



Samuel Ole Maseri Kiondo v Waishoshi & 3 others (Environment and Land Case Civil Suit E008 of 2021) [2022] KEELC 3835 (KLR) (21 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3835 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ENVIRONMENT AND LAND CASE CIVIL SUIT E008 OF 2021

CG MBOGO, J

JULY 21, 2022

IN THE MATTER OF SECTION 38 OF THE LIMITATIONS OF ACTIONS ACT

AND

IN THE MATTER OF REGISTERED LAND ACT 2012

AND

**IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION
IN RESPECT OF PARCEL NO. CIS-MARA/KIPISE/776**

BETWEEN

SAMUEL OLE MASERI KIONDO PLAINTIFF

AND

DORCUS WAISHOSHI 1ST DEFENDANT

LAND ADJUDICATION OFFICER, NAROK 2ND DEFENDANT

DISTRICT LAND OFFICER, NAROK 3RD DEFENDANT

DISTRICT LAND SURVEYOR 4TH DEFENDANT

JUDGMENT

1. Before this court for determination is an originating summons dated 5th July, 2021 expressed to be brought pursuant to Order 37 Rule 7 of the *Civil Procedure Rules* and Section 38 of the Limitations of Actions Act seeking the following: -
 - a. Whether the plaintiff has been in adverse possession of the defendants parcel of land number Cis-Mara/Kipise/776.



- b. Whether the plaintiff should be registered as the proprietor of parcel of land number Cis-Mara/Kipise/776.
 - c. Whether the district lands registrar Narok should be directed to register the plaintiff on the possession of parcel known as Cis-Mara/Kipise/776 in place of the defendant.
 - d. Whether the republic registrar of this honourable court should execute transfer documents to effect transfer to the plaintiff herein of the parcel measuring...HA of land in the event the defendant refuses.
 - e. Whether the defendant should be restrained by an order of injunction from selling, transferring or in any other manner whatsoever interfering with the plaintiffs peaceful use, occupation and or enjoyment of land known as Cis-Mara/Kipise/776 both parties pending the hearing of the suit and after the determination hereof.
 - f. Who should pay costs of the suit.
2. The application is supported by the affidavit of the plaintiff sworn on even date together with a verifying affidavit and a witness statement dated 5th July, 2021. In his supporting affidavit, the plaintiff deposed that he has been in occupation of the suit property for many decades and has raised his children there which land belonged to his father who acquired it from Kipise Group Ranch who then allocated to him as his son.
 3. He further deposed that he was not aware of any objection to the land adjudication record and was not present during the meeting that purported to hold that the suit land belonged to the 1st defendant and the defendant intends to evict him from the same without any reasonable cause. He deposed that he has been in occupation peacefully and without interruption and built permanent structures thereon and that unless the court intervenes, chaos and anarchy might ensue. Further, he has acquired rights that are adverse to those of the 1st defendant and hence the suit land should be transferred to him.
 4. In his witness statement dated 5th July, 2021, the plaintiff stated that he has been in occupation of the suit land for many decades and has raised his children there, the same belonging to his father who acquired it from Kipise Group Ranch and his occupation has been peaceful without any interruption.
 5. The 1st defendant filed a notice of preliminary objection and statement of grounds of opposition in opposition to the originating summons dated 5th February, 2022 on the following grounds: -
 1. That the suit as instituted offends section 7 of the Limitations of Actions Act.
 2. That the suit as filed offends Order 37 Rule 7 (2) of the *Civil Procedure Rules*.
 3. That the application is incurably defective, has no basis in law and is an abuse of the court process.
 4. That the suit is frivolous, vexatious and an abuse of the court process.
 5. That the 1st defendant got registered as a proprietor of the parcel on 17th May, 2016.
 6. In addition, thereto, the 1st defendant filed a replying affidavit sworn on 4th April, 2022. The 1st defendant deposed that she has been in occupation of the suit land since the year 1972 and that in 1978 the government undertook survey and demarcation of Kipise Adjudication section while they were in occupation before the plaintiff was born. That she took possession of the suit land having been granted permission by Putiai Ole Kiondo (deceased) who is an uncle to the plaintiff and having lived and utilised the suit land for cultivation until 1990, the owner requested that they formalise the



