



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO. 38 OF 2020 (ORIGINATING SUMMONS)

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP 22 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE LAND REGISTRATION ACT OF 2012

AND

IN THE MATTER OF THE CIVIL PROCEDURE RULES, CAP 21 OF THE LAWS OF KENYA

BETWEEN

EUNICE MWANGU OKENYE.....APPLICANT

VERSUS

STEPHEN OMENGE.....RESPONDENT

JUDGMENT

INTRODUCTION

1. The Applicant instituted this suit by way of Originating Summons seeking a determination of the following questions:

- a) Has the Applicant herein been in open, quiet and uninterrupted occupation and possession of the whole of that land parcel known as WANJARE/BOKEIRE/1399 for a period of more than 12 years?
- b) If so, has the said open and uninterrupted occupation and possession of the said portion been adverse to the title of the said land parcel No. WANJARE/BOKEIRE/1399?
- c) Has the Applicant therefore acquired the title for the whole of the said land parcel No. WANJARE/BOKEIRE/1399 under the provisions of the law of Limitations of Actions Act against the registered proprietor?
- d) Can the Respondent now be compelled to transfer the whole of the said land parcel No. WANJARE/BOKEIRE/1399 to the Applicant herein and in default, can the Deputy Registrar of this Honourable Court be authorized to transfer the same on behalf of the said Respondent to the Applicant?
- e) Who should bear the costs of this suit?

2. The Originating Summons was supported by the Plaintiff's affidavit sworn on the 23rd day of October, 2020. In the said affidavit she deposes that the suit property is registered in the name of the Respondent as the first registered owner since 1976. She further states that she was born in 1968 and she has lived on the suit property openly and continuously together with her siblings and parents since she was born.

3. Despite being served with the Originating Summons by way of Substituted Service, the Respondent did not file any Replying Affidavit. The court therefore directed that case proceeds by way of Formal Proof and the Plaintiff testified as the sole witness.

APPLICANT'S CASE

4. The Applicant testified that she had lived on land parcel number WANJARE/BOKEIRE/1399 (hereinafter referred to as the suit property) peacefully, openly and without any interruption since she was born more than 50 years ago. She said her parents had also lived on the suit property and this is where their homestead was. They use part of the land for farming. It was her testimony she did not know the Defendant and that she discovered that the suit property was registered in the name of the Defendant when she visited the Lands office to make inquiries about it. She produced a copy of the extract of the register (green card) for the suit property as Plaintiff's exhibit 1. She also produced photos depicting their homestead and the developments they have made on the suit property. She prayed that she be declared to have acquired the suit property by way of adverse possession and that the title thereto be transferred to her name.

5. Since the Applicant's case was undefended, learned counsel for the Applicant opted not to file any submissions.

ISSUES FOR DETERMINATION

6. Having considered the pleadings and evidence tendered by the Applicant, the issues for determination are:

i. Whether the Applicant herein has been in open, quiet and uninterrupted occupation and possession of the whole of that land parcel known as WANJARE/BOKEIRE/1399 for a period of more than 12 years.

ii. If the answer to (i) is in the affirmative, has the said open and uninterrupted occupation and possession of the said portion been adverse to the title of the said land parcel No. WANJARE/BOKEIRE/1399?

iii. Whether the Applicant has acquired the title for the whole of the said land parcel no. WANJARE/BOKEIRE/1399 under the provisions of the law of Limitations of Actions Act against the registered proprietor?

iv. Whether the Respondent can be compelled to transfer the whole of the said land parcel No. WANJARE/BOKEIRE/1399 to the Applicant herein and in default, whether the Deputy Registrar of this Honourable Court can be authorized to transfer the same to the Applicant on behalf of the said Respondent.

v. Who should bear the costs of this suit.

ANALYSIS AND DETERMINATION

7. The concept of adverse possession was defined by the Court of Appeal in the case of **Mtana Lewa v Kahindi Ngala Mwangandi Civil Appeal No. 56 of 2014 [2015]eKLR** thus;

Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.

Section 7 of the Limitations of Actions Act provides as follows:-

(a) *An action to recover land 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. After the expiry of 12 years, a party may approach the High Court under section 38 of the Limitation of Actions Act for a declaration that the property has devolved to him in accordance with the doctrine of adverse possession.

Section 38(1) of the Act states as follows;

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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 a proprietor of the land.”

9. The Court of Appeal in the case of **Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR** stated as follows:-

*“At the expiration of the twelve-year period the proprietor's title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land. Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it. See **Littledale v Liverpool College** (1900)1 Ch.19, 21.”*

10. In the instant case, the Applicant's uncontroverted evidence is that she has been in open, continuous and uninterrupted possession and

occupation of the suit property for more than 50 years which is well above the statutory period of 12 years envisaged in the Limitation of Actions Act. She testified that even though the Respondent is the registered owner of the suit property, he has never come to claim the same and he is not known to the Plaintiff. It is therefore evident that the Plaintiff's occupation of the suit property has been adverse to the Respondent's title.

11. In view of the foregoing, I am satisfied that the Applicant has proved her case on a balance of probabilities. Accordingly, I enter judgment for the Applicant and make the following final orders:

a) A declaration is hereby issued that the Applicant has acquired the title for the whole of land parcel No. WANJARE/BOKEIRE/1399 by way of adverse possession.

b) The Respondent is hereby ordered to transfer the whole of the said land parcel No. WANJARE/BOKEIRE/1399 to the Applicant within 30 days from the date of this judgment, failing which the Deputy Registrar of this Honourable Court shall transfer the same to the Applicant on behalf of the said Respondent.

c) The costs of this suit shall be borne by the Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 8TH DAY OF MARCH, 2022.

J.M ONYANGO

JUDGE