



REPUBLIC OF KENYA



KENYA LAW
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**Mbaruk v Ali & another (Environment & Land Case 386 of 2017)
[2022] KEELC 2296 (KLR) (28 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2296 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 386 OF 2017**

NA MATHEKA, J

JUNE 28, 2022

BETWEEN

NASSOR SALIM MBARUK PLAINTIFF

AND

FAWZI OMAR ALI 1ST DEFENDANT

NAGIB OMAR ALI 2ND DEFENDANT

JUDGMENT

1. This originating summons is brought under Section 7, 8, 17, 38 (1), (2) of the *Limitation of Actions Act*, Cap 22 Laws of Kenya, Sections 1A, IB & 3A of the *Civil Procedure Act*, Cap 21 and Order 37 Rule 7 (1), (2), (3) of the *Civil Procedure Rules*, Cap 21 of the Laws of Kenya seeking the following orders;
 1. Whether the plaintiff has acquired title to the suit property by adverse possession? If so it be declared and decreed that the plaintiff/applicant has acquired title to all that parcel of land known as Plot No. Kilifi/Mtwapa/229 by adverse possession.
 2. Whether the Defendants title to the suit property has been extinguished by operation of the law? If so, it be declared and decreed that pursuant to the provisions of Section 17 of the *Limitation of Actions Act*, Cap 22 Laws of Kenya, the Defendants' title to all that title of land known as Plot No. Kilifi/Mtwapa/229 is extinguished.
 3. Whether the Plaintiff is entitled to be registered as the owner of the suit property? If so, it be declared and decreed that the plaintiff be registered as the owner of all that parcel of land known as Plot No. Kilifi/Mtwapa/229
 4. Whether by dint of Section 8 of the *Limitation of Actions Act*, Cap 22, Laws of Kenya, and the Defendants are barred from claiming any eviction? If so, the Defendants be stopped from evicting the Plaintiff from the parcel of land known as Plot No. Kilifi/Mtwapa/229



5. That costs of this application be in the cause.
2. PW1 the plaintiff testified that he has occupied the suit property Plot No. Kilifi/Mtwapa/229 from 1993. That his occupation has been peaceful and uninterrupted and with the knowledge of the defendants. On the October 20, 2017 he woke up to leaflets threatening to evict him. that he was never their caretaker and has cultivated the suit land and keeps livestock. PW2 confirms that the plaintiff has cultivated part of the land and had livestock.
3. The defendants who are brothers testified that they are the registered proprietors of the property known as Kilifi/Mtwapa/229. That the plaintiff has never lived on the above named property for the period of 12 years or at all. That the plaintiff/Applicant had approached their uncle Mbarak Ali Gadim (deceased) sometime in the late 1990's and requested him for permission to carry out some cultivation on a portion of the property. Their late uncle was the caretaker and general overseer and manager of their property. He was granted permission provided that he shared some of the produce he got with their uncle. The Applicant has therefore never lived on their property and in fact is known to live at Mzambarauni, in the neighboring area. DW4 Hassan Hamisi Kishungi testified that he used to occupy the adjacent portion of land on the same property and carrying out poultry farming. He states that the plaintiff was not living there but only cultivating the land. He left in 2000 and he left the chicken house he had put up. DW5, Mohamed Mahfudh Said the former driver to the said uncle and DW3 Zaki Ali Mohamed the in law of the plaintiff confirmed that they are aware that the plaintiff was given permission to occupy the property by the defendants uncle by the plaintiffs. That this property has always belonged to the Defendants. The title to the property got lost sometime in 2005/2006 and they had to reapply for issuance of a new title which was reissued in December 18, 2006. DW6 the Chief in Mtwapa from 2001 to 2021 stated that the plaintiff lived in Mzambarauni and not on the suit land. She states that there were no permanent structures on the suit land but only mud ones.
4. This court has carefully considered the evidence and submissions therein. The [Land Registration Act](#) is very clear on issues of ownership of land and Section 24(a) of the [Land Registration Act](#) provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Section 26 (1) of the [Land Registration Act](#) states as follows:

The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
5. The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.



6. This court in considering this matter referred to the case of *Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & Another* [2013] eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The court in the case while considering the application of section 26(1) (a) and (b) of the *Land Registration Act* rendered himself as follows:-

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

7. It is not in dispute that the plaintiffs are the registered owners of the suit property Plot No. Kilifi/Mtwapa/229. The issue for determination is whether or not they hold good titles by virtue of the plaintiffs, claim of adverse possession. Be that as it may, in determining whether or not to declare that a party has acquired land by adverse possession, there are certain principles which must be met as quoted by Serгон J in the case of *Gerald Muriithi v Wamugunda Muriuki & Another* [2010] eKLR while referring to the case of *Wambugu v Njuguna* [1983] KLR page 172 the Court of Appeal held as follows;

1. In order to acquire by statute of limitations title to land which has a known owner the owner must have lost his right to the land either by being dispossessed of it or by having continued 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 for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed of the suit land for a continuous period of twelve years as to entitle him, the respondent to title to the land by adverse possession.
2. The *limitation of Actions Act*, on adverse possession contemplates two concepts: dispossession and discontinuance of possession. 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 the claimant has proved that he has been in possession for the requisite number of years.
3. Where a claimant pleads the right to land under an agreement and in the alternative seeks adverse possession, the rule is: the claimant's possession is deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least 12 years after such payment.

8. The court was also guided by the case of *Francis Gicharu Kariri vs Peter Njoroge Mairu*, Civil Appeal No. 293 of 2002 (Nairobi) the Court of Appeal approved the decision of the High Court in the case of *Kimani Ruchire vs Swift Rutherford & Co. Ltd.* (1980) KLR 10 where Kneller J, held that;

“The plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion)”.

9. So the plaintiff must show that the defendants had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it. In applying these principles to the present case, PW1 the plaintiff testified that he has occupied the suit property Plot No. Kilifi/Mtwapa/229 from 1993. That his occupation has been peaceful and uninterrupted and with the knowledge of the defendants. The defendants who are brothers testified that they are the registered



proprietors of the property known as Kilifi/Mtwapa/229. That the plaintiff has never lived on the above named property for the period of 12 years or at all. That the plaintiff/applicant had approached their uncle Mbarak Ali Gadim (deceased) sometime in the late 1990's and requested him for permission to carry out some cultivation on a portion of the property. DW3 to DW6 all corroborated their evidence that the plaintiff never lived there but was cultivating and keeping livestock. I find that the plaintiff was a licensee having been given permission by the plaintiff's uncle. Once that said uncle died the plaintiff has now changed the story and wants to claim the land by way of adverse possession. I find that the plaintiff has not proved that he has been in occupation of the suit land from 1993 without interruption as indeed DW4 was keeping his chicken from 1998 to 2000 when he left. The plaintiff was there with the permission of the defendants' uncle. I find that the plaintiff has failed to establish that his possession of the suit land was continuous and not broken for any temporary purposes or any endeavours to interrupt it for a period of 12 years. I find that the plaintiff has failed to prove his case on a balance of probabilities and I dismiss the same with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF JUNE 2022.

N.A. MATHEKA

JUDGE

