



**Hathing Self Help Group (With a Membership of 293 Members and Suing Through the Registered Officials James Nzeru Musembi, Daniel Mutinda Ndwiki and Harrison Mutunga Wambua) v Co-operative Bank Housing Co-operative Society Ltd (Enviromental and Land Originating Summons E001 of 2021) [2024] KEELC 1270 (KLR) (6 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1270 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E001 OF 2021**

**A NYUKURI, J  
MARCH 6, 2024**

**BETWEEN**

**HATHINGE SELF HELP GROUP ..... PLAINTIFF  
WITH A MEMBERSHIP OF 293 MEMBERS AND SUING THROUGH THE  
REGISTERED OFFICIALS JAMES NZERU MUSEMBI, DANIEL MUTINDA  
NDWIKI AND HARRISON MUTUNGA WAMBUA**

**AND**

**CO-OPERATIVE BANK HOUSING CO-OPERATIVE SOCIETY  
LTD ..... DEFENDANT**

**JUDGMENT**

**Introduction**

1. This suit was instituted by the officials of Hathing Self Help Group representing 293 members, against the Cooperative Bank Housing Cooperative Society Limited, by way of an Originating Summons dated 18<sup>th</sup> January, 2021 and amended on 20<sup>th</sup> January, 2021. The plaintiff sued the defendant claiming ownership by way of adverse possession of the parcel of land known as LR 14750/2 or any resultant subdivision thereof (suit property).
2. The amended Originating Summons was supported by the affidavit sworn on 20<sup>th</sup> January, 2021 by Harrison Mutunga Wambua, one of the officials of the plaintiff. The plaintiffs’ case is that the plaintiff is a registered society with a membership of 293 members who reside on the suit property. He stated that the plaintiffs have been in occupation of the suit property since 1980 to date. Further that the plaintiffs’ membership have been in open, peaceful and uninterrupted occupation of the suit property for over 40 years without consent of the defendant. That they have cultivated crops and constructed permanent and semi-permanent houses thereon where they live with their families.



3. He also stated that in December, 2020, in an attempt to take possession, the defendant attempted to fence the suit property and attempted to unlawfully evict the plaintiffs' members by demolishing some of the houses of the plaintiffs' members. He attached the plaintiffs' resolutions, certificate of registration, copy of title and photographs.
4. They sought the court's intervention in determining the following questions;
  - a. Whether the applicants have acquired the title to and are entitled to the entire title (possession, occupation and transfer of property namely LR No. 14750/2 or any resultant subdivision thereof by adverse possession on account of continuous uninterrupted possession thereof for over 40 years since the year 1980.
  - b. Whether a permanent injunction should be issued restraining the defendant by themselves, agents, servants or otherwise howsoever from interfering with the plaintiff, Hathing Self Help Group and or their servants and or members access to quiet possession of, accessing, advertising, offering for sale, leasing, mortgaging, charging, transferring or assigning, subdividing and or otherwise dealing with property namely LR No. 14750/2 or any resultant subdivision in North East of Athi River in Mavoko Municipality.
  - c. Whether the applicants are entitled to the cost of this suit.
5. The defendant entered appearance and opposed the suit. The defendant filed a replying affidavit sworn on 9<sup>th</sup> April, 2021 by John Kimutai Ngeno, the defendant's manager. He deposed that the defendant bought all that land registered as land Reference Number 14750/2 measuring 48 acres from Pozzolana Stones Limited vide a written sale agreement dated 21<sup>st</sup> March, 2012, and were subsequently, issued with title. He stated further that the suit property has since been subdivided into three parcels being LR No. 14750/33, 14750/34 and 14750/35 and that the three parcels are registered in the defendant's name.
6. He further averred that the defendant acquired the suit property for purposes of constructing 2000 affordable housing units for its members and the general public. He stated that on 7<sup>th</sup> December, 2019, while the defendant was engaging a developer to start the construction of the aforesaid houses, persons who were unknown to the defendant illegally and violently started taking occupation of the suit property, prompting the defendant to report the matter to Athi River Police Station. That this was followed by a notice in the "People Daily" Newspaper informing members of the public that the three suit properties were not for sale.
7. He also asserted that on 2<sup>nd</sup> October, 2020, the defendant was granted permission to construct a boundary wall on the three suit properties. He stated that the defendant sought security to construct a wall from the Ministry of Interior and Construction of National Government on 11<sup>th</sup> November, 2020. He maintained that it is after the plaintiffs' members were evicted from the suit property that they decided to file the instant suit.
8. According to him, it was not true that the plaintiffs' members had constructed permanent and semi-permanent houses on the suit property or planted trees or cultivated crops thereon. He also stated that the suit was meant to legalize the plaintiffs' illegal actions as the suit property belonged to the defendant. He attached a sale agreement, copies of titles and a copy of the notice in the "People Daily" Newspaper.
9. On 20<sup>th</sup> November, 2023, in view of the fact that the suit involved many parties, the court directed both parties to file and exchange copies of the parties' identification documents. This directive was complied with.



