



REPUBLIC OF KENYA



KENYA LAW
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**Yaa v Nyaje (Environment & Land Case 24 of 2015)
[2022] KEELC 12662 (KLR) (26 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12662 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 24 OF 2015
MAO ODENY, J
SEPTEMBER 26, 2022**

BETWEEN

RAPHAEL MURE YAA PLAINTIFF

AND

NYEVU NYAJE DEFENDANT

JUDGMENT

1. By a plaint dated February 4, 2015 the plaintiff herein sued the defendant seeking the following orders: -
 - a. Permanent injunction restraining the defendant, her servants, agents, workers, employees and/ or whosoever from interfering with the plaintiff's quiet and peaceful enjoyment and use of the suit plot.
 - b. An order compelling the defendant and her authorized agents and/or servants to remove and/ or demolish the building and/ or structure on plot known as Kilifi/Ngerenyi/223 at her own cost and hand over vacant possession of the said plot to the plaintiff. alternatively, the court bailiff to remove and/ or demolish any building and/ or structure and evict the defendant and her authorized agents and/ or servants and give the plaintiff vacant possession of the plot known as Kilifi/Ngerenyi/223 at the defendant's cost and that of the OCS Kilifi Police station or any other police station with the jurisdiction to provide security during the eviction of the defendant and her authorized agents and/ or servants from the suit plot.
 - c. Costs of this suit.
 - d. Interest on (c) above at court rates
 - e. Any other relief that this honourable court would dim fit to grant.
1. The defendant filed a defence and counterclaim denying the plaintiff's claims and sought the following orders;



- a. A declaration that the defendant has acquired the land by way of adverse possession.
- b. The defendant is the bonafide owner of the parcel of land having been purchased by the husband Kazungu Karisa Ngowa.
- c. That the title deed issued to the plaintiff be cancelled and be issued in the name of the defendant.
- d. Costs of the suit.

Plaintiff's Case

2. PW1-Kesi Mukare Lewa adopted his witness statement and stated that the suit land belonged to one Kajole Kombe who sold it to the plaintiff. On cross examination he stated that the defendant and her husband came into the land in the 1970's and the plaintiff found them on the land.
3. PW2- Kengo Kajole stated that the suit land belonged to his late father who is deceased and was buried on the suit land. He further stated that he sold the land to the plaintiff and it is not true that the defendant lives there.
4. On cross examination PW2 stated that the defendant's family did not welcome them to the area as alleged. PW2 further stated that at some point in time the defendant was cultivating the land but when they confronted them they left.
5. PW3- Charo Tete Koi stated that he helped the plaintiff acquire the land and added that after the death of Kajole, the son Kengo Kajole remained on the land PW3 also testified that Kajole and the wife were buried on the suit land.
6. PW4- John Wachira Karanja a Land Adjudicator and Settlement Officer Kilifi testified that the suit land was government land and that the government decided to settle the squatters which was done by following the adjudication and settlement procedures. He added that there is a procedure for receiving complaints and he was not aware that the defendant had raised any complaints. PW4 produced a report dated November 8, 2021. On cross examination he stated that he did not know how long the defendant had lived on the land.
7. PW5- Ruth Dama Ngowa the plaintiff's wife adopted her witness statement dated June 17, 2021 and produced the documents as per the list of documents as exhibits. She stated that the plaintiff bought the suit property from one Chengo.
8. On cross examination she stated that when they went to the suit land, the defendant was on the land and had built a house. She also stated that the defendant had been cultivating the land for many years. She added that Chengo Kajole sold the land to them while it was still in his father's name.

Defendant's Case

9. DW1 adopted her statement and stated that she has resided on the suit land with her husband for over 40 years. It was her evidence that her husband died in 2010 and was buried on the suit land. That when the government declared the area a settlement scheme, the late Kajole Kombe was allocated the suit land but the defendant continued occupying the land.
10. DW1 produced documents as per the list of documents to show that they have been on the suit land. On cross examination, she stated that she knew Kajole Kombe who was allowed to build a house temporarily. She added that the Land Adjudication officer went to the land but she was never



compensated for the trees planted. Further that they were ten family members who have constructed on the suit land.

11. DW2- Patrick Saro also adopted his statement and stated that he knew Kajole Pombe who was an in law to the defendant. It was his testimony that Kajole was given land to build a house temporarily and that the land was subdivided in 1963 and titles issued to Kajole for land which he was residing on.

