



REPUBLIC OF KENYA



KENYA LAW

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

**Ali v Kwamboka (Environment & Land Case 595 of 2017)
[2022] KEELC 14833 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14833 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 595 OF 2017
MN KULLOW, J
NOVEMBER 17, 2022
IN THE MATTER OF AN APPLICATION FOR ADVERSE
POSSESSION UNDER ORDER 37 RULE 7(1)(2) AS READ
WITH SECTION 38 OF THE LIMITATION OF ACTIONS ACT
CAPP 21 AND THE REGISTERED LANDS ACT CAP 300
LAWS OF KENYA**

BETWEEN

YAHYA HASSAN ALI APPLICANT

AND

MILLEN KWAMBOKA RESPONDENT

JUDGMENT

1. Yahya Hassan Ali ('the applicant') commenced this suit by way of an Originating Summons dated August 14, 2014 against the respondent for a determination of the following issues: -
 - i. That this honourable court do declare that the applicant has acquired adverse possession of all that land measuring 2.5 acres being the portion he is occupying and using on land parcel no Suna East/Wasweta I/1399 having been in uninterrupted occupation and/or possession of the said portion for over 12 years, that is to say since 1973.
 - ii. That this honourable court be further pleased to order land parcel no Suna East/ Wasweta I/ 1399 transferred and registered in the names of the applicant.
 - iii. That this honourable court do issue injunctions restraining the respondent from interfering with the applicant's enjoyment of the said 2.5 Acres.
 - iv. Any other relief this honourable court may deem fit to grant in the circumstances.



2. The Originating Summons is premised on the 2 grounds thereof and on the applicant's Supporting Affidavit sworn on August 14, 2014. The applicant avers that the suit land which was originally L R no Suna East/ WAasweta I/ 936 belonged to his grandfather who is since deceased and he has lived on the said parcel since birth in 1973 and has continued to live therein together with the rest of the extended family. He stated that sometimes in the year 2000, he constructed a house on his portion of land where he has continued to occupy/ reside in together with his nuclear family to date.
3. It is his contention that in January 2014; the respondent informed him that she was the registered proprietor of the said suit parcel having purchased the same from his grandmother. It is however his case that he has neither seen the said respondent before the said date nor was he aware of the alleged sale and transfer of the suit parcel to the respondent.
4. He maintained that he has been in occupation and possession of the suit land continuously for a period exceeding 12 years and the said occupation has been open and without permission or consent of the respondent. He thus contends that as a result of the said occupation and possession of over 12 years, he has acquired adverse possession of the suit property and urged the court to allow his claim.
5. The respondent entered appearance and filed a Replying Affidavit sworn on July 21, 2021, witness statement dated November 22, 2021 and a list of documents evenly date. She maintained that she is the registered proprietor of the suit parcel L R no Suna East/ Wasweta I/ 1399 measuring 1.0 ha having acquired the same as a bonafide purchaser for value without notice. That the said land was a subdivision of original parcel no Suna East/ Wasweta I/ 936; she acquired the letter of consent from the Land Control Board in 1982 and has since acquired title to the said portion of land.
6. It is her claim that sometimes in 2013; the applicant without any right or justifiable cause, wrongfully and unlawfully trespassed onto the suit land and begun construction and she outlined the particulars of trespass. She further contends that despite several requests to the applicant to vacate the land, he refused and she therefore instituted a case against him vide KISII HC ELC NO 437 of 2014 now MIGORI HCELC 479 of 2017, which suit was stayed pending the determination of the instant suit.
7. She denied the applicant's allegations that he has been in open, continuous, uninterrupted and peaceful possession and occupation of the suit land for over 12 years and maintained that the applicant entered into/ trespassed into the suit land sometimes in the 2013 and therefore it has only been 7 years since his entry onto the said land. Further, she stated that the said occupation was interrupted in 2014 when she filed her claim for trespass against the applicant.
8. He dismissed the applicant's claim as having been made in bad faith and is highly prejudicial and urged the court to dismiss the applicant's suit and to issue an order of injunction and eviction orders against the applicant to stop them from further trespass on the said suit parcel.

