



**CIVIL**

- Claim for adverse possession of land by a licensee.

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**HCC NO. 56 OF 2006 (OS)**

**ANTONY MUTEMBEI M'NTHAKA ..... PLAINTIFF**

**VERSUS**

**WINGFIELD KABURU ..... DEFENDANT**

**JUDGMENT**

The plaintiff by the originating summons herein is seeking this court's declaration that he has become entitled to one acre of land namely *L.R. No. Igoji/Kianjogu/800* (suit property) by adverse possession. In the plaintiff's supporting affidavit, he deponed that he had been in continuous and exclusive possession of the said portion since his birth. He said that his possession of that portion had been adverse to the defendant's title. He annexed to his supporting affidavit a copy of the title of the suit property and a letter written to him by L. Kimathi Kiaria & Co. Advocates on instructions of the defendant. It is worthy to reproduce that letter in this judgment as follows:-

***"Festus Kirungu  
And Antony Mutembei  
P.O. Box 27  
IGOJI – MERU***

***Dear Sir,***

**RE: WINGFIELD KABURU**  
***The above matter refers.***

***We have been instructed by our above referred client to issue you with 30 days notice to vacate from his homestead and go to your own lands. This has been necessitated by your continuous abuse of your license to stay in our client's home, by abusing him and threatening to harm him. Further and better particulars are best within your knowledge.***

**TAKE NOTICE that unless you comply with his notice within 30 days from this date, our firm and mandatory instructions are to institute legal proceedings to forcefully have you evicted.**

***So note and be advised accordingly.***

***Yours faithfully,***

**FOR L. KIMATHI KIARA & CO. ADVOCATES**

**CC  
CLIENT”**

In a short replying affidavit, the defendant stated thus:-

1. ***That I am the deponent herein and thus competent to swear this affidavit.***
2. ***That I am the sole and the first registered owner of L.P. No. Igoji/Kianjogu/800.***
3. ***That I was given the said land by my father absolutely in 1970 and he was left with his own share for himself and his family.***
4. ***That my father was left with more than (9) acres and that is where the plaintiff should lodge his claim.***
5. ***That I have never had any claim from anybody and I do not hold this land in trust of my brother.”***

By consent dated 26<sup>th</sup> September 2009 and recorded in court on 28<sup>th</sup> September 2009, the parties agreed to hear this matter by affidavit evidence and by written submissions. The plaintiff’s counsel in his written submissions stated that the defendant did not deny that the plaintiff was in continuous and exclusive possession of one acre of the suit property for 20 years. Further, he stated that by the letter reproduced in this judgment, the defendant acknowledged the plaintiff’s said possession. The defendant’s counsel in his submission stated that the plaintiff was his brother and that his remedy lay in a claim for trust. It is not denied that the plaintiff is a brother of the defendant. In those circumstances, can it then be said that the plaintiff’s occupation of the suit property entitles him to be declared to have acquired title? The defendant argued that the plaintiff’s occupation was as a licensee. Black’s Law Dictionary defines license as:-

***“License is an authority to do a particular act, or series of acts, upon another’s land, without possessing any estate therein.”***

In the case **Goomti Ramnarace Vs. Harrypersad Lutchman Privy Council Civil Appeal No. 8 of 2000** the Privy Council was considering an appeal where the appellant had been allowed to remain on the land belonging to her uncle. Evidence was led that she and her uncle had agreed that she would occupy that land rent free until she was able to afford to buy it from him. She later claimed to have acquired title by adverse possession. I wish to quote some of the relevant portions of the decision of the Privy Council as follows:-

***“ A person cannot be a tenant at will where it appears from the surrounding circumstances that there was no intention to create legal relations..... In the present case, the appellant was allowed into occupation of the land as part of a family arrangement and at least in part as an act of generosity.”***

The plaintiff in this present case as a brother of the defendant undoubtedly was given a license to occupy the one acre as he alleges, of the suit property. In the letter reproduced above, however, the plaintiff was said to be living in the defendant’s home. He however entered the suit property with the permission of the defendant. One of the legal requirements when a party is claiming to have acquired land by adverse possession is for such a claimant to prove that the entry on the land was without permission of the owner. It was so stated in the case, **Mbira Vs. Gachuhi** [2002] 1 EA:-

***“That the adverse possessor had openly and without the consent of the true owner done acts which were inconsistent with the enjoyment by the true owner of land for purposes for which he intended to***

***use it.”***

The fact that the defendant granted the plaintiff permission to enter the suit property is to be confirmed by the plaintiff's own exhibit, that is, the letter reproduced in this judgment. That permission is implied in that letter. In the case **Hughes Vs. Griffin** [1969] WLR 23 it was stated that the time in a claim for adverse possession did not begin run in favour of a licensee so long as the license endured. The plaintiff's license in our case endured up to the time he received a demand letter to vacate the suit property. That demand letter was written on 15<sup>th</sup> May 2006. The plaintiff filed this present suit seeking a declaration that he acquired title by adverse possession on 6<sup>th</sup> July 2006. The period between the date of the letter and the date this suit was filed is less than two months. The plaintiff could only seek a declaration that he had acquired title by adverse possession after 12 years from the date his license was revoked that is, the date of the demand letter. As a licensee, he was not entitled to claim title as he has done in this suit. This was clearly stated in the case **Samwel Nyakenogo Vs. Samwel Orucho Onyaru** Civil appeal No. 24 of 2004 where the Court of Appeal stated thus:-

***“Time can run in favour of a tenant at will by virtue of section 12 of the Limitation of Actions Act but it cannot run in favour of a licensee, therefore a licensee has no possession (Hughees V. Griffin [1969] 1 WLR 23).”***

The plaintiff's claim therefore fails and the suit is dismissed with costs being awarded to the defendant.

***Dated, signed and delivered at Meru this 17<sup>th</sup> day of March 2011.***

**MARY KASANGO  
JUDGE**