- purchase of the land and on 8th March, 1990 they entered into a sale agreement for the sale of two and half acres. That in 1993, clashes erupted and they temporarily left Kipise for safety and at the end of the year 1996 they returned and have continued to be in occupation of the suit land since.
7. The 1st defendant further deposed that the assertion by the plaintiff that she intends to evict him is unfounded and untrue as it is the plaintiff who has a scheme to evict her as he illegitimately and unlawfully tried to take possession of the suit land by grazing his livestock and further that the statements in the supporting affidavit are vague since together with her husband, they constructed their first house in 1972 which was torched following the clashes in 1993 but have been utilising the suit land by cultivating and rearing of livestock. The 1st defendant deposed that the plaintiff cannot seek for adverse possession for the reason that she has been in effective and actual possession since 1972, a period exceeding twelve years without interruption and that her possession of the parcel of land was not forceful as it was vide an agreement for sale which she was issued with a certificate of title on 17th May, 2016 and therefore a claim for adverse possession cannot be sustained.
 8. On 24th March, 2022 parties agreed to dispose the application by way of written submissions.
 9. The plaintiff filed written submissions dated 18th July, 2022. The plaintiff submitted that contrary to the 1st defendant's claim, the originating summons was filed on 5th July, 2021 whereas the title to the suit land was issued fraudulently to the 1st defendant in the year 2016 as such 12 years have not lapsed and therefore the suit is filed within the correct timelines. The plaintiff further submitted that in his list of documents he has indicated a copy of official search of the suit land and therefore the application is not incurably defective and abuse of the court process.
 10. The 1st defendant filed written submissions dated 22nd April, 2022. The 1st defendant submitted that she is the indefeasible legal owner of the suit land having been issued with a certificate of title on 17th May, 2016 and such a claim cannot arise as the title is only seven years old from the date of issue. The 1st defendant relied on the case of *Mbira versus Gachuhi* [2002]1 EA and Section 7 of the [Limitations of Actions Act](#) and submitted that the plaintiff's claim is therefore premature and a nonstarter.
 11. The 1st defendant further submitted that a party instituting a claim for adverse possession is to provide material facts in support of the claim as per Order 37 Rule 7 (2) of the [Civil Procedure Rules](#) and that the plaintiff has flouted this cardinal rule in advancing his claim by failing to attach an extract of the title which departure is fatal to their claim.
 12. The 2nd, 3rd and 4th defendants filed written submissions dated 14th June, 2022. The 2nd, 3rd and 4th defendants submitted that the law on adverse possession is well settled and the essential requirements that one has to meet in order to succeed in an application for adverse possession have been discussed by the courts. The 2nd, 3rd and 4th defendants relied on the case of *Wambugu versus Njuguna* (1983) KLR 173, *Mbira versus Gachuhi* (2002) 1EALR 137, *Mtana Lewa versus Kabindi Ngala Mwangandi* (2005) eKLR and *Gabriel Mbui versus Mukindia Maranya* [1993] eKLR and submitted that the plaintiff has failed to prove the ingredients to the claim of adverse possession and is merely trespassing on the suit land.
 13. In order to establish a claim for adverse possession, a party has to demonstrate exclusive possession, adverse rights of the title owner and the intention to possess it. Adverse possession is 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 period of 12 years.
 14. The process is by operation of the law and 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 license of the owner. It must be adequate in continuity, in publicity and in



extent to show that possession is adverse to the title owner. This doctrine is provided in Section 7 of the *Limitation of Actions Act*, which states that: -

“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.”

15. The *Limitation of Actions Act* makes further provision for adverse possession at Section 13 that:

“(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 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 afresh 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), the land in reversion is taken to be adverse possession of the land.”

16. Sections 37 and 38 of the *Limitation of Actions Act* stipulate that if the land is registered under one of the registration Acts then the title is not extinguished, but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him.

17. Section 37 provides that: -

“(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.”

18. According to *Halbury's Laws of England, 4th Edition Volume 28*, paragraph 768.

“No right to recover land accrues unless the land is in the possession of some person in whose favour the period of limitation can run. What constitutes such possession is a question of fact and degree. Time begins to run when the true owner ceases to be in possession of his land.”

19. In this case, the plaintiff must show that he has been in continuous possession of the land for 12 years or more; that such possession has been open and notorious to the knowledge of the owner and that the plaintiff has asserted a hostile title to the owner of the property.

20. The plaintiff has stated that he has been in occupation of the suit land for many decades and has raised his children there. He has not stated when he began his occupation and has left this court to wonder for how long his occupation has been. He has also not stated that he has been in occupation and possession of the suit land openly and continuously and without interruption for all these many decades but has



stated that he has constructed permanent structures which again he has not given proof. This court seriously doubts whether the plaintiff is genuine with his claim or is pursuing other intentions. I will advise the plaintiff's counsel to read widely on the laws governing adverse possession for the reason that even in the plaintiff's written submission, there seems to be poor grasp on the laws governing the same.

21. As such, I find that the originating summons dated 5th July, 2021 is hopeless and defective and the same is hereby dismissed with costs to the defendants. The notice of preliminary objection dated 5th February, 2022 is upheld. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL ON 21ST JULY, 2022.

Mbogo C.G

Judge

21/7/2022

In the presence of:-

CA: Timothy Chuma

