



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MAKUENI**

**ELC (OS) NO. 46. OF 2019**

**JOSEPH KIMATU NDOLO.....APPLICANT**

**VERSUS**

**ALEX MUNGUU MUETI.....1<sup>ST</sup> RESPONDENT**

**MATALI MASILA NDEI.....2<sup>ND</sup> RESPONDENT**

**JOHN KIKUVI MALUA.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Applicant filed an Originating Summons under **Order 37 Rule 7 of the Civil Procedure Rules and Section 38 (1) of the Limitations of Actions Act Cap 22** on 9<sup>th</sup> July, 2019 seeking the following Orders:-

***1. That the application be certified as urgent in the first instance;***

***2. That the honourable court be pleased to issue restrictive orders over the land parcels no Ukia/Nzuuni/1816 and Ukia Nzuuni/1347 until the hearing and determination of this suit.***

***3. That the Honourable court be pleased to order Makueni County Land Registrar to register the Applicant Joseph Kimatu Ndolo in parcels No. Ukia/Nzuuni/1816 and Ukia/Nzuuni/1347 by virtue of adverse possession.***

***4. That the costs of this suit be in the cause.***

2. The Summons are premised on the grounds that the Applicant has lived on the suit land since 1943 and which land initially belonged to his deceased father, one Ndolo Mwinzi Ndunda, and that the land was transferred to the Respondents erroneously while knowing that the said land parcels belonged to the Applicant.

3. The Summons is supported by the Affidavit of the Applicant sworn on 9<sup>th</sup> July, 2019 in which he deponed that he is among the beneficiaries of the estate of his deceased father alongside his brothers Francis Kikuvu Ndolo and Martin Musembi Ndolo. That the suit land belonged to his great grandfathers which he has been living since 1943 without interruption. He further deponed that he had developed the suit land and the Respondents have never used the land despite being erroneously registered as the proprietors.

4. That the suit land was ancestral having been passed on through his great grandfathers. The Applicant further deponed that he had been requesting for the transfer but the Respondents have refused to do so and it is his request that the Land Registrar do register the suit land in his names owing to adverse possession.

5. The 1<sup>st</sup> Respondent filed his replying affidavit sworn on 19<sup>th</sup> September, 2019 in which he deponed that the 3<sup>rd</sup> Respondent is not a registered owner of the suit land and is therefore wrongly enjoined as a party to the suit. That land parcel number Ukia/Nzuuni/1347 is registered in the name of Malua Kitonga Mwaniki who is deceased and cannot participate in the proceedings. The 1<sup>st</sup> Respondent contended that one of the suit land being land parcel number Ukia/Nzuuni/1816 is owned jointly by himself and the 2<sup>nd</sup> Respondent in equal share.

6. The 1<sup>st</sup> Respondent further contended that the Applicant failed to prove that indeed the suit land belonged to his great grandfathers as alleged and the claim of adverse possession cannot stand whereas the Applicant is claiming ownership through inheritance. That the Applicant has not shown how he dispossessed the 1<sup>st</sup> and 2<sup>nd</sup> Respondent of land parcel number Ukia/Nzuuni/1816. It is also the 1<sup>st</sup>

Respondent's contention that if the Applicant's claim is that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent were erroneously registered as the owners of the suit land, then the cause of action would have been for rectification of titles by cancellation pursuant to the provisions of section 143 of the Registered Land Act.

7. The 1<sup>st</sup> Respondent contends that the suit land was unregistered as it was under an adjudication section until 6<sup>th</sup> May, 2002. That, previously, there was a dispute concerning the suit land which began in 1981 before the Land Adjudication Committee as Land Case No. NZI/75/81 between the Applicant's deceased father and the Respondents in which the committee determined the case in favour of the Respondents. The Applicant was only awarded Parcel Number 1347. The 1<sup>st</sup> Respondent contends that on 22<sup>nd</sup> October, 1993, he received a letter from the District Land Adjudication and Settlement Officer informing him that the Applicant's deceased father had filed an Appeal to the Minister in which the Minister ordered that status quo be maintained. It is also the 1<sup>st</sup> Respondent's contention that the Applicant disobeyed the Minister's order by digging a foundation with the intention of erecting a permanent structure on the suit land. As a result, on 13<sup>th</sup> January, 2015, he visited the District Land Adjudication and Settlement Officer and lodged a complaint against the Applicant. It is also the 1<sup>st</sup> Respondent's contention that the Applicant being dissatisfied with the committee's decision delivered on 27<sup>th</sup> March, 2019 filed a Judicial Review Number 2 of 2019 seeking Orders of Certiorari and Prohibition.

