



Siyani & another v Savannah Properties and Mortgages Limited & another (Environment & Land Case E016 of 2021) [2023] KEELC 823 (KLR) (9 February 2023) (Judgment)

Neutral citation: [2023] KEELC 823 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E016 OF 2021
OA ANGOTE, J
FEBRUARY 9, 2023**

BETWEEN

SURESH NARAN SIYANI 1ST PLAINTIFF

DINKER NARAN KARSAN SIANI 2ND PLAINTIFF

AND

SAVANNAH PROPERTIES AND MORTGAGES LIMITED 1ST DEFENDANT

HOME SAVINGS AND MORTGAGES LIMITED 2ND DEFENDANT

JUDGMENT

1. Before this Court for determination is an Originating Summons dated March 23, 2021 and brought under Sections 7, 9, 13, 17, 19(1) and 4, 37 and 38 of the *Limitations of Actions Act* and Order 37 Rule 7 (1), (2) and (3) of the *Civil Procedure Rules*. The Plaintiffs are seeking orders that:
 - a. The 1st and 2nd Plaintiffs be declared to have become the legal owners entitled to adverse possession of over 12 years since 31st September 1991 of two parcels of land registered as LR No 209/10488/26 and LR No 209/10488/29 (hereinafter ‘the suit properties’).
 - b. The 1st and 2nd Plaintiffs be registered as the proprietors of the suit properties in place of the 1st Defendant.
 - c. A declaration that the 2nd Defendant having not exercised its statutory power of sale under the charge dated February 20, 1989 registered against the suit properties is time barred and cannot exercise such power as the said charge is nullified by operation of the law.
 - d. The charge dated February 20, 1989 registered against the suit properties in favour of the 2nd Defendant be discharged.



- e. The original Grant No IR 40725 for LR No 209/10488 (the mother title) and the original transfers for the suit properties be dispensed with.
 - f. A partial discharge of the charge dated February 20, 1989 by the 2nd Defendant registered against the suit properties be dispensed with.
 - g. Costs of this application be provided for.
2. The Originating Summons was supported by an affidavit sworn by Suresh Naran Siyani, the 1st Plaintiff, with permission from the 2nd Plaintiff. The 1st Plaintiff deponed that their family business, Siyani Enterprises, was registered on May 29, 1982 with his father and brother (the 2nd Plaintiff) as partners and that the business registered office was on LR No 209/75/2/2.
 3. It was deponed by the 1st Plaintiff that the 1st Defendant was registered as the owner of LR No 209/10488(IR No 40725) on May 9, 1986 and charged the property to Middle Africa Finance Company Limited and Home Savings and Mortgages Limited on February 24, 1989 and that the 1st Defendant subdivided the property into 84 plots and built 84 houses thereon. The houses were transferred to various purchasers.
 4. According to the Plaintiffs, on August 13, 1991, the deponent became a partner in Siyani Enterprises which had moved its offices to one of the suit properties; that his father purchased the suit properties from HA Halai & Co Limited for Kshs 700,000for each of the suit property and that the completion date was 31st September 1991.
 5. It is the 1st Plaintiff's deposition that Siyani Enterprises took possession of the suit properties which were sold to it with vacant possession.
 6. It was averred that on April 15, 1995, the Plaintiffs' father instructed his advocates to write to the advocates for the 1st Defendant requesting the 1st Defendant to transfer the suit properties to him; that the advocates stated that they were acting for the 1st Defendant and not for H. A Halai who sold the suit properties and that the Plaintiffs have occupied the suit properties since it was purchased by their father.
 7. It is the Plaintiffs' case that they have developed the suit properties with the knowledge but without the permission or licence of the 1st Defendant; that their occupation was occasioned by the agreements they signed with HA Halai and that they have been paying land rates, electricity and water bills for the suit properties since they took possession.
 8. It was further stated by the Plaintiffs that their possession has been continuous, exclusive and for a period of about 30 years; that the 1st and 2nd Defendants have not interrupted the said occupation and that the Middle Africa Finance Company executed a partial discharge and has no claim on the suit property as chargee.
 9. The Defendants did not enter appearance despite being served, including by way of substituted service in the local dailies. During the hearing, the 1st Plaintiff testified as PW1. He adopted his supporting affidavit as his evidence-in-chief and produced the annexures as exhibits.