Trial

9. On June 06, 2022 the plaintiff's case proceeded for hearing. The plaintiff testified as PW1, he adopted his witness statement as his testimony in chief. It was also his testimony that he built a house on the suit land in the year 2000 and moved in and dismissed the claims by the defendants that he moved into the suit land in the year 2013.
10. It his contention that he later found out that the land was registered in the name of the Defendant and it is then that he filed the instant suit. He urged the court to allow his claim and he be issued with the title of the same.
11. He also produced the following documents as exhibits in support of his case as follows;



- a. Copy of Green Card for L R no Suna East/ Wasweta I/ 1399 – PExhibit 1
 - b. Bundle of photographs of the suit land – PExhibit 2 (a) and (b)
12. On cross-examination, he stated that he was not aware that the suit land was a subdivision of Suna East/Wasweta I/936, though the same were registered in the name of Khadija Ali and Binti Rashid Ali, who are his grandmothers. He further stated that he was not aware that the suit land had been sold to the defendant by his family members or at all. It was his claim that he inherited the suit land from his deceased father Hassan Ali.
 13. On re-examination he clarified that he was not aware that the suit land had been sold at the time he was building his house and further that at the time of the alleged sale he was 6 years old. That when he was shown where to build, there was no visible boundary between parcel nos 1398 & 1399. Further, there was no resistance by anyone stopping him when he started constructing his house.
 14. Mustafa Hassan testified as PW2; he adopted his witness statement as his testimony in chief. On cross-examination, it was his testimony that the plaintiff's extended family lives on the suit land.
 15. On re-examination, he clarified that the plaintiff lives on his compound and his relatives lives in their compound.
 16. Esau Ojode testified as PW3; he stated that he is the area village elder and adopted his witness statement as his testimony and evidence in chief. He further stated that as a village elder, he has never received any complaint from anyone that a house had been built on their land.
 17. On cross-examination he stated that he did not know the defendant as a resident of his village. He conceded that even though he could not remember the parcel number of the land where the plaintiff had built his house, he was present when the house was being constructed in the year 2000, together with the other members of the plaintiff's family. The plaintiff thereafter closed his case.
 18. The matter proceeded for defence Hearing on the same day. The defendant testified as DW1, she adopted her witness statement dated November 22, 2021 as part of her evidence and testimony in chief. She further stated she purchased the suit land in 1978 and was issued with a certificate of title on June 26, 1979. Upon the said purchase; she fenced the land in the year 1982.
 19. It was her claim that the plaintiff challenged her title to the suit land but the said title was never revoked and/or cancelled. It was her position that the plaintiff started constructing on the land in the year 2013 and she immediately reported the matter to the police and denied the plaintiff's averments that he had been staying on the suit land for more than 12 years.
 20. She relied on the documents on her list of documents dated November 25, 2022 and asked the court to mark the same as defence exhibits in support of her case as follows;
 - a. Copy of title deed of L R no Suna East/ Wasweta I/1399 –DExhibit 1
 - b. Mutation Form dated July 6, 1978 – DExhibit 2
 - c. Chief's letter dated March 4, 2019 – DExhibit 3
 - d. Letter of consent for correction of name dated August 30, 1982 - DExhibit 4
 - e. Copies of land registry receipts dated July 14, 1978, February 9, 1983, August 14, 1998 & August 17, 1998 - DExhibit 5 (a) to (d)
 - f. Photographs – DExhibit 6



21. On cross-examination, she stated that she did not develop the land immediately after she purchased it and have been unable to develop it to date due to financial problems. She reiterated that when she found out about the plaintiff's construction, she reported the matter to the police and to the D C, though she conceded that she did neither produce the OB number nor copies of the statement made at the office of the D C.
22. On re-examination she clarified that she was unable to develop the suit land due to financial constraints. Further, that one Mr Owino informed her that there was a structure built on her suit land sometimes in the year 2013. The Defence thereafter closed their case.
23. Upon close of the defence case, I issued directions on the filing of submissions. Both parties filed their rival submissions and authorities which I have taken into account and summarized as hereunder;