8. That at no particular time was the Applicant in quiet and peaceful possession of the suit land as there has been litigation over the same since the year 1981 and cannot therefore, claim adverse possession.

9. This matter was mentioned on 14<sup>th</sup> November, 2019 where parties consented to dispose the Originating Summons by way of viva voce evidence. Hearing of the Originating Summons proceeded on 23<sup>rd</sup> June, 2021. The Applicant stated that the suit land belonged to his late father who died in the year 1997 upon which he inherited it after his father's demise. He stated that he was born on the suit land and he has lived there ever since having constructed on the suit land. It was also his testimony that he has used the suit land uninterrupted ever since and he would wish to be declared the proprietor of the suit land. He also stated that the arbitration board determined that the suit land belonged to his father and that the Respondents have never cultivated on it. He further stated that he does not know how the Respondents acquired title deeds to the suit land having learnt of the same when he conducted an official search. He stated that he was aware that his late father had a dispute over the suit land before the Land Adjudication Committee since the years 1970. He was also not aware of the Minister's decision dated 27<sup>th</sup> March, 2019. He also told the court that he filed an application for Judicial Review seeking for Orders of Certiorari and Prohibition which is still pending before court.

10. The Applicant's first witness Mbwika Maingi (PW1) stated that the Applicant has lived on the suit land since the years 1940 and was aware that there was a dispute concerning the suit land in which the Minister determined in favour of the Applicant. The Applicant's second witness, Kilokwe Matolo (PW2), stated that the Applicant has cultivated on the suit land since the year 1943 owing to the fact that they are neighbours. He was also aware that there was a dispute concerning the suit land having participated in the proceedings before the Committee as a witness.

11. The 2<sup>nd</sup> Respondent stated that he is aware that one of the suit land being land parcel number Ukia/Nzuuni/1816 was issued to the 1<sup>st</sup> Respondent in equal share with his late father and that they have constructed a house on the share belonging to his late father. He also stated that he was aware of the dispute surrounding the suit land but did not participate in the proceedings. The 2<sup>nd</sup> Respondent's witness, John Kikuyu Malua (DW2), stated that he is aware that there was a dispute over the suit land which dispute has been there since the year 1975. That part of the suit land belonged to his now deceased father who did not construct on land parcel number Ukia/Nzuuni/1347.

12. The 1<sup>st</sup> Respondent stated that the suit land is ancestral albeit he does not reside on the same. He is aware that the suit land was surveyed in the year 1975 but he does not remember when he was issued with a title deed. He produced the documents as contained in his replying affidavit and marked as D.EX Number 1 to 17.

13. The Applicant in his written submissions dated 28<sup>th</sup> June, 2021 submitted that since the entry of ownership of the two parcels of land until the filing of the Originating Summons, 17 years have lapsed with the suit land being in possession of the Applicant thereby conferring ownership to the Applicant pursuant to section 38 of the Limitation of Actions Act. The Counsel for the Applicant cited the cases of *Mtana Lewa versus Kahindi Ngala Mwangandi [2015]eKLR*, *Titus Kigoro Munyi versus Peter Mburu Kimani [2015]eKLR* and *John Maingi Matili versus Beatrice Mwovi Mbusya & Maingi Mwovi*. In the above cited cases, I find the case of *Mtana Lewa versus Kahindi Ngala Mwangandi [2015]eKLR*, irrelevant to the extent that it challenges the constitutionality of Section 38 of the Limitations of Actions Act.

14. The 1<sup>st</sup> Respondent in his written submissions dated 1<sup>st</sup> July, 2021 submitted that the applicant's case is one of ancestral ownership as opposed to adverse possession. That at no particular time during the entire period of 38 years has the Applicant been in peaceful and quiet possession of the suit land. That possession is not adverse as against the Applicant and his family either through himself or his deceased father for they were never entitled to possession in the first place. It is his submission that the alleged stay only ripens into a prescriptive title only if it is juridical and must have none of the claims such as stealth, violence or supplication.

