



REPUBLIC OF KENYA



KENYA LAW
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**Mwambegu v Nyale (Environment & Land Case 36 of 2017)
[2022] KEELC 4843 (KLR) (21 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4843 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 36 OF 2017
MAO ODENY, J
SEPTEMBER 21, 2022**

BETWEEN

JUMA NGALA MWAMBEGU PLAINTIFF

AND

PAULINE KITI NYALE DEFENDANT

JUDGMENT

1. By a plaint dated February 21, 2017, the plaintiff herein sued the defendant seeking the following orders: -
 - a. A declaration that the plaintiff is the legal and lawful owner of all that suit property known as Gede/Mijomboni/22.
 - b. A permanent injunction order restraining the defendant, her servants, and or agents from trespassing and or in any manner whatsoever dealing in the suit property and or interfering with the plaintiff quiet possession of all that property known as Gede/Mijomboni/22.
 - c. Eviction of the defendant from all that property known as Gede/Mijomboni/22.
 - d. Costs of this suit.
 - e. Any other or further orders this honourable court deems fit to grant.
2. Upon service the defendant filed a defence and counterclaim dated March 1, 2019 seeking the following orders: -
 - a. A declaration that the plaintiff (by counter claim) is in adverse possession of the suit property.
 - b. An order for cancellation of the title to the suite property being Gede /Mijomboni/22 and registration thereof by the 2nd defendant (by counter claim) in the name of the plaintiff (by counter claim).



- c. Costs.
- d. Any other or further reliefs this honourable court deems fit to grant.

Plaintiff's Case

3. PW 1 adopted his witness statement as evidence in chief and produced a list of documents filed on February 21, 2017. It was PW1's evidence that the suit plot belonged to the late Dama Simeoni Mwambegu who was his grandmother who gave his father Emmanuel Ngala Mwambegu to hold the property in trust for himself and his brother Simon Mwambegu.
4. PW1 stated that after the demise of the grandmother the father took out letters of administration intestate on January 25, 1994, and that the land was transfer to the name of Emmanuel Ngala Mwambegu. That the property was later transferred to PW1 on September 20, 1995. However, the title deed got lost which prompted PW1 to make an application dated June 5, 2009 to the Land Registrar for the loss which was gazetted in the Kenya Gazette.
5. It was PW1's testimony that he was not able to get the title as one Geoffrey W Katana who is the late husband to the defendant had lodged a caution claiming purchaser's interest.
6. On cross examination by Mr Mwakisha, counsel for the defendant, PW1 stated that he lives on Plot No Kilifi/Mbarakachembe/11 situated on one side of the Kilifi-Malindi highway while the suit property is on the opposite side of the highway. To him, the two properties are one and the same plot divided by the highway.
7. PW1 further stated that he started seeing the defendant and her family on the suit property in the late 1970's but did not know how they acquired the suit property and that he did not know whether his father sold the land to the defendant's husband.

Defendant's Case

8. DW1 adopted her witness statement and stated that she has been in occupation of the suit property together with her late husband for a period of over 30 years. DW1 testified that the late husband bought the suit property in the year 1978 from Ngala Mwambegu the father of the Plaintiff and have developed since 1987.
9. It was DW1's evidence that they have occupied the suit property openly, peacefully and without interference of the registered proprietor for over 12 years and thus acquired the said plot by way of adverse possession for over 30 years.
10. DW1 confirmed that the land was originally in Dama Mwambegu's name who is deceased and that the late husband is the one who paid the succession Cause fees to transfer the title to Ngala's name who got letters of administration. That Ngala asked the Defendant's husband to come from Meru so that they could process a transfer but when he visited the Lands office, he found that the title had been transferred to Juma Ngala's name which prompted him to lodge a caution on the suit land.
11. DW1 stated that the suit portion measures 6acres which she urged the court to make an order that it be transferred to her as she has acquired it by way of adverse possession as the plaintiff's rights over the suit property have since been extinguished by virtue of section 7 of the [Limitation of Actions Act](#).



Plaintiff's Submissions

12. The plaintiff submitted that his registration status was not disputed, therefore, his proprietorship could not be challenged unless proven that the same was acquired fraudulently.
13. The plaintiff further submitted that the defendant's claim for adverse possession could not co-exist with her claim for a purchaser's interest and relied on the case of *William Tadeus v Swaleh Jined Bawazir* ELC No 190 of 203 to buttress this point. The Plaintiff also stated that the claim for adverse possession could not stand for reasons that from the time he discovered the trespass in the year 2001, he filed a suit against the defendant's husband, therefore it could not be said that the defendant has been in peaceful possession and cited the cases of *Abmed Abdulhakim & another v Member for Lands, Mines & another* [1958] EA 436; and *Kimani Ruchine & another v Swift Rutherford Co Ltd & another* [1977] KLR 10.
14. The plaintiff therefore urged the court to allow the claim as prayed and dismiss the defendant's counterclaim.

