



**Bedan v Diocese of Embu Trustees Registered (Environment & Land
Case 36 of 2018) [2024] KEELC 1435 (KLR) (5 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1435 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 36 OF 2018**

A KANIARU, J

MARCH 5, 2024

BETWEEN

ALEXANDER KARIOKO BEDAN PLAINTIFF

AND

DIOCESE OF EMBU TRUSTEES REGISTERED DEFENDANT

JUDGMENT

1. The plaintiff herein- Alexander Karioko Bedan – filed this case here against the defendant –Diocese Of Embu Trustees Registered –vide an Originating Summons dated 13.08.2018 and filed on 12.09.2018. In the summons he claims 1.34 Acres out of land parcel No Gatari/Nembure/3120 as an adverse possessor. The land is registered in the name of the defendant – Diocese of Embu Trustees Registered. The plaintiff wishes the court to order that the defendant title to the 1.34 acres out of Gatari/Nembure/3120 has been extinguished by way of adverse possession and that the defendants transfer the land to him. He also wants costs of the suit.
2. The defendant responded to the plaintiff's suit via a replying affidavit dated 05.11.2018 and filed on the same date. The replying affidavit is sworn by Rev. FR. John Macharia Njeru who is said to be the Trustee and priest in charge of the Catholic Diocese of Embu. He essentially denies the plaintiff's claim and explains that the defendant acquired the suit land from Alexander Muiyu & Elizabeth Waithera Mburu as a gift for construction of a church. That the suit land was originally registered in the name of Bedan Muthara Mtetu who he believes is the father of the plaintiff.
3. He stated further that the plaintiff is the registered proprietor of land parcel no. Gatari/nembure/6582 which shares a common boundary with the suit land herein - Gatari/Nembure/3120. That sometime in the year 2011 the plaintiff defaced the official common boundary of the two parcels of land and forcibly extended his land which is 0.40 ha into the defendants land thus illegally purporting to acquire 1.34 acres. He considers this an act of trespass. That afterwards the defaced common boundary was re-



- demarcated and repositioned by the District Surveyor in the year 2012. The re-demarcation has caused the plaintiff to engage the District Surveyor and the defendants in protracted disputes.
4. It was further his case that the plaintiff has not been in uninterrupted, open, and continuous possession of the said portion of land since 1975. That the defendant only came to own the land in 1995. That the plaintiff was forcibly removed in 2012 from the suit portion of land when the District Surveyor re-demarcated and restored the common boundary.
 5. The matter was set down for hearing on 19.01.2023 and only the plaintiff testified. He began by adopting his witness statement as evidence in his case. He then testified that he is claiming the suit land from the defendant. That he was the one occupying the land in the past but nobody occupies the land now. That he now lives on his son's land which is Gaturi/Nembure/6582. The land is registered in his name although he is registered as such on behalf of his son. He also testified that his house was on the portion that he was claiming but it was demolished by the defendant. He produced in evidence the green card of the suit land as well as a copy of the search as Plaintiff's Exhibit 1 & 2 respectively.
 6. On cross examination, it was his testimony that the suit land originally belonged to his father who sold it to Mburu in 1981. Mburu then sold it to the church. That there is a wooden church built there. Contrary to his statement in chief, he testified that his step mother gave him one acre from land parcel no. 2740 which became parcel no. Gaturi/Nembure/6582 that he has owned for about 20 years. That his house and his coffee is on that one acre which also borders the defendants land. That where the wooden church is and where his house is, there is an open, unoccupied space which is actually the land he is claiming. His position was that there is no boundary as he had uprooted it.
 7. He admitted that the District Surveyor known as Karuchu put up the boundary and that there is a permanent church coming up where he is claiming. It was also his case that there is coffee belonging to him on the suit portion but the church building is being built there.
 8. The defendants on the other hand also had one witness. DW1 was Father or Padre John Njeru Macharia. He testified that the diocese was given the suit land as a gift, which land was 3.10 Ha in size. That they built a church on one part of the land and the other part is being cultivated by the church. That the plaintiff is their neighbor and that he complained about the boundary issue in several places without success. That the plaintiff took the matter to the Land Tribunal. The Land Registrar and the District Surveyor visited the land, took measurements, and the boundary was fixed. The boundary is still in situ.
 9. He testified that the plaintiff would plant some maize on the land but they would order him to leave and he would. That there is no new church being put up on the land. That the first church building was a semi-permanent one and that they decided to put up a permanent building and construction is still on going. It was his testimony that the plaintiff has never lived on the land, and that his house is on his own parcel of land. That the plaintiff's efforts to cultivate the suit land have been futile as they have been stopped completely. He produced in evidence a copy of the green card for land parcel Gaturi/Nembure/3120 & 6582 as well as the mutation form for parcel 2740.
 10. The parties filed written submissions, with the plaintiff's submissions filed on 13.10.2023 and the defendant's on 19.10.2023. The plaintiff submitted that he has satisfied the test to be declared the owner of the portion of the suit land by way of adverse possession. He cited the case of Margaret Wangui Njugu & 2 Others v George Kimani & Anor (2019) Eklr to reinforce this position.
 11. The defendant on the other hand submitted that the principles of adverse possession are set out in the court of appeal case of Ruth Wangari Kanyagia v Josephine Muthoni Kinyanjui (2017) Eklr citing the India Supreme court decision in the case of Kamataka Board of Wakf v Government of India & Others



(2004) 10 SCC 779. That the way to assess proof of adverse possession is that the court must first have regard to the manner and circumstances under which the alleged dispossession or discontinuance of dispossession took place and whether the occupation by the adverse possessor excluded the true owner. That there must be a discontinuance of possession by the owner, or he must have been removed from the land followed by the clear actual possession by the claimant.

