



**Public Trustee ((As the Administrator of the Estate of Darshan Singh Surein Singh (deceased)) v Mudashi & 2 others (Environment & Land Case 308 of 2019) [2022] KEELC 12814 (KLR) (30 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12814 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 308 OF 2019  
OA ANGOTE, J  
SEPTEMBER 30, 2022**

**BETWEEN**

**PUBLIC TRUSTEE ..... PLAINTIFF  
(AS THE ADMINISTRATOR OF THE ESTATE OF DARSHAN SINGH SUREIN SINGH (DECEASED))**

**AND**

**JOHN MUDASHI ..... 1<sup>ST</sup> DEFENDANT  
HERMAN MUDENYO ..... 2<sup>ND</sup> DEFENDANT  
JAPHET KWASIMA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed a Plaint dated June 30, 2000 in which it sought the following orders:
  - a. Immediate eviction of the said Defendants from the said piece of land.
  - b. Any other or further relief which this Honourable Court may deem fit and just to grant.
  - c. Costs of and incidental to this action.
2. The Plaintiff's case is that on March 26, 2000, the Plaintiff, while inspecting Bukhayo/kisoko/950 (the suit land), discovered that the Defendants were without lawful authority, staying on the suit land; that the Defendants have trespassed on the suit land and have constructed huts, cultivated and fenced a part of the land.



3. It was averred in the Plaint that through their illegal occupation, the Defendants have affected the market value of the suit land by constructing huts and unlawfully engaging in subsistence farming which is detrimental to machinery of the Jaggery housed on the suit land and that they have been destroying the buildings which were attached to the Jaggery in order to conduct subsistence farming. The Plaintiff argued that the estate of the deceased was bound to suffer on account of such unlawful occupation.
4. The Defendants filed an amended Statement of Defence and Counterclaim dated May 15, 2018 in which they denied the Plaintiff's allegations. They averred that they have been in occupation and possession of the suit premises for the last 30 years as of right and have developed the same. According to the Defendants, they have occupied the suit premises with the full consent and knowledge of the owner as a consideration for the work and services rendered by them and their deceased father.
5. In the Counterclaim, the Defendants averred that sometime in 1968, the deceased, Darshan Singh, gave them possession of the suit land as a consideration and in lieu of money for work and services rendered to the deceased by them and their father, Laban Kwasima Ichehi.
6. They contended that they have lived on the suit land for over forty years peacefully, exclusively, and without interruption and that they have occupied the suit premises with their families, developed the same and buried seven of their relatives on the said land without any objections from anybody. The Defendants thus contend that they have acquired ownership of the suit land by virtue of adverse possession. They sought for the following prayers:
  - a. A declaration that they have acquired title by virtue of adverse possession
  - b. An order for transfer of land parcel Bukhayo/Kisoko/950 to the Defendants to be executed by the Public Trustee on behalf of the estate of Darshan Singh Surein Singh, in default the said transfer to be executed by the Deputy Registrar of the High Court.
  - c. Costs of the suit.
7. The Plaintiff filed a Reply to the Counterclaim dated 29<sup>th</sup> May 2018, in which it argued that as the Defendants have admitted that they are on the suit land with the full consent/ permission of the owner, their invocation of the doctrine of adverse possession is inaccurate and misguided.
8. The Plaintiff reiterated that the Defendants hold no interest in the suit land and that their claims and/ or allegations are aimed at obstructing and defeating justice.

### **Hearing and evidence**

9. The Plaintiff's suit was dismissed for want of prosecution. The Defendants called three witnesses to prove their Counter claim. DW1, the 3<sup>rd</sup> Defendant, testified that the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants are his brothers; that the 1<sup>st</sup> Defendant is deceased and that the 2<sup>nd</sup> Defendant is very sick.
10. DW1 informed the court that the suit land is registered in the name of the Public Trustee and that it was owned by the Singhs; that they lived on the land while their father worked for the Singhs; that they have been on the land for forty years, where they were born and worked on the land and that when their father died, he left them on the land. It was the evidence of DW1 that the land had a factory for molasses and that when the owner of the land died, they continued living on the land.



