



**Hirani v Walusanda & 8 others (Environment & Land Case
385 of 2010) [2022] KEELC 3979 (KLR) (27 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3979 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 385 OF 2010
NA MATHEKA, J
JULY 27, 2022**

BETWEEN

HARJI KALYAN HIRANI PLAINTIFF

AND

MOHAMMED WALUSANDA 1ST DEFENDANT

MARIAM SALEH AHMED 2ND DEFENDANT

MUNICIPAL COUNCIL OF MOMBASA 3RD DEFENDANT

ABDALLA MOHAMED KASANGAMBA 4TH DEFENDANT

MOHAMED HAMISI MWAPESA 5TH DEFENDANT

MWINYI SALIM ZULLA 6TH DEFENDANT

ALI SUDI MWASIRIMA 7TH DEFENDANT

ABUBAKAR JUMA 8TH DEFENDANT

MWATIME JUMA NGORODO 9TH DEFENDANT

JUDGMENT

1. The Plaintiff avers that he purchased the property known as L.R. No. Mombasa/Block 1/Mainland South/29 in 1987 and title issued in his name and entered as such in the register on 23rd February 1987. The Plaintiff has been paying all rates and any taxes to the 3rd Defendant and the Central Government as and when due. That the 1st Defendant has without any colour of right or any basis in law started erecting structures on the said property, L.R. No. Mombasa/Block Mainland South/29, without the authority, consent or permission of the Plaintiff. The 2nd Defendant and other persons not authorized and permitted by him have invaded the Plaintiff's property, L.R. No. Mombasa/Block I/Mainland South/29 without consent of the Plaintiff and without any color of right. The 4th, 5th, 6th, 7th, 8th, and



9th Defendants respectively have invaded the Plaintiff's said property, without consent of the Plaintiff and without any colour of right as such trespassing on the Plaintiff's property L.R. No. Mombasa/Block I/Mainland South/29 and have erected semi-permanent structures on the suit property. The 2nd Defendant has filed HCCC No 250 of 2009 (O.S) seeking adverse possession against the Plaintiff after misrepresenting facts that she has occupied the property since 1970. The Plaintiff avers that the 1st, 2nd, 4th, 5th, 6th, 7th, 8th, and 9th Defendants have never lived on the said property and that they have never been on that property. The 1st, 2nd, 4th, 5th, 6th, 7th, 8th, and 9th Defendants with other people only invaded the Plaintiff's property from October 2010 and not as alleged by the 2nd Defendant. The 3rd Defendant is charged with the duty of approving building plans to any one constructing as such within its jurisdiction and has permitted 1st, 2nd, 4th, 5th, 6th, 7th, 8th, and 9th Defendant to so construct and/or erect structures on the said property without building plans or approvals and unless restrained, the 3rd Defendant may continue to approve, permit and or authorize the 1st, 2nd, 4th, 5th, 6th, 7th, 8th, and 9th Defendants to construct, erect and or build structures on L.R. No Mombasa/Block I/Mainland South/29. Despite various attempts by the Plaintiff to stop the 1st, 2nd, 4th, 5th, 6th, 7th, 8th, and 9th Defendants from constructing and/or erecting the said structures, the 1st, 2nd, 4th, 5th, 6th, 7th, 8th, and 9th Defendants have defiantly ignored the requests and instead threatened the Plaintiff's agent and will continue to do so unless restrained by way of an injunction. The Plaintiff is also apprehensive that the 1st, 2nd, 4th, 5th, 6th, 7th, 8th, and 9th Defendants if not stopped by the Honourable court, will deprive the Plaintiff use of his rightfully owned property, the suit property herein. The Plaintiff prays for judgment against the Defendants for:-

- a. A declaration that the Plaintiff is the legal and lawful owner of all that property known as L.R. No. Mombasa/Block I/Mainland South/29.
 - b. An injunction restraining the 1st Defendant, his servants and agents from erecting any structure, temporary and or permanent on the Plaintiff's property and or committing any act of trespass on the Plaintiff's property L.R. No. Mombasa/Block I/Mainland South/29.
 - c. An injunction restraining the 1st, 2nd, 4th, 5th, 6th, 7th, 8th, and 9th, Defendants their servants and agents from erecting any structure, temporary and or permanent on the Plaintiff's property and or committing any act of trespass on the Plaintiff's property, L.R. No. Mombasa/Block I/Mainland South/29.
 - d. An injunction restraining the 3rd Defendant from issuing any permits, authorizations, permissions to the 1st, 2nd, 4th, 5th, 6th, 7th, 8th, and 9th Defendants permitting them to erect, construct or build any structures on the Plaintiff's property L.R. No. Mombasa/Block I/Mainland South/29.
 - e. A mandatory injunction directed at the 1st and 2nd, 4th, 5th, 6th, 7th, 8th, and 9th. Defendants, their servants and/ or agents requiring them to remove all buildings and structures on the Plaintiff's property L.R. No. Mombasa/Block I/Mainland South/29 and to deliver up vacant possession.
 - f. Accounts from the 1st, 2nd, 4th, 5th, 6th, 7th, 8th, and 9th. Defendants for any period that they may have occupied the said property.
 - g. General Damages
 - h. Costs of this suit.
2. The 3rd Defendant stated in their defence that they have no relationship with the squatters and the claim is vexatious and should be dismissed. This matter was consolidated with case No. 250 of 2009 and 43 of 2011 where the rest of the Defendants have raised the issue of adverse possession. The case against the



