



REPUBLIC OF KENYA



KENYA LAW
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**Mgwisho v Kisangishuma (Environment & Land Case E004 of 2021)
[2022] KEELC 14541 (KLR) (3 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14541 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E004 OF 2021**

AE DENA, J

NOVEMBER 3, 2022

BETWEEN

SAID MWALIM MGWISHO PLAINTIFF

AND

BOAZ REUBEN KISANGISHUMA DEFENDANT

JUDGMENT

The Suit

1. The plaintiff/applicant commenced this suit by way of originating summons dated November 17, 2021. The plaintiff claims to have become entitled by adverse possession of all that parcel of land title No Kwale/Ng'ombeni/967 measuring 0.47Ha or thereabout and prays for the following orders;
 1. That this summons be served upon Boaz Reuben Kisangishuma by fixing a copy thereof on the court notice board in the court house or by advertisement once in the daily newspaper
 2. That the plaintiff be registered as the proprietor in common of the land comprises of plot No Kwale/Ng'ombeni/967 measuring 0.47Ha or thereabout and the registrar of titles Kwale do delete entry in favour of the plaintiff and issue certificate of title in place of Boaz Reuben Kisangishuma
 3. That the defendant his servant and/or any other authorized person or independent contractor be restrained by permanent injunction from demolishing the houses and/or property and structures thereon and/or evicting the Plaintiff, his family and/or tenant or any other manner whatsoever interfering with the plaintiff and his family peaceful occupation of the suit land.
 4. That the costs of this suit be provided for.
2. The summons are supported by the supporting affidavit of the plaintiff sworn on the November 17, 2021 and the grounds stated on the face of the summons. It is averred that the plaintiff has been living



and cultivating the suit property Kwale/Ng'ombeni/967 with his family for more than 30 years. That he has built permanent structures and made other developments which include farming activities as evidenced by a bunch of photographs annexed to the affidavit. He stated that the registered owner of the suit property is the defendant and whose whereabouts are unknown. That the plaintiff has continued to utilize the suit property and no one has ever come to claim the same. The court is asked to grant the orders sought for the plaintiff to be registered as the lawful owner of the suit property.

3. On December 28, 2021 when the matter first came up before court, leave was granted for service of the pleadings upon the defendant by way of advertisement in one of the local dailies of nationwide circulation. I also directed that the same be placed in a conspicuous page of the daily and state the particulars of the suit property. The advert was placed in page 30 of the Daily Nation newspaper on December 15, 2021. An affidavit of service sworn on December 15, 2021 by his counsel on record Oduor Henry John Advocate evidences such service. The defendant did not file any response to the suit and necessitated the suit to proceed undefended. The court further ordered for a ground status report to be carried out over the suit property. A ground survey was carried out on April 11, 2022 and a status report dated April 12, 2022 by S Kihara the District Surveyor Kwale filed with the court.

Plaintiff's Case

4. The plaintiff during his evidence in chief produced a copy of his identity card and adopted his witness statement dated November 17, 2021 as his evidence. It is the plaintiff's case that he has been in occupation of the suit property for more than 12 years. He produced copies of the official search to the suit property, green card, adjudication letter dated February 12, 2021 in proof that the defendant is the owner of the suit property. The plaintiff also tendered the survey report on the ground status. The documents were marked as Pexh 1-4 in the order listed in the plaintiff's list of documents. The plaintiff prays for the suit property to be registered in his names.

Submissions

5. The plaintiff's submissions are filed before court on June 17, 2022. It is submitted that the plaintiff's averments have not been controverted. That the plaintiff in his pleadings has demonstrated that he has been staying on the suit property for over 30 years without any interference from the title holder. That it has further been demonstrated that the said occupation was not forceful, not in secrecy, not on authority or permission of the registered owner, peaceful and continuous from the time he occupied the subject matter and the occupation has been for over 12 years. The court is urged to grant the orders sought. Reliance is placed on the holding in [*Celina Muthoni Kithinji \[suing on behalf of 5 others\] v Safiya Binti Swaleh & 8 others*](#) Mombasa ELC 248 of 2016.

Analysis And Determination

6. The [*Limitation of Actions Act*](#) underpins the doctrine of adverse possession in the undernoted provisions;

Section 7 states 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”



Section 13

- “(1) A right of action to recover land does not accrue unless the land is in the 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.”

Section 17 goes on to state;

“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.”

Finally, section 38(1) and (2) states;

- “(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 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.
- (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.”

7. Having considered the above the key issue that calls for determination is whether the plaintiff has proved a claim for adverse possession of the suit property against the defendant and who should bear the costs of this suit. To prove a claim for adverse possession it is now trite that several elements must be met by the party claiming adverse possession. Simply put the suit property must have a known owner; That the said known owner must have lost his right to the land by being dispossessed by the applicant; That the applicant’s possession of the land was without the true owner’s permission; That the discontinuance by possession has been open for a continuous period of 12 years; The defendant has not taken any action against the plaintiff to extinguish their occupation of the suit land or interrupt the same over the minimum statutory period of 12 years and that the applicant 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 *Wambugu v Njuguna* (1983) KLR 172, The Court of Appeal in *Benson Mukuwa Wachira v Assumption Sisters of Nairobi Registered Trustees* [2016] eKLR as well as *Chevron (K) Ltd v Harrison Charo Wa Shutu* (2016) eKLR.
8. It is the plaintiffs case that he has been on the suit property for a period of over 30 years. That within the same period he has made developments on the suit property and it has been his known place of abode. It is further the plaintiff’s case that he has been in open, exclusive, peaceful and actual possession of the suit property without any interruption from the defendant. According to the plaintiff, the said period



is more than the 12 years required under the law for him to acquire title against the defendant by way of adverse possession. My review of a copy of the official search to the suit property dated February 12, 2021 reveals that the land was first registered on June 9, 1982 under the defendant's name. An adjudication search letter from the department of adjudication and settlement Kwale County confirms that at the time of demarcation the suit property was recorded in the name of the defendant. From the evidence adduced by the plaintiff, it is safe to conclude that he has indeed been in occupation of the suit property for a period exceeding 12 years and that the said occupation has been open, continuous and uninterrupted.

9. From the survey report herein it is clear the land is in use. This amounts to occupation. In cementing this, I associate myself with the courts sentiments in Land Case No 124 of 2012 *Alice Chemandan Siyoi v Joel Kiptoo Ng'eno and 3 others John Thuo [Interested Party]* where it was stated; -

“the court is persuaded that possession does not necessarily imply that the possessor has to reside on the land. the fact that a possessor fences off the land and grows crops thereon amounts to possession”.

The above position has been affirmed by the Court of Appeal in *Peter Mbiri Michuki v Samuel Mugo Michuki