



REPUBLIC OF KENYA



KENYA LAW
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**Mwaramoyo v Jeevraj (Environment & Land Case 5 of 2021)
[2023] KEELC 17768 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 17768 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 5 OF 2021**

AE DENA, J

FEBRUARY 2, 2023

BETWEEN

SAGO MWIJAKA MWARAMOYO APPLICANT

AND

ALIMOHAMED HASSANALI JEEVRAJ RESPONDENT

JUDGMENT

Introduction

1. This suit was instituted by way of originating summons brought under the provisions of Order 37 Rule 7 of the Civil Procedure Rules and Section 38 of the *Limitation of Actions Act* all other enabling provisions of the law. The plaintiff seeks for the following reliefs;
 - a. An order declaring that the Plaintiff has acquired title of that whole parcel of land known as Kwale/Shimba North/Kundutsi 'A'/209 by adverse possession.
 - b. An Order directing the Chief Land Registrar Kwale to rectify its record by deleting the name of the Defendant and replacing it with the name of the plaintiff as the registered proprietor of that whole parcel of land known as Kwale/Shimba North/Kundutsi 'A'/209.
 - c. A permanent injunction against the defendant, their officials or anybody claiming right through or under them restraining the plaintiff's peaceful possession and enjoyment of that whole parcel of land known as Kwale/Shimba North/Kundutsi 'A'/209.
 - d. An order for costs
 - e. Such other orders as may be deemed appropriate under the circumstances of the case, in the ends of justice.



2. The suit is undefended. The summons and attendant pleadings were served by way of advertisement in the Daily Nation of 16th June 2022 pursuant to the order of the court of 10th May 2022. The defendant did not enter appearance.

The Plaintiffs Case

- 3 The Originating summons is premised on the grounds that that the plaintiff has cultivated, built a house, lived on the suit property and used it as if it were his own for over 50 years without interruption. That such use was without force, without secrecy and without permission. That the defendant is a paper owner of the suit property having a land certificate issued on 13th March 1981. That he has had notice of the plaintiffs occupation and possession of the land. That the defendants' rights over the suit property have been extinguished following the plaintiff's adverse occupation of over 12 years.
- 4 The Plaintiff was represented by Mr. Mwawasaa Advocate. The matter proceeded by way of viva voce evidence on 12th October 2022. The plaintiff gave evidence on his behalf. He adopted the supporting affidavit sworn on 31st January 2020 filed on even date which reiterated the grounds stated in paragraph 3 above. In addition, he stated that he and his family will suffer irreparable losses should the structures on the suit property be demolished which would also leave them destitute. That the defendants will suffer no prejudice if the suit is allowed. He testified that he has also buried the dead on the land. That he was surprised to learn that the land had been sold and asked the court to give him a title deed to the land.
- 5 Counsel for the plaintiff relied solely on the pleadings and evidence adduced before court and did not file any submissions.

Analysis And Determination.

- 6 Having considered the pleadings and evidence led before court the main issue for determination is whether the applicant has proved a claim of adverse possession in respect of the suit property Kwale/Shimba North/Kundutsi 'A'/209.
- 7 Claims for adverse possession are regulated under the *Limitation of actions Act* Chapter 22 of the Law of Kenya. Section 7 stipulates 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.”
- 8 Section 38(1) of the Limitations of Actions Act Cap 22 of the Laws of Kenya is to the effect that where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this 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 or lease in place of the person then registered as proprietor of the land.
- 9 From the above it is clear that the land that is claimed must belong by registration to the person who is said to be dispossessed in this case the defendant. The plaintiff in his oral testimony produced a copy of a Certificate of Official Search dated 23/12/2019 for Kwale/Shimba North/Kundutsi 'A'/209. It shows Ali Mohamed Hassanali Jeevraj the defendant as the proprietor having been registered as such on 10th March 1981 and a title deed was issued on 13/03/1981.
- 10 It is now trite that to prove a claim for adverse possession the applicant must have been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either



after dispossessing the owner or by the discontinuation of possession by the owner on his own volition. See Titus Mutuku Kasuve –vs- Mwaani Investment Ltd & Others, Civil Appeal 2004 1 KLR 184. Adverse possession only arises in case of continuous uninterrupted occupation of the land for over 12 years. See Sarah Nyambura Kungu-vs- David Njuguna, Civil Appeal No. 20 of 1988. The plaintiff stated in his pleadings and evidence that he was born in the suit property and this was supported by his Identity Card which shows his location as Tsimba, Kundusi sublocation in Matuga Kwale County which coincides with the registration particulars of the suit property Kwale Kundutsi which is further confirmed by the survey report produced dated 28/10/20 in respect of the suit property. It was his evidence that he had lived on the said land for over 50 years which age is supported by the date of birth noted in the plaintiffs Identity Card (1944). He stated he had built houses on the suit premises and also undertook farming. To prove his occupation, the plaintiff showed some photographs that depicted the houses built on the suit property. This was confirmed by the survey report which was undertaken and filed pursuant to the orders of the court issued by my brother Justice Sila Munyao on 9/3/2020. The survey was undertaken by District Surveyor Kwale (G. Mwangoma) on 8/10/2020 as directed and filed herein. The plaintiff produced it as part of the evidence in support of his claim. I studied the report which confirmed the plaintiff's actual occupation of the suit property on the ground where developments are listed both permanent and temporary, grave yards were cited including mango, banana, cashewnuts, orange and lemon trees. The report also states that there were elderly people on the ground of between 73 -87 years who were interviewed who were the plaintiff's relatives.

- 11 Looking at the period of the plaintiff's occupation and use of the suit property from the time the defendant was registered as the proprietor that is in March 1981 to January 2020 the date this action was commenced the plaintiff has been in such possession for a period of over 30 years.
- 12 Based on the foregoing this court is satisfied that the plaintiff was in actual occupation of the suit property using it to the exclusion of the defendant, without his permission and openly for the period stated and in tandem with his identity card. The plaintiff has therefore proved the claim for adverse possession to the required standard.
- 13 The upshot of the foregoing is that I enter judgement for the plaintiff against the defendant in the following terms; -
 - a. An order be and is hereby issued declaring that the Plaintiff has acquired title of that whole parcel of land known as Kwale/Shimba North/Kundutsi 'A'/209 by adverse possession.
 - b. An Order and is hereby issued directing the Chief Land Registrar Kwale to rectify its record by deleting the name of the Defendant and replacing it with the name of the plaintiff SAGO MWIJAKA MWARAMOYO as the registered proprietor of that whole parcel of land known as Kwale/Shimba North/Kundutsi 'A'/209.
 - c. A permanent injunction is issued against the defendant, their officials or anybody claiming through or under them restraining them from interfering with the plaintiff's peaceful possession and enjoyment of that whole parcel of land known as Kwale/Shimba North/Kundutsi 'A'/209.
 - d. The plaintiff shall have the costs of this suit.

DELIVERED AND DATED AT KWALE THIS 2ND DAY OF FEBRUARY, 2023

A.E. DENA

JUDGE

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:



Mr. Mwawasaa for the Plaintiff

N/A for the Defendant

Mr. Daniel Disii- Court Assistant.