12. They submitted further that the defendants were and are still utilizing the suit land. That there was no point where the plaintiff dispossessed the defendant of the land. That the plaintiff failed to produce evidence to support his claim of being in possession of the suit land for the statutory period or his developments of the same. They urged the court to dismiss the plaintiff's case.
13. I have considered the pleadings as filed, the evidence tendered during hearing, and the written rival submissions. The task before me is to determine if the plaintiff has demonstrated that he is an adverse possessor.
14. What is not in dispute herein is that the plaintiff owns land that borders that of the defendants. It is also clear that both parties are the registered proprietors of their respective parcels of land.
15. The plaintiff's claim however is that he has become entitled to 1.34 acres out of the defendant's parcel of land by way of adverse possession. He says that the said portion of land is an open and unoccupied space between where he has built his house on his land and where the defendants have built a church. The said space is said to belong to the defendants but the plaintiff claims that he has been in possession of the same since 1975. He says that he had built a house on the said portion of land but the house was demolished by the defendants although no evidence of the same was tendered.
16. The defendant on the other hand says that there has been a boundary dispute over time between the two parties. That the plaintiff around the year 2011 moved the common boundary of the two parcels of land to show that his land which was originally 0.40 ha was 1.34 acres which amounts to trespass. That the boundary was fixed by the Land Registrar and the District Surveyor which fact the plaintiff does not deny. The plaintiff however says that there exists no boundary as he uprooted the same. The defendant also deny the plaintiff's possession of the suit portion of land as his attempts to cultivate the said portion have been met with resistance.
17. In the case of *Mtana Lewa –vs- Kahindi Ngala Mwangandi* [2015] eKLR as cited in *Otwoma v Ombele* (Environment & Land Case 13 of 2021) [2022] KEELC 2522 (KLR) (10 May 2022) (Judgment) the court of Appeal defined adverse possession as:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that 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.”
18. In the case of *Richard Wefwafwa Songoi Vs Ben Muniyifwa Songoi* [2020]eKLR, the court pointed out, inter alia, that an adverse possessor needed to demonstrate the following:
 - a. On what date he went into possession.
 - b. What was the nature of his possession.
 - c. Whether the fact of his possession was known to the other party. and;



- d. For how long the possession had continued.
19. Section 13 (1&2) of the *Limitation of Actions Act* also provides:
- 1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of Limitation can run (which possession is this Act referred to as adverse possession), where under sections 9, 10, 11 and 12 of this Act 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 cease to be in adverse possession, the right of action is no longer taken to have accrued and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.
20. It is clear from all this that in order to succeed in a claim of adverse possession, the claiming party has to demonstrate that he has been in continuous possession of the land for the requisite period, which is twelve (12) years in Kenya. The true character of adverse possession must be brought out by the claimant. This requires demonstration that the possession has been continuous, uninterrupted and/ or unbroken for the requisite statutory period. The possession should also be visible, open and notorious thus giving reasonable notice to the registered owner and the community at large of the exercise of dominion over the land.
21. This legal position is discernible in a long line of cases including *Wambugu vs Njuguna* (1983) KLR 172, where the court inter alia held as follows;
- “In order to acquire by the statute of Limitation title to Land which has a known owner that owner must have lost his right to the land either by being disposed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil, for the purpose of which he intended to use it.”
- And that;
- “The proper way of assessing proof of adverse possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.” Further in *Mbira Vs Gachuhi* (2002) IEALR 137, the court also observed thus;
- “...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....”
22. My considered view is that the plaintiff has not succeeded to prove that he is an adverse possessor. He in fact admitted that what he is claiming is an “open and unoccupied” space between his parcel of land and that of the defendants. There is also credible evidence that his attempts to possess or use the land have repeatedly been thwarted by the defendant. At the time of giving evidence here, it is reasonably clear that the plaintiff could not be said to be in actual or even ostensible possession of the land. There



is nothing like continuous possession. The defendant demonstrated that it is in actual physical control of the land.

23. It is crucial to point out also that the plaintiff was the only person to give evidence in the matter. Adverse possession requires that notoriety of possession be shown. This would necessarily require that the fact of possession by the plaintiff should be well known by persons other than himself. It seems odd to the court that the plaintiff could not bring evidence to show that other people knew him as the kind of possessor he claims to be. The fact of visible, notorious, and/ or open possession is therefore not demonstrated.
24. The upshot, in light of the foregoing, the plaintiff has not proved he is an adverse possessor. The plaintiff's suit is therefore dismissed in its entirety. Costs of the suit to the defendant.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 5TH DAY OF MARCH, 2024.

In the presence of;

Mr. Njeru Ithiga for the defendant - present

Court assistant - Leadys

A. KANIARU

JUDGE –ELC, EMBU

5.3.2024