10. The suit proceeded by way of *viva voce* evidence.

### **Plaintiffs' Evidence**

11. This case was heard on 18<sup>th</sup> February, 2023. PW1 was James Nzeru Musembi, an official of the plaintiff. He adopted the contents of his witness statement filed in court as his evidence in chief. His testimony was that he was one of the plaintiffs registered official and that Hathing Self Help Group is a registered society with a membership of 293 members who reside and occupy the suit property, and have been residing thereon since 1980 to date.
12. He further stated that the plaintiffs' members have been in open, peaceful and adverse possession of the suit property for more than 12 years whereof their occupation is without the defendant's consent and without force, fraud, mistake or collusion with the defendant. He also averred that for over 40 years they have been cultivating crops thereon and have constructed permanent and semi-permanent structures on the suit property without interruptions from the defendant.
13. He stated that in December, 2020, in an attempt to take possession, the defendant attempted to fence the suit property and further attempted to evict the plaintiffs' members therefrom by demolishing some of their houses. He maintained that these attempts were unlawful and intended to obliterate Evidence of the plaintiffs' occupation.
14. He added that it is their parents who lived on the suit property for long. He produced authority to sue, plaintiffs' registration certificate, list of members, copy of title, minutes and photographs.
15. In cross examination he stated that he was born in 1982 and that his statement shows that he found himself on the suit property because in 1980 his parents were on the suit property. He conceded that in his witness statement, there was no mention of his parents. He confirmed that he had no copy of the search certificate of the suit property. He stated that he entered on the suit property together with the people whose parents were working for Munyeti, a white man who lived on the suit property. He stated that the plaintiff was registered on 5<sup>th</sup> December, 2019 and filed this case in 2021. He stated that he had not filed the building plans for their houses in court. That marked the close of the plaintiffs' case.

### **Defendant's Evidence**

16. DW1 was John Kimutai Ngeno the defendant's manager. He adopted the contents of his witness statement filed on 27<sup>th</sup> October, 2022 as his evidence in chief. He testified that having worked for the defendant for 6 years he was conversant with its operations. He stated that the defendant was forced to look for investment opportunities for its members including purchase of land, subdividing, developing it and selling to the members.
17. It was his testimony that in 2012 after conducting due diligence, the defendant purchased the suit property from Pozzolana Stones Limited at Kshs. 268,900,000/= and was subsequently issued with a certificate of title. He also stated that on 6<sup>th</sup> June, 2012, the defendant obtained a loan from the Cooperative Bank of Kenya Limited. That the suit property was subdivided into three portions to enable the defendant develop the property in phases. These titles were LR 14750/33; LR 14750/34; and LR 14750/35.
18. It was DW1's position that valuation report was done on 28<sup>th</sup> May, 2012 by Mak Property Company which report showed that the suit property was fully fenced and secured along its boundaries with chain link and barbed wire fencing on timber and concrete posts. That the report further showed that the suit property was uncultivated, and undeveloped except for the homestead area which were an old farm shed/stores accessible through the main steel gate. He also stated that a further valuation report by



Trans County Valuers Limited on 27<sup>th</sup> August, 2013 confirmed perimeter boundaries clearly marked with a chain link fence and status of the land being unoccupied.