Applicant's submissions

24. The applicant gave a brief background of the case and a summary of both the applicant and the respondent's case with the respective testimonies in court.
25. He further submitted that the facts on record and which have not been controverted are that he constructed a house on a portion of the suit property in the year 2000, the same was stated by the applicant and confirmed by his 2 witnesses and the said occupation continued till 2014 when the respondent confronted him. That the respondent did not adduce any evidence to prove any attempts in disrupting the applicant's peaceful possession between the year 2000 – 2014. He maintained that he had met the legal threshold for the claim of adverse possession.
26. He relied on the following cases in support of his claim; *Maweu vs Kiu Ranching and Farming Coop Society* CA no 2 of 1983 KLR 430, KISUMU CA no 110 of 2016 *Richard Wefwafwa Songoi vs Ben Munyifwa Songoi*.

Defendants' submissions

27. The respondent submitted on 3 issues; the first issue was whether the applicant has proven his claim of adverse possession. It was his submission that the applicant only pleaded that he occupies 2.5 acres of the suit land but did not lead any evidence to prove the exact location of occupation other than the photographs of his home. That a surveyor's report would have been sufficient evidence to prove both the alleged occupation and acreage of the portion occupied.
28. It was the respondent's contention that the applicant's occupation was unknown to her since she had been ill for such a long time and therefore the said occupation could not have been open and adverse if the respondent was unaware of such occupation. She submitted that adverse possession cannot be claimed against a party who is unaware of such occupation and in the circumstances, the applicant had failed to satisfy all the elements necessary to prove adverse possession.
29. It was also the respondent's position that there was no accumulation of time amounting to 12 years and thus that the applicant had failed to prove that he is qualified to have legal title over the suit property.
30. On the second issue, she maintained that the title she holds of the claimed portion of land remains valid and stated that the applicant was not entitled to any of the orders sought. She thus urged the court to dismiss the suit with costs.



Analysis and determination

31. I have carefully considered the Originating Summons and the response filed thereto, the respective exhibits and submissions in totality. On that account, it is my considered opinion that the following issues arise for determination: -
- a. Whether the claim of adverse possession has been proved by the plaintiff.
 - b. Whether the plaintiff is entitled to the reliefs sought.

A. Whether the claim of adverse possession has been proved by the plaintiff.

32. Adverse possession is essentially a situation where a person takes possession of land and asserts his rights over it and the person having title and rights to the said land neglects to take action against such person in assertion of his title for a period of twelve (12) years.
33. Section 7 of the *Limitation of Actions Act* provides 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.”
34. Further section 13 of the *Limitation of Actions Act* provides 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.
35. The requirements for adverse possession were reiterated in Kisumu Civil Appeal No 27 of 2013 *Samuel Kihamba v Mary Mbaisi* [2015] eKLR where the court held as follows: -
- “Strictly, for one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, *nec vi, nec clam, nec precario*. The additional requirement is that of *animus possidendi*, or intention to have the land”
36. It is the applicant’s contention that he has been in possession and occupation of a portion of the suit property measuring approx. 2.5 acres since 1973. He further stated that in the year 2000, he constructed a house on the suit property and has remained in occupation to date. It is his claim that his occupation was only disrupted in the year 2014 by the respondent hence the instant suit.
37. The respondent on the other hand; denied the claims by the applicant and maintained that she is the lawful owner of the suit property with a valid title. She further dismissed the applicant’s claims that he has been in possession and occupation of the suit property for a period of over 12 years and stated that the applicant trespassed into her suit property sometimes the year 2013. She further stated that the Applicant’s occupation was not known to her and therefore the applicant has not satisfied the elements of adverse possession.