15. It is also the 1<sup>st</sup> Respondent's submission that after 38 years of litigating over the suit land, litigation came to an end on 27<sup>th</sup> March, 2019 and therefore the Originating Summons is prematurely filed as 12 years are yet to lapse. The 1<sup>st</sup> Respondent relies on the case of *Bejoy Chundra v Kally Prosonno [1878] 4 Cal 1327*, *Gabriel Mbui Versus Mukindia Maranya [1993]eKLR* on the doctrine of adverse possession. It is the 1<sup>st</sup> Respondent's submission that time cannot be said to begin to run from the time when the suit land was under the adjudication process. It is his submission that time starts to run from the time the owner of the land becomes the registered owner. However, the Applicant's claim of adverse possession remains weak as litigation was ongoing even after the 1<sup>st</sup> Respondent was issued with a title deed. As such, the Applicant is an intruder who has no apparent title to the suit land. The 1<sup>st</sup> Respondent relies on the case of *Ernest Wesonga Kweyu Omuto CA Civil Appeal Number 8 of 1990*. It is also the 1<sup>st</sup> Respondent's submission that the Applicant had unpermitted occupation of the suit land owing to the vast litigation exercise spanning 38 years. The 1<sup>st</sup> Respondent relies on the case of *Gatimu Kinguru versus Muya Gathangi [1976]KLR 253 at page 257 and 258* that unpermitted occupation is usually expressed as hostile possession to emphasize

that 'hostility' is the very marrow of adverse possession. It is the 1<sup>st</sup> Respondent's submission that a prudent squatter should use the land to acquire the means to get his own land elsewhere and not abuse generosity and a good heart of the owner. That the cultivation of the suit land by the Applicant is not reason enough for the Applicant to claim adverse possession. It is also the 1<sup>st</sup> Respondent's submission that possession may be interrupted by among others; the institution of legal proceedings by the rightful owner to assert his right to the land. The Counsel submits that in Hassanali Mamuji versus Alibhai Ebrahimji Dar & Sons [1935], 2 EAC111, a person in possession of land is not entitled to the protection of the Statute of Limitation as against the owner of the land where the latter and his predecessors in title have not been kept dispossessed or have not abandoned possession of the land, and the adverse possessor remained in actual possession for the whole statutory period without a break in the block period.

16. The 2<sup>nd</sup> Respondent filed his written submissions dated 1<sup>st</sup> July, 2021 in which the Counsel associated himself with the written submissions of the 1<sup>st</sup> Respondent. It is the 2<sup>nd</sup> Respondent's submission that the Applicant has no *animus possidendi* to acquire the land by adverse possession as the circumstances as to how he acquired the suit land have not been proved. The 2<sup>nd</sup> Respondent relied on the case of Mwatando Mwangambo Wasanga versus Ngarko Mwangome & 11 Others (2014) eKLR that the Applicant cannot claim to have acquired the land by adverse possession if he claimed that the land was fraudulently registered in their favour. The Counsel also cited the case of Githu Versus Ndeete [1984] KLR 776 that the claim against the Respondents was premature and therefore untenable.

17. The 3<sup>rd</sup> Respondent submitted that with respect to Ukia/Nzuuni/1347 which is registered in the name of Malua Kitonga Mwaniki, a claim against a deceased person cannot be sustained. That the Applicant did not sue the deceased and as such the claim against the 3<sup>rd</sup> Respondent in his personal capacity has not been made. That the Minister's decision of 27<sup>th</sup> March, 2019 has not been appealed against and therefore the Respondents remain the owners of the suit land as detailed in the copies of the title deed. I will also not delve further into these submissions because the Applicant withdrew the case against the 3<sup>rd</sup> Respondent and therefore was not a party to these proceedings.

18. I have carefully analysed the Originating Summons, the relevant replies thereof together with the annexures and the written submissions and authorities relied on by the Counsel on record for the parties.

The issues for determination are as follows:-

- a) What is the effect of the Minister's decision dated 27<sup>th</sup> March, 2019?
- b) Whether the Applicant has met the threshold to warrant adverse possession; and
- c) Who is to bear the cost.

19. It was the 1<sup>st</sup> Respondent's evidence that the Applicant could not establish ownership of the land and therefore cannot claim adverse possession of the suit land. A look at the proceedings and the determination of the Appeal to the Minister dated 2<sup>nd</sup> May, 2019 indicate the findings of the court in paragraph 4 that the Applicant could not substantiate his actual residence despite claims of old structures which made the court to believe that he has a permanent home elsewhere which he has developed. The court dismissed the land Appeal case for plots Number.1347 and 1816 and directed that ownership of the parcels remain as they appear in lands records. Most notably, the Applicant who was the Appellant was granted 60 days right of appeal to the High Court. **Section 26 (1) (b) of the Land Adjudication Act** provides that any person aggrieved by the determination of an objection shall within sixty days from the date of the determination appeal to **the Minister and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final**. In my view and based on the above provision of the law, the decision of the Minister was final and the only recourse available for the Applicant would have been a Judicial Review process.