Defendant's Submissions

15. Counsel submitted that it is not disputed that the defendant has been in occupation of the suit property since early 70's hence the plaintiff's rights to the suit property have been extinguished by virtue of section 7 of the *Limitation of Actions Act*, Cap 22 and that the
16. Counsel further submitted that exclusive possession founded on an aborted sale is recognized as one of the circumstances in which time would run in favour of an occupant for purposes of limitation under section 7 and 38 of the *Limitation of Actions Act* and cited the case of *Public Trustee v Waruru Ndegwa* [1984] eKLR; and *Sisto Wambugu v Njuguna* [1983] eKLR.
17. Counsel also submitted that the above position was espoused in the Court of Appeal decision in *Sisto Wambugu v Njuguna* [1983] eKLR, where the court recognized exclusive possession pursuant to a sale as being capable of providing a platform upon which time would run for purposes of limitation.
18. The defendant urged the court to dismiss the plaintiff's claim by virtue of adverse possession as was held in the case of *Chevron K Ltd v Harrison Charo Shutu* [2016] eKLR.

Analysis and Determination

19. The issue for determination is whether the plaintiff is the rightful owner of the suit land and whether the defendant has acquired the suit land by way of adverse possession.
20. It is not disputed that the suit land is registered in the plaintiff's name as per the search certificate. What is in dispute is whether the plaintiff is the rightful owner of the suit land as the defendant has stated that she has been in exclusive and uninterrupted possession/occupation of the suit land.
21. The plaintiff gave evidence and stated that he started seeing the defendants in occupation of the suit land in early 1970's and did not know how they got into such possession. The plaintiff further stated in his plaint as follows at paragraphs 4 and 6:-
 - 4; The plaintiff avers that the defendant has without any colour of right or any basis in law trespassed on the suit property, have (sic) built permanent structures and is cultivating and carrying on other agricultural activities on the suit property.
Particulars
 - a) The defendant has constructed permanent structures without the plaintiff's consent.



- b) The defendant has and is still living in the suit property without the plaintiff's consent.
 - c) The defendant is cultivating crops and carrying on other agricultural activities on the suit property without the plaintiff's consent.
- 6 The plaintiff avers further that the continuous occupation of the suit property by the defendant has effectively denied the plaintiff the use and quiet enjoyment of the suit property and the plaintiff's plans to develop the same has failed.
22. Parties are bound by their pleadings and in this case the plaintiff admits in the plaint and in his evidence that the defendant has been in continuous occupation of the suit land. He also admitted that he lives on the right side of the Kilifi Mombasa road and that the defendant is on the left side of the road.
23. The plaintiff did not counter the defendant's evidence that the defendant's husband is the one who paid for the succession cause to enable the title transferred in his name and that the same was supposed to be transferred in the defendant's late husband's name. The occupation of the defendant for over a period of 30 years which is admitted by the plaintiff cannot be wished away as the plaintiff could have taken action for recovery of the land before the 12-year period had lapsed.
24. The plaintiff has also not explained why he did not question the lodging of the caution by the deceased Katana which caution was lodged immediately after the issuance of title to the plaintiff. The said caution is still in force and the Plaintiff has not taken any steps to remove it.
25. A party claiming to have acquired land by way of adverse possession must prove that he/she has been in 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. In the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, the court held: -
“The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. *De facto* use, and *de facto* occupation must be shown”
27. The plaintiff was aware that the defendant has been in occupation since early 1970's which he admitted during his evidence in chief but did not take any action to remove or evict the defendant. The plaintiff also stated that the defendant has built structures, is cultivating the suit land. The defendant also stated that have planted trees cashew nuts, coconut trees and has been cultivating the land.
28. The action that the plaintiff purportedly took was to file two cases in 2001 which he subsequently withdrew. Even if we start counting when the time started running from the time he first filed the suit to recover land in 2001, the Plaintiff would still have lost his right vide adverse possession. The current case was filed in 2017 when the right to the suit property had been extinguished.
29. There was no evidence that the defendant got into the suit land by the Plaintiff's permission, the plaintiff having stated in his plaint that the defendant got into the suit property without his consent or any color of right. He also confirmed during cross examination that he did not know how the defendant got into the land but saw them in early 1970's.



30. In the case of *Joseph Gabumi Kiritu v Lawrence Munyambu Kabura* CA No 20 of 1993 Justice Kwach JA (as he then was) stated as follows; -

“The passage from Chesire’s Modern Law of Real Property to which Porter JA made reference in *Githu v Ndeete* is important and deserves to be read in full.Time which has begun running under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that merely formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. He must either make a peaceable and effective entry, or sue for recovery of the land.”.

31. The plaintiff attempted to stop time from running by filing a case in court to interrupt the occupation of the adverse possessor but he did it too late when his rights had already been extinguished.

32. I have considered the pleadings, the evidence on record and the submissions by the parties together with the relevant judicial authorities and find that the plaintiff has failed to prove his case against the defendant to the required standard and the same is dismissed with costs to the defendant.

33. I have also considered the defendant’s counterclaim and find that defendant has proved that she acquired the suit land by way of adverse possession and grant the specific orders as follows:

- a. A declaration is hereby issued that the defendant is in adverse possession of the suit property.
- b. An order is hereby issued for the cancellation of the suit property No. Gede /Mijomboni/22 in the Plaintiff’s name and be registered in the name of the defendant.
- c. Costs to the defendant.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST 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.