11. DW1 adduced in evidence the certificate of official search, a copy of the register of land, a sketch map of the land, a report of a site visit ordered by this court, the letters of administration of his father's estate and photographs of the land showing the houses on the land.
12. DW2 testified that he knew the Defendants, their family and the suit property, as well as the Singh family. He informed the court that the Defendants' father, Mr. Laban Kwasime and his family lived on the land and used to get proceeds from the said land and that that the said Mr. Laban and his sons worked for the Asian without any cash in exchange for the land.
13. DW2 stated that the Defendants and their families settled on the suit premises a long time ago as a matter of right during the lifetime of Darshan Singh, who never raised any complaint; that Mr. Laban and other members of the family were buried on the land; that he attended the burials and that nobody has ever raised any objection.
14. DW3 testified that he knew the Defendants and Darshan Singh; that the Defendants and their father used to work on the suit premises and in the jaggery business; that he (DW3) used to go for sugar at the premises and that the 2<sup>nd</sup> Defendant used to serve him.
15. According to DW3, he was aware of an oral agreement between the Defendants, their father and Darshan Singh that the Defendants were to possess and/or own the suit land as compensation and/or in lieu of the salaries for the services rendered.

#### **The submissions**

16. The Plaintiff submitted that the Defendants have not acquired the suit property by dint of the doctrine of adverse possession and that the Defendants did not meet the criteria set out in the case of *Haro Yonda Juaje vs Sadaka Dzengo Mbauro & Another* [2014] eKLR where the court outlined the elements that a claimant must prove on a balance of probability for a claim of adverse possession to succeed.
17. It was submitted that the doctrine of adverse possession cannot apply because the Defendants have stated that they reside on the suit property with the permission of the deceased and that the Defendants failed to prove their assertion that they were not paid salaries but were instead given the suit property. Further, it was submitted, the Defendants have not produced any evidence to prove that in consideration for their alleged free labour, the deceased gave them the suit property, as the law requires that disposition of interests in land must be in writing.
18. The Plaintiff submitted that it is trite law that where an employee has land or a house by virtue of his employment, he cannot seek to have that land or house by way of adverse possession. The Plaintiff relied on the cases of *Mubu Holdings Ltd & 2 others vs Achina Nangomo & 27 others* [2018], *Delamere Estates v Ndungu Njai & Others* [2006] eKLR and *Wellington Lusweti Barasa and 75 others v Lands Limited & another* [2014].
19. It was submitted that the Defendants' prayer for transfer of title acquired by dint of the doctrine of adverse possession in a Counterclaim is misplaced, lacks legal basis and offends the provisions of Order 37 Rule 7 of the *Civil Procedure Rules*, which provides that a claim for title under the doctrine of adverse possession should be instituted by way of Originating Summons. The Plaintiff relied on the case of *Gulam Mariam Noordin v Julius Charo Karisa* Civil Appeal No. 26 of 2015 and *Chevron (K) Ltd v Harrison Charo wa Shutu* [2016] eKLR.
20. The Defendants submitted that their occupation and possession of the suit premises was confirmed by the report of the site visit submitted to the court; that they took possession of the suit property and were in possession of the same during the life of the registered owners and after their death for



an uninterrupted period of over 12 years and that they have proved their counterclaim because the evidence they adduced was not challenged or controverted.

21. The Defendants relied on the case of *Trust Bank Limited v Paramount Universal Bank Ltd & 2 others* [2009] eKLR and *Auter Singh Babra and Another v Raju Govindji* HCCC No. 548 of 1998 (UR), where the court emphasised that where a party fails to call evidence to support his case, the claims made in their pleadings remain unsubstantiated.
22. The Defendants also relied on the Court of Appeal case of *Sisto Wambugu v Kamau Njuguna* [1983] eKLR where the court held that in order to acquire land by a statute of limitation, the owner must have lost right to the land either by being dispossessed of it or having discontinued his possession of it.

### **Analysis and determination**

23. When this matter came for hearing on November 11, 2021, the Court dismissed the Plaintiff's suit with costs due to non-attendance and prosecution. What is for determination by this court is the Defendant's Counterclaim, in which they assert that they have acquired title to the suit land by adverse possession and have sought for the transfer of the land to themselves.
24. It is undisputed that the Defendants and their families are residing on the suit land, Bukhayo/kisoko/950. What is in issue is whether the Defendants have obtained title to the said land vide the doctrine of adverse possession.
25. The Defendants have averred that they have been in occupation and possession of the suit premises for more than 40 years as of right and have developed the same. They argue that their occupation of the suit premises was with the full consent and knowledge of the deceased, Mr. Darshan Singh, as consideration for the work and services rendered by them and their father to the deceased.
26. The Plaintiff submitted that the doctrine of adverse possession cannot apply because the Defendants have admitted in their pleadings that they occupied the suit property with the permission of the deceased. Further, it was submitted by the Plaintiff that the Defendants have not produced any evidence to prove that in consideration for their alleged free labour, the deceased gave them the suit property. Lastly, it was submitted that where an employee has land or a house by virtue of his employment, he cannot seek to have that land or house by way of adverse possession.
27. The law on adverse possession is set out in Section 7 of the *Limitation of Actions Act* as follows:

“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.”
28. Section 38 (1) of the *Limitation of Actions Act* provides the manner in which land may be registered in favour of a party who shows that he is entitled to the land by way of adverse possession. The section provides as follows:

“(1) 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.”