1st Defendant was withdrawn. The 2nd Defendant stated in her application for adverse possession that she has been occupying the suit property for over a period of 12 years uninterrupted and peacefully and is seeking to be registered as the legal owner of the property. The 4th to 9th Defendants aver and maintain that they entered the suit premises and/or were born thereon, and have lived and/or resided in the suit premises peacefully and/or openly and/or continuously and/or uninterruptedly and/or exclusively and/or adverse to the title of the purported registered owner for over 12 years, hence the Plaintiff's claim herein is time barred under Section 7 of the [Limitation of Actions Act](#) (Cap 22), Laws of Kenya. The 4th to 9th Defendants aver and maintain that their entry onto the suit premises was without anybody's permission and/or authority and/or consent and having therefore resided and/or occupied the suit premises for over 12 years, the 4th to 9th Defendants are entitled under the Provisions of Section 38 of the [Limitation of Actions Act](#) to seek for orders of adverse possession against the Plaintiff herein.

3. The 4th to 9th Defendants further aver and maintain that they are in actual occupation and/or possession of the suit premises, living thereon with their family members and that they do not know of any other place as residence except the suit premises herein, while on the other hand the Plaintiff has discontinued his possession of the plot since he has no structure or anything on the suit premises to show or prove that he has possession of the suit premises, hence he has been dispossessed of his purported parcel of land by the 4th to 9th Defendants, which calls for the dismissal of the Plaintiffs' suit with costs. The 4th to 9th Defendants pray for the Plaintiffs' suit to be dismissed with costs.
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.”

5. 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.”

6. 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.
7. 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.”

8. It is not in dispute that the Plaintiff is the registered owner of the suit property known as L.R. No. Mombasa/Block I/Mainland South/29. The issue for determination is whether or not he holds good titles by virtue of the Defendants, 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 Seron 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.

9. The court was also guided by the case of *Francis Gicharu Kariri v 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 v 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)”.

10. In applying these principles to the present case, PW1 the Plaintiff testified that the Defendants have invaded the said property, without consent of the Plaintiff and without any colour of right as such trespassing on the his property L.R. No. Mombasa/Block I/Mainland South/29 and have erected structures on the suit property. The Defendants with other people only invaded the Plaintiff's property from October 2010 and not as alleged in their claim for adverse possession. That he has rented out the part of the land to Mavji Harji Patel to farm. PW2 Francis Gikonyo, testified that he managed the property from 1989 and they were no squatters when the Plaintiff purchased the land. That he wrote to the squatters in 2007. DW1 the 4th Defendant states that he was born in 1988 and that is their family home. They own shops there which they have rented out but do not have title to the land.



They also did not get approvals to construct from the relevant authorities. The rest of the Defendants did not testify. Indeed, the Defendants are not clear as to when they occupied the land as it is clear that there was correspondence in 2007. The 2nd Defendant who states that she lived there from 1970 never gave evidence in court to prove her allegations. I find that the 2nd 4th to 9th Defendants have failed to establish that they have been in 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 2nd 4th to 9th Defendants have failed to prove their counterclaim on a balance of probabilities and I dismiss the same with costs. The Plaintiff has failed to prove that the 3rd Defendant issued any permits or authorisation for constructions and the 4th Defendant has also confirmed that they never had any permits to construct. I therefore dismiss the case against the 3rd Defendant. The Plaintiff has failed to prove the claim for the ward of general damages and the same will not be made. I find that the Plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. An injunction restraining the 2nd, 4th, 5th, 6th, 7th, 8th, and 9th Defendants their servants and agents from erecting any structure, temporary and or permanent on the Plaintiff's property and or committing any act of trespass on the Plaintiff's property, L.R. No. Mombasa/Block I/Mainland South/29.
2. A mandatory injunction directed at the 2nd, 4th, 5th, 6th, 7th, 8th, and 9th. Defendants, their servants and/ or agents requiring them to remove all buildings and structures on the Plaintiff's property L.R. No. Mombasa/Blocki/Mainland South/29 and to deliver up vacant possession within the next 90 (ninety days) from the date of service of this decree.
3. The 2nd, 4th, 5th, 6th, 7th, 8th, and 9th Defendants to bear the costs of this suit.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF JULY 2022.

N.A. MATHEKA

JUDGE