38. From the foregoing, it is not in dispute that the applicant has been in occupation of the suit parcel measuring approx. 2.5 acres; the only issue in contention is the period of such possession and occupation. The plaintiff contends that he moved into the suit land and constructed a house sometimes in the year 2000 and remained in occupation thereof until sometimes in the year 2014 when the respondent disrupted his occupation hence the instant suit. The respondent on the other hand maintains that the applicant's occupation and possession was in the year 2013 and the same was disrupted in the year 2014 when she lodged a trespass suit against him and thus dismissed the claims that such possession and occupation has been for over 12 years.
39. Adverse possession is a hostile takeover by clearly asserting a wrongful disposition in denial of the title of the rightful owner. It must start with a wrongful dispossession of the rightful owner and be actual, visible, exclusive and continued over the statutory period of 12 years. Even though the suit property is registered in the name of the respondent, the applicant herein moved into the land and constructed a house in the year 2000 where he lives with his family to date. Both PW2 and PW3 testified to this effect and confirmed that the applicant and his family lives on the suit land. Further, PW3 testified that he was present when the house was being constructed in the year 2000. It is further the applicant's contention that he remained in possession thereof until sometimes in the year 2014 when the respondent disrupted his occupation hence the instant suit. He maintained that he is entitled to the suit property by virtue of adverse possession owing to his occupation of the suit for over 12 years.
40. It is important to note that even though the respondent maintained that the applicant entered the suit land in 2013, it was her testimony that she was informed of the said occupation by one Owino but did not call the said person to testify in support of her claims. As such therefore, the said averments are hearsay with no probative value.
41. Possession and occupation are one of the key requirements that need to be demonstrated in a claim for adverse possession. Possession and occupation must be open, continuous, uninterrupted for a period of 12 years. From the foregoing, it is my finding that the applicant has sufficiently demonstrated that his possession and occupation of the suit land from the year 2000 became adverse in the year 2012.
42. I have also looked at the respective exhibits produced by the parties herein; the applicant produced bundle of photographs in support of his occupation claims while the respondent produced documents in support of the ownership and registration of the suit land in her name. It is worth pointing out that in a claim of adverse possession, the claim is on the land rather than the title; the applicant does not contest the ownership of the respondent but only asserts rights over the said property by virtue of his continued possession and occupation for a period of over 12 years which are inconsistent with the title of the respondent as the owner of the land. The said occupation must be with the clear intention to obtain and hold the land adversely.
43. Having considered the witness testimonies and the evidence before me, I find and hold that the applicant has satisfactorily proved on a balance of probabilities that his occupation and use of a portion of the suit property measuring 2.5 acres to warrant the reliefs sought.

B. Whether the plaintiff is entitled to the reliefs sought

44. In view of the foregoing, having held that the applicant has proved his claim on adverse possession against the defendant's title to the required standard, I find that he is entitled to the reliefs sought.



Conclusion

45. The upshot of the above is that the plaintiff has proved his claim on adverse possession on a balance of probabilities and I accordingly allow the Originating Summons dated August 14, 2014 on the following terms;
- a. A declaration be and is hereby made that the applicant has acquired adverse possession of a portion of the suit property measuring 2.5 Acres being the portion he is occupying and using on land parcel no Suna East/Wasweta I/1399 having been in uninterrupted occupation and/or possession of the said portion for over 12 years.
 - b. An order be and is hereby issued that a portion of land parcel no Suna East/ Wasweta I/ 1399 measuring 2.5acres be transferred and registered in the names of the applicant.
 - c. An order of injunction be and is hereby issued restraining the respondent either by herself, her agents, servants, employees or anyone claiming through her, from interfering with the applicant's enjoyment of the said 2.5 Acres.
 - d. Costs of the suit be borne by the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 17TH DAY OF OCTOBER, 2022.

MOHAMMED N KULLOW

JUDGE

In presence of;-

Nonappearance for the plaintiff

Nonappearance for the defendant

Court assistant - Tom Maurice