19. He asserted that the defendant inherited the caretaker of the person that sold it the land, namely one Katali Kangonga. He averred that the defendant had contracted experts from Green Place Limited sent by Kute Build Limited who had partnered with the defendant to construct affordable houses. That on 7<sup>th</sup> December, 2019 at 10:30 am, the witness and the said experts visited the suit property whereof he showed them the beacons on the land. That he was on the land upto 12:30 pm and left the experts on the land.
20. He stated that while in a nearby hotel, Mr. Hibrahim, one of the said experts called him and told him that people had come on the suit property claiming ownership thereof, prompting the witness to ask Katali Kangonga to go to the suit property. That the latter told him he did not know those people; that they were land grabbers and that they had armed youths. He stated that the next morning, he learnt that armed persons vandalized the gate at night. That they made a report to Athi River Police Station vide OB No. 31. That the plaintiffs also went to the said police station claiming ownership of the suit property. Further that the experts did their work to completion.
21. He termed the plaintiffs' assertion of having occupied the suit property for over 40 years as a lie on the basis that when they purchased the suit property there was no one thereon and the only house thereon belonged to the seller, and that the search shows the defendant is the owner.
22. He maintained that the plaintiffs invaded the suit property on 7<sup>th</sup> December, 2019, vandalized the gate and began constructing small permanent houses day and night so as to legitimize their claim of having been on the and since 1980. He insisted that the plaintiffs were land grabbers and should be Evicted from the suit property.
23. He produced documents attached to the defendant's list of documents dated 18<sup>th</sup> October, 2022. He produced copies of the titles and search certificates for LR No. 14750/2; LR No. 14750/33; LR No. 14750/34 and LR No. 14750/35; land rates clearance certificates for the three titles; agreement for sale; Gazette advertisement of "buyer beware"; valuation reports dated 28<sup>th</sup> May, 2012 for LR No. 14750/2 and dated 12<sup>th</sup> October, 2016 for LR No. 14750/33; and three letters dated 23<sup>rd</sup> October, 2014 from the County Surveyor, County Physical Planning Officer and Chief Land Administration Officer respectively.
24. On cross examination, he stated that the caretakers on the suit property were Mr. Kitali, Mr. Kimuli and Mr. Mureithi, who are the persons who witnessed the invasion. Further that the caretakers were not cooperating and were dismissed from employment in 2020.
25. He stated that Mr. Abunga was the defendant's Chairman, Mr. Mugambi the defendant's Vice Chairperson; Florence Njuguna was the Honourable Secretary; Lawrence Karanja was the Treasurer and Engineer Antony Moire was the Treasurer. He confirmed that they had had meetings with the plaintiffs to resolve the matter. He stated that the plaintiffs were currently constructing on the suit property and they began building in the suit property upon chasing the defendant's agents in 2020. He insisted that the valuation reports showed that the suit property was vacant at the time of purchase.
26. In re examination he stated that having charged the suit property and having loans to pay, they were desperate due to the length of litigation that is why they began having meetings with some of the plaintiffs' members to resolve the dispute and that to date it is dangerous for the defendant's agents to enter the land. That marked the close of the defence case.



27. On 18<sup>th</sup> December, 2023, parties were granted leave to file and exchange written submissions by 30<sup>th</sup> January, 2024 but none of the parties complied.

### **Analysis and Determination**

28. This court has carefully considered the pleadings and the evidence. The only issue that arise for determination is whether the plaintiff has proved its claim of adverse possession as against the defendant.

29. Adverse possession is a doctrine where a person who without the owner's consent is in occupation of land which he or she does not own, obtains ownership and title thereto after openly and without interruption occupies the same for a specific period of time, in Kenya the period is 12 years. The doctrine is anchored within the provisions of the *Limitations of Actions Act* Cap 22 Laws of Kenya.