29. In *Mtana Lewa vs Kabindi Nala Mwangandi* [2015] eKLR the Court of Appeal summed up what adverse possession entails:

“... 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...”

30. Similarly, the term ‘adverse possession’ was defined in *Gabriel Mbui v Mukindia Maranya* [1993] eKLR as follows:

“It is possible to define “adverse possession” more fully, as the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owners enjoyment of the land for the purposes for which the owner intended to use it.”

31. In *Mbira v Gachuki* [2002] 1EALR 137 the court held 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 statutory prescribed period without interruption...”

32. In *Haro Yonda Juaje v Sadaka Dzengo Mbauro & Another* [2014] eKLR, this court articulated five elements that a claimant must prove on a balance of probability for a claim of adverse possession:

- i. One must prove that they have made physical entry on the land and is in actual possession or occupancy of the land for the statutory period.
- ii. The occupation of the land by the claimant must be non-permissive.
- iii. The acts done by the claimants must be inconsistent with the owner’s enjoyment of the soil for the purpose which he intended to use it.
- iv. Possession by the person seeking to prove title by adverse possession must be visible, open and notorious. The possessing act must be substantial.
- v. The possession must be continuous, uninterrupted and unbroken for the required statutory period.

33. In this case, the Defendants have satisfied the first element by showing that they have been in occupation of the suit property for more forty (40) years, a period which far exceeds the statutory period of twelve (12) years. This was evidenced through the report of the site visit, adduced by the Defendant as DEXB4, which shows that the Defendants and their families have been living on the suit land since 1968 undisturbed and uninterrupted.



34. Indeed, the uncontroverted evidence by the Defendants shows that the Defendants have built residential houses on the suit land, cultivated the land and have buried their deceased relatives, including their father on the land, with four visible graves, including that of the 1<sup>st</sup> Defendant. The said occupation was further corroborated by the evidence of DW2 and DW3
35. The second element that the Defendant were required to establish was that their occupation of the suit land is non-permissive. The Defendants' case is that the late Mr. Darshan Singh gave them possession of the suit land as consideration and in lieu of money for work and services rendered to the deceased by the Defendants and their late father, Laban Kwasima Ichehi.
36. The Plaintiff has submitted that as the Defendants have admitted that they are on the suit land with the full consent/ permission of the owner, the invocation of the doctrine of adverse possession is inaccurate and misguided.
37. In the case of *Ndiema Samburi Soti v Elvis Kimtai Chepkeses* [2010] eKLR, it was held that where the person occupying land does so with the consent of the owner, such a person cannot be said to be in adverse possession as in reality, he has not dispossessed the owner and the possession is not illegal. Such possession only becomes adverse when such a licence determines, as was held in *Wambugu v Njuguna*, [1983] KLR 172:
- “Where the claimant is in exclusive possession of the land with leave and license of the appellant in pursuance to a valid agreement, the possession becomes adverse and time begins to run at the time the license is determined”.
38. This court is persuaded by the authorities relied on by the Plaintiff in asserting that where an employee has land or a house by virtue of his employment, he cannot seek to have that land or house by way of adverse possession. That is what the court stated in *Delamere Estates v Ndungu Njai & Others* [2006] eKLR, which was later quoted with approval in *Wellington Lusweti Barasa and 75 others v Lands Limited & another* [2014] and in *Muhu Holdings Ltd & 2 others v Achina Nangomo & 27 others* [2018] eKLR as follows:
- “If a person is an employee of another and by virtue of his employment he is allowed to reside on his employer's property, his entry and occupation thereon is not adverse to his employer's rights because he entered therein with permission of his employer.
- The person is actually a licensee and time does not run in favour of a licensee as was held in *Hughes v Griffin*[1969] 1 WLR 23. In that case it was also held that a licensee has no adverse possession.”
39. On the basis of the admission by the Defendants in their pleadings and testimony that their occupation of the suit land was with the permission of the land owner, and that they entered the suit land by virtue of being employees of the registered owner, this court finds that the Defendants' claim for adverse possession must fail. The Defendants' prayer for an order of transfer of the suit land in their favour therefore fails.
40. For those reasons, the Defendants' Counterclaim dated May 15, 2018 is disallowed with no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 30TH DAY OF SEPTEMBER, 2022.**

**O. A. ANGOTE**



**JUDGE**

**In the presence of;**

**Ms Musyoka for the Plaintiff**

**Mr. Muthuri for muia for the Defendants**

**Court Assistant - June**