Submissions

10. The Plaintiffs filed their submissions on July 13, 2022. The Plaintiffs submitted that they have acquired title to the suit properties by way of adverse possession having taken possession of the same on 31st



September 1991 and that they have been in continuous occupation without any disturbance from the Defendants.

11. It was submitted by the Plaintiffs that having proved adverse possession and having been in continuous possession of the suit properties, they should be registered as the owners.
12. On the third prayer sought, the Plaintiffs relied on Section 4(1) of the *Limitation of Action Act*; that since more than six years had elapsed, a cause of action based on the charge dated February 20, 1989 was unsustainable in law; that the court should facilitate the discharge of charge and that there is no plausible reason as to why the Defendants have not discharged the charge and surrendered the mother title.

Analysis and Determination

13. Based on the foregoing, the following issues arise for determination:
 - a. Whether the claim for adverse possession has been proved.
 - b. Whether the charge in favour of Middle Africa Limited and the 2nd Defendant should be discharged.
 - c. Whether the Plaintiffs should be registered as the owners of the suit properties.
14. The elements for proving adverse possession were set out as follows in the case of *Gabriel Mbui vs Mukindia Maranya* [1993] eKLR:
 - a. The person claiming land by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period.
 - b. The entry and occupation must be with, or maintained under, some claim or colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else.
 - c. The occupation of the land by the intruder who pleads adverse possession must be non-permissive use, ie without permission from the true owner of the land occupied.
 - d. The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with the evinced unmistakable animus possidendi, that is to say occupation with clear intention of excluding the owner as well as other people.
 - e. Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessors in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.
 - f. The possession by the person seeking to prove title by adverse possession must be visible, open and notorious, giving reasonable notice to the owner and the community of the exercise of dominion over the land.
 - g. The possession must be continuous uninterrupted, unbroken for the necessary statutory period.
 - h. The rightful owner or paper title holder against whom adverse possession is raised must have an effective right to make entry and to recover possession of the land throughout the whole of, and during, the statutory period.



- i. The rightful owner must know that he is ousted. He must be aware that he had been dispossessed, or he must have parted and intended to part with possession.
 - j. The land, or portion of the land adversely possessed must be a definitely identified, defined or at least an identifiable portion, with a clear boundary or identification. The absence of a plot or title number need not present any difficulty, nor should it be a bar to establishing a claim of adverse possession.”
15. I will now proceed to examine whether the Plaintiffs’ claim has fulfilled the above elements. The Plaintiffs have stated that they entered and then took possession of the suit properties in 1991. The Certificate of Registration of Change of Particulars (dated August 13, 1991) shows the Plaintiffs and their father as the partners of Siyani Enterprises which is situated on one of the suit properties.
16. The occupation by the Plaintiffs was made under some colour of right/title as the Plaintiffs believed they were occupying it after purchasing it from VA Halai. Agreements which were executed on August 30, 1991 and whose completion date was 31st September 1991 were produced as evidence of the purchase.
17. The occupation of the suit property by the Plaintiffs was also without the permission of the true owner, that is the 1st Defendant. The Certificate of Title supports the assertion that the 1st Defendant is the true owner of the parent title of the suit properties.
18. This position is supported by the 1st Defendant’s advocate’s letter dated May 3, 1995, in which he stated that VA Halai did not have title to the suit properties and that there was no privity of contract between the Plaintiffs’ father and the 1st Defendant. That being the position, it should be inferred that the Plaintiffs’ occupation of the suit property has been without the permission of the 1st Defendant.
19. The Plaintiffs have demonstrated that they have occupied the suit properties without force and without secrecy. Having put up their business offices on the suit properties, they dispossessed the true owner.
20. According to the Plaintiffs’ testimony, they have been in continuous occupation of the suit properties since 1991, which is more than the required statutory period of 12 years. There is no evidence to show that the occupation has been interrupted or broken. The only question that this court should deal with in the present claim is whether a claim of adverse possession can succeed as against a chargee.
21. According to the evidence on record, the Plaintiffs’ advocates followed up on the issue of discharge of charge with the 1st Defendant’s advocates, the liquidator of Middle Africa Limited and the advocates for the 2nd Defendant.
22. The evidence before this court shows that the liquidator of Middle Africa Limited executed a partial discharge of charge while the advocates for the 2nd Defendant declined to execute the partial discharge because they did not have any records of payments made in respect of the suit properties.
23. In their letter, the 2nd Defendant’s advocates advised the Plaintiffs to follow up the matter with the chargor (the 1st Defendant). It is not clear to this court if the Plaintiffs pursued the issue of having the suit property discharged as advised by the 2nd Defendant’s advocate.
24. Having established that the Plaintiffs are entitled to ownership of the suit properties by adverse possession as against the registered proprietor, the question that arises is whether the claim also succeeds as against the chargee.