Section 7 provides as follows;

“An action may not be brought by any person to recover land after the end of 12 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.”

Section 13 provides as follows;

- “(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 in this *Act* referred to as adverse possession), and 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 ceases 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.
- (3) For the purpose of this Section, receipt of rent under a Lease by a person wrongfully claiming, in accordance with Section 12(2) of this *Act*, the land in reversion is taken to be adverse possession of the land.”

Section 17 states as follows;

“Subject to Section 18 of this *Act*, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.”

Section 38(1) and (2) 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 the *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.
- (2) An order made under subsection (1) of this Section shall on registration take effect subject to any entry on the register which has not been extinguished under this *Act*.”



30. The rationale for adverse possession is to bar an owner of land who has deliberately failed to assert his or her rights within the statutory period against a non-owner who has been in occupation for the said period without the owner's permission; and subsequently grant title to the unlawful occupant.
31. In the case of *Chevron (K) Limited v. Harrison Charo Wa Shutu* (2016) eKLR, the Court of Appeal cited with approval the decision in the case of *Adnam v. Earl of Sandwich* (1877) 2 QB 485, where it was held as follows:
- “The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have by default and neglect on their part to assert their rights, slept upon them for a long time, as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties.”
32. To prove adverse possession, a claimant must demonstrate to have been in exclusive occupation of the land without the owner's consent openly without any interruption for a continuous period of at least 12 years. It is key that the claimant must show that he or she dispossessed the real owner of the land for a continuous period of 12 years. In the case of *Richard Wefwafwa Songoi vs. Ben Munyifwa Songoi* [2020] eKLR, the Court of Appeal stated that a person claiming adverse possession must demonstrate:
- a. On what date he came into possession;
  - b. What was the nature of his possession.
  - c. Whether the facts of his possession was known to the other parties;
  - d. For how long his possession has continued; and
  - e. That the possession was open and undisturbed for the requisite period of 12 years.
33. Similarly, in the case of *Wambugu v. Njuguna* [1983] KLR 173, the court held that the proper way of assessing proof of adverse possession is whether or not the owner has been dispossessed or has discontinued his possession for 12 years and not whether or not the applicant has proved possession for the statutory period.
34. In the instant case, the plaintiffs' witnesses stated that the plaintiffs' members had been on the suit property since 1980 and that by the time of filing suit in 2021, they had occupied the suit property continuously without the defendant's consent for over 40 years. He stated that they had been cultivating crops thereon and had put up permanent and semi-permanent houses and it was only in 2020 that the defendant attempted to evict some of their members.
35. The plaintiffs' witness produced a registration certificate showing that it was registered on 5<sup>th</sup> December, 2019 as a Self Help Group by the Ministry of Labour and Social Protection Department of Social Development and a list of 183 members. They also filed copy of certificate of title for IR 46432 LR No. 14750/2 showing that the suit property was on 4<sup>th</sup> January, 1989 registered in the name of Munyeti Limited. They further filed their minutes and photographs showing houses and crops.
36. On the other land, the defendant denied the plaintiffs' assertions that their members entered the suit property in 1980. They maintained that on purchasing the suit property in 2012, the same was fenced but no one occupied it but that it was only in 2020 that the plaintiffs' members invaded the suit property with intention to grab it. They produced the sale agreement and titles for the subdivided land in their name being 14750/33, 14750/34 and 14750/35. They also produced two valuation