20. On whether the Applicant met the threshold to warrant adverse possession, I will rely on the case of Virginia Wanjiku Mwangi v David Mwangi Jotham Kamau [2013] eKLR which explained in detail the principles to be met by a party seeking adverse possession and which court observed as follows:- "The first issue to be determined is whether the plaintiff has established a claim under adverse possession. The plaintiff's claim is based on principles of adverse possession whose import is that any person who claims to be entitled to land by adverse possession has the right to apply to the High Court for an order that he be registered as the proprietor of the land. The person must prove that he has been in occupation and possession of the land exclusively and openly and as of right and without interruption for a period of 12 years. The adverse party is the one who dispossesses the true owner of the property. The former must openly occupy the property exclusively, keeping out others, and use it as if it were his own. Some jurisdictions permit accidental adverse possession as might occur with a surveying error. Generally, the openly hostile possession must be continual (although not necessarily continuous or constant) without challenge or permission from the lawful owner, for a fixed statutory period to acquire title. Where the property is of a type ordinarily occupied only during certain times, the adverse party may need to have only exclusive, open, and hostile possession during those successive useful periods, making the same use of the property as an owner would for the required number of years. Adverse Possession requires at a minimum five basic conditions being met to perfect the title of the adverse party. These are namely (a) *open and notorious use of the property*. For this condition to be met the adverse party use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim. The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about. (b) *Continuous use of the property* – The adverse party must, for statute of limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor's time on the land, not how long true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession. Incidences such as merely cutting timber at intervals, when not accompanied by other actions that demonstrate actual and continuous possession, fails to demonstrate continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned. (c) *Exclusive use of the property* – The adverse party holds the land to the

exclusion of the true owner. If, for example, the adverse party builds a barn on the owner's property, and the owner then uses the barn, the adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (i.e. owners) in common, so long as the other elements are met. (d)*Actual possession of the property* – The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession. The actions of the adverse party must change the state of the land, as by *clearing, mowing, planting, harvesting fruit of the land, logging or cutting timber, mining, fencing, pulling tree stumps, running livestock* and constructing buildings or other improvements. If the property is residential, such actions may include *mowing the yard, trimming trees and hedges, changing locks, repairing or replacing fixtures* (such as a swimming pool, sprinkler system, or appliances), or other actions so as to maintain the property for its intended use, to the exclusion of its true owner. (e)*Non-permissive, hostile or adverse use of the property* – The adverse party entered or used the land without permission. Renters, hunters or others who enter the land with permission are not hostile. The adverse party motivations may be viewed by the court in several ways: *Objective view*—used without true owner's permission and inconsistent with true owner's rights. *Bad faith* or intentional trespass view—used with the adverse possessor's subjective intent and state of mind . *Good faith* view where the party mistakenly believed that it is his land. The law requires that the adverse party openly claims the land against all possible claims. The Specific requirements for adverse possession by the court is a Claim of title or claim of right. The mere intent to take the land as one's own constitutes "claim of right. A claim of right exists if the person believes he has rightful claim to the property, even if that belief is mistaken. A negative example would be a timber thief who sneaks onto a property, cuts timber not visible from the road, and hauls the logs away at night. His actions, though they demonstrate actual possession, also demonstrate knowledge of guilt, as opposed to claim of right, Good faith or bad faith, improvement, cultivation, or enclosure, Payment of property taxes, color of title: A legal document that appears (incorrectly) to give the claimant title, dispossession not under force of arms is a specific requirement for the principle of adverse possession to apply . In such cases dispossessing the owner or after discontinuation of possession by the owner of his own volition the person in adverse possession has a right to acquire title. The court finds that the plaintiff has not satisfied the claim on adverse possession as the plaintiff's occupation of the suit premises is not adverse as she was given permission to be in possession by the defendant as a wife of the defendant hence there is no element of *non-permissive, hostile or adverse use of the property.*'

21. I agree with Counsel for the Respondents that the application for grant of adverse possession is prematurely filed for the reason that time begins to run as from when the title was registered. As was admitted by the Respondents during the hearing, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were issued with a title deed to the suit land on 6<sup>th</sup> May, 2002 and in between this period, there has been active litigation over the suit land. The Applicant cannot therefore claim peaceful and quiet enjoyment of the suit land for the period of 17 years.

22. The upshot of the foregoing is the Originating Summons is dismissed. As it is a well-established principle, costs follow event and this court will grant the 1<sup>st</sup> and 2<sup>nd</sup> Respondent costs of this suit. It is so ordered.

**DATED, SIGNED AND DELIVERED VIA EMAIL ON THIS 8<sup>TH</sup> DAY OF FEBRUARY, 2022.**

**MBOGO C. G.**

**JUDGE**

**8/2/2022**

In the presence of:

CA:T.Chuma