25. The evidence before this court shows that LR No 209/10488 was sub divided into 84 sub plots on March 27, 1990 and sold to several people. Before the said sub division, the entire parcel of land was charged to Middle Africa Finance Company Limited and Home Savings and Mortgages Limited.
26. Although Middle Africa Finance Company Limited agreed to discharge the two suit properties, which are a sub division of the charged property, the 2nd Defendant has never discharged the same.
27. In the *Co-operative Bank of Kenya Limited vs Patrick Kangethe Njuguna & 5 others* [2017] eKLR case, the Court of Appeal defined a charge as an interest in land securing the payment of money or money's worth or the fulfillment of any condition (see Section 2 of the *Land Act*). As such, it gives rise to a relationship where one person acquires rights over the land of another as security in exchange for money or money's worth.
28. The Court of Appeal in the *Cooperative Bank* case (supra) stated that the rights so acquired are limited to the realization of the security so advanced, and that the creation of that relationship has nothing to do with use of the land, and is limited to ensuring that the chargee is assured of the repayment of the money he has advanced the chargor.
29. In *Benson Mukuwa Wachira vs Assumption Sisters of Nairobi Registered Trustees* (2016) eKLR, the Court of Appeal cited with approval the finding by the High Court in *Kipkoech Arap Langat & Another vs Kipngeno Arap Laboso*, Kericho HCCC No 124 of 2004 (OS) where the court stated as follows:

“Where a proprietor charges or mortgages land occupied by a trespasser adversely to the title of the proprietor, regardless of whether the trespasser is aware of such transaction, the act of charging or mortgaging the land does not interrupt time from running in adverse possession. Time for adverse possession continues to run. Such adverse possession is an overriding interest acquired or in the process of being acquired by virtue of Section 38 of the Limitations of Actions Act. It must be noted that where the proprietor transfers land, the act of transfer does not interrupt the running of time in adverse possession. In both cases of transfer and mortgage of land on which a trespasser is in adverse possession, the running of time in adverse possession is not interrupted. As adverse possession is an overriding interest (acquired or in the process of being acquired) under Section 30 (f) of the Registered Land Act, Cap 300, the mortgagee or transferee takes subject to such overriding interest.”
30. From the reading of the above decisions, it is the finding of this court that a claim for adverse possession can lie against both the proprietor and the chargee. The mere fact that the land has been charged does not stop time from running.
31. Considering that the 2nd Defendant did not defend the Plaintiffs' claim, and having found that indeed the Plaintiffs have been on the suit properties for more than 12 years un interrupted, and with the knowledge of the Defendants, it is the finding of this court that the Plaintiffs have proved their claim on a balance of probabilities.
32. For those reasons, the Plaintiffs' Originating Summons dated March 23, 2021 is allowed as follows:
 - a. The 1st and 2nd Plaintiffs be and are hereby declared to have become the legal owners entitled to adverse possession of over 12 years since 31st September 1991 of two parcels of land registered as LR No 209/10488/26 and LR No 209/10488/29.
 - b. The 1st and 2nd Plaintiffs be registered as the proprietors of LR No 209/10488/26 and LR No 209/10488/29 in place of the 1st Defendant.



- c. The original Grant No IR 40725 for LR No 209/10488 (the mother title) and the original transfers for LR No 209/10488/26 and LR No 209/10488/29 be dispensed with.
- d. A partial discharge of charge dated February 20, 1989 by the 2nd Defendant registered against LR No 209/10488/26 and LR No 209/10488/29 be dispensed with.
- e. Each party to bear his/its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9TH DAY OF FEBRUARY, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Otieno for Amulama for the Plaintiff

No appearance for the Defendants

Court Assistant - June