- reports and letters done in 2014 from the County Surveyor, Physical Planning Officer and Chief Land Administration Office. Further they produced land rates clearance certificate showing payment of rates.
37. Therefore, to demonstrate adverse possession the plaintiff was under obligation to demonstrate that it entered the suit property in 1980; the manner and nature of possession and that the occupation was not permitted by the defendant and that the defendant did not interrupt the same.
  38. From the plaintiffs' registration certificate it is clear that the Hathing Self Help Group, who is the Plaintiff herein was not in existence in 1980, as it was registered as a Self Help Group in December, 2019. The plaintiffs' witness alleged that the plaintiffs' members took possession of the suit property in 1980. However, PW1 stated that he was born in 1982. Even the filed identity cards for the plaintiffs' members show that many members were born after 1980. These include Willy Munyoki born on 1<sup>st</sup> August, 1989, Victor Munuve Muthuita born on 23<sup>rd</sup> July, 1981 Cleophas Macharia Momanyi born on 9<sup>th</sup> January, 1996, Julian Wanjiku Wainaina born on 8<sup>th</sup> May, 1987 and Shadrack Kyalo born on 25<sup>th</sup> March, 1994, just to mention a few. It is therefore not possible that persons born after 1980 would have entered the suit property in 1980.
  39. PW1 attempted to introduce another angle to the date of entry by introducing a matter not mentioned in its pleadings or witness statement by alleging that they were born on the suit property and that it is the fathers of the plaintiffs' members who entered the suit property in 1980. However, that in my view was an afterthought, immaterial and a non-issue in this matter as their fathers were not parties to this dispute and neither was this suit filed on behalf of their fathers. In addition, the pleadings and filed evidence does not at all mention the fathers of the plaintiffs' members. In any event allegations that the plaintiffs' members were born on the suit property have no basis and no evidence has been produced to prove the same as the various identification cards filed by the plaintiffs show that many of them were born in places other than Mavoko/Machakos County as some were born in Mandera, Nyeri, Busia, Muranga, Makueni and other places.
  40. Besides the plaintiffs' witness did not state how and under what circumstances 293 people who are now members of the plaintiff agreed to enter the suit property at once in 1980.
  41. In view of the above there is no evidence to show that the plaintiff by itself as a Self Help Group or through its 293 members entered the suit property in 1980 as alleged or at all or that they have been in occupation for over 12 years. There is also no evidence to show that the plaintiffs' members were born on the suit property.
  42. On whether the plaintiffs' members have been in continuous occupation of the suit property for a period of over 12 years, the plaintiff produced photographs of houses. However no expert evidence was presented to demonstrate that the houses in the photographs are on the suit property. Having considered the valuation reports produced by the defendant, it is clear from the report by Ebony Estates Limited dated 12<sup>th</sup> October, 2016 that as at 2016 the suit property was vacant as demonstrated at page 5 of the report. In addition the 2<sup>nd</sup> valuation report also shows that at the time of purchase the suit property was vacant. For those reasons I am not persuaded that the plaintiffs were in occupation of the suit property before 2016.
  43. The defendant's evidence that they purchased the suit property when it was vacant has been demonstrated by the valuation report produced. I believe the defendant's evidence that the plaintiffs' members invaded the suit property on 7<sup>th</sup> December, 2019 and began putting up permanent structures as credible as evidence on record shows that as of 2016, there were no structures on the suit property. Besides, the suit property is subject to payment of rates and land rates. It would be expected that if



indeed the plaintiff members were in occupation they ought to have paid or been paying the rates or rent but no such evidence was presented by the plaintiff.

44. The evidence on record shows that the defendant applied for subdivision of the suit property in 2014 and the application was approved by the County Surveyor; County Physical Planning Officer and Land Administration Officer. Subsequently titles for LR 14750/33, LR 14750/34 and LR 14750/35 were issued in 2014 in favour of the Defendant.
45. The totality of the above evidence is that while the suit property is registered in the defendant's name, the plaintiff has failed to demonstrate that Hathinge Self Help Group or their 293 members have been in open, continuous and uninterrupted occupation of the suit property exclusively for a continuous period of 12 years.
46. The upshot is that the plaintiff has failed to prove their case against the defendant and the same is hereby dismissed with costs.
47. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 6<sup>TH</sup> DAY OF MARCH, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

In the presence of;

Mr. Kalwa for Plaintiffs

Mr. Mungata for Defendant

Court Assistant- Josephine.

