said land is clearly identified as held by the Court in Wilson Kazungu Katana & 101 Others v Salim Abdalla Bakshwein & Another [2015] eKLR this Court observed:-

“The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this Court in the case of Githu v Ndele [1984] KLR 776. The appellants did not discharge the burden



of proving and specifically identifying or even describing the portions, sizes and locations of those in their respective possession from the larger suit premises that they sought to have decreed to them.”

45. The Court in the foregoing case found that the requirement of identification was crystalized by the mandatory provisions of order 37 rule 7 of the *Civil Procedure Rules*, which requires that an application for adverse possession be accompanied with a title deed extract. The Applicants have attached a copy of a title deed extract as required by law. The title shows that the land is registered in the name of Sterling Developers Limited. The courts are therefore mandated by statute to consider a title document as prima facie evidence of ownership to land and conclusive evidence of proprietorship to land.
46. In totality, this Court finds and hold that the Applicants have on a balance of probability demonstrated that they are entitled to ownership of land parcel known as LR 18111/470 Nairobi.
47. Having now considered the available evidence in totality together with the vital written submissions, the Court finds and holds that the Applicants herein have proved on the required standard of balance of probabilities that they are entitled to ownership of the stated parcel of land by virtue of adverse possession.
48. For the above reasons, the Court enters judgment for the Applicants herein against the Respondent in terms of the claim contained in the Originating Summons dated 25/05/2018. The Court allows the Applicant’s claim herein in terms of prayers No. (1) and (2). I make no orders as to costs because the Respondent did not participate.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 11TH DAY OF MAY 2022

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MOGENI J

JUDGE

In the presence of: -

Mr. Koinange for the Applicants

N/A for the Respondent

Mr. Vincent Owuor - Court Clerk