Plaintiff's Submissions

12. Counsel identified 2 issues for determination namely whether the plaintiff is entitled to the orders sought and whether the defendant has acquired the suit land by way of adverse possession.
13. On the first issue counsel submitted that the Plaintiff has proved ownership by producing a title deed confirming that he is the owner of the suit property and the defendant has not set out any particulars of fraud that would lead to nullification of the title. Further that the defendant never challenged the allotment to the original allottee the late Mr Kajole.
14. Counsel relied on articles 40, 65 of the *Constitution* and sections 24, 25 and 26 of the *Land Registration Act* on the right to own property and on indefeasibility of title counsel relied on the case of *Ahmed Ibrahim Suleiman & another v Noor Khamis Surur* [2015] eKLR
15. It was counsel's further submission that the late Kajole Kombe was allocated the suit property in the 1960's and at the time of allocation the land was unsurveyed and constituted part of government land, therefore adverse possession cannot accrue against land owned by the government. Further that the plaintiff's interest in the land was registered in 2014 therefore a claim for adverse possession against the plaintiff cannot not hold.
16. Counsel also submitted that the doctrine of adverse possession is not applicable to public or trust land owned by the government and relied on section 41 of the *Limitation of Actions Act* which excludes public land from the application.
17. Mr Obaga relied on the case of case of *Francis Gitonga Macharia v Muiruri Waitbaka* Civil Appeal No 110 of 1997 where the Court of Appeal stated that that limitation period for purposes of adverse possession only starts running after registration of the land in the name of the respondent.

Defendant's Submissions

18. Counsel reiterated the evidence of the parties and submitted that the plaintiff neither showed that the allotment letter nor fees paid in that respect. Further that vide a letter dated November 21, 2006 from the Ministry of Lands and Adjudication shows that the allottee never paid legal fees for the allotment hence the seller did not have the capacity to sell the property.

Analysis And Determination

19. The issues for determination are as to whether the plaintiff is entitled to the reliefs sought and whether the defendant has acquired the suit land by way of adverse possession?
20. The plaintiff gave evidence and produced an agreement dated April 17, 2013 which shows that he purchased the suit property from Chengo Kajole Kombe for Kshs 1,200,000. The transfer document was registered in favour of the plaintiff on August 27, 2014 and thereafter a title deed was issued in the name of the plaintiff on October 2, 2014.



21. The defendant claimed that they have been on the suit land for a period of over 40 years hence have acquired the suit land *vide* adverse possession. There is no evidence that the plaintiff acquired the suit land fraudulently or was issued with the title deed illegally.
22. It is noteworthy that the defendant who hinges her claim on adverse possession question whether the original seller had capacity to sell the land from the plaintiff on the ground that neither an allotment letter nor payment for the allotment letter was produced.
23. For a party to succeed in a claim of adverse possession, such party must acknowledge the title holder's title. If you do not acknowledge the title, then you cannot hinge your claim on such title.
24. On the issue whether the defendant has acquired the suit land by way of adverse possession, an applicant must adhere to the provisions of section 7, 13, 18, 17 and 38 of the *Limitations of Actions Act*. Section 7 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”
25. In the case of *Kasuve v Mwaani Investments Limited & 4 others* 1 KLR 184, the Court of Appeal restated what a plaintiff in a claim for adverse possession has to prove; -

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition”.
26. The issue of when time starts running is key in the determination whether a claimant has been on the suit land for a period of 12 years continuously without interruption. In the instant case, the evidence on record shows that the plaintiff acquired the property in the year 2013 and a title in 2014. This suit was instituted in 2015 hence the defendant cannot benefit from the doctrine of adverse possession.
27. In the case of *Michale Githinji Kimotho v Nicholas Murathe Mugo* Nairobi Civil Appeal No 53 of 1995 and it held as follows; -

“If the appellant has been in occupation of the suit and as a squatter without any right or title to the suit land in the favour, he was obviously in no position to resist the respondent's claim. Though the appellant has for a long time been in occupation of the suit land which was government land before it was allocated to the respondent, this could not have helped him in resisting the respondent's claim where the latter is registered as owner of the land. Similar, if he, the appellant, had carried out any development on the suit land, he did so at his own peril and he could not expect any compensation in that respect. Even if for argument sake the suit land had been erroneously allocated to the respondent the appellant as a squatter in the suit land had no *locus standi* and the so called erroneously allocation could not be an answer to the respondent's claim for possession as the registered owner of the suit land.”
28. Further the land was government land which was allocated to squatters and therefor the doctrine of adverse possession could not run against the government as per section 41 of the *Limitation of Actions Act*.



29. I find that the plaintiff has proved his case and is therefore allowed as prayed. The defendant's counterclaim is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 26TH DAY OF SEPTEMBER, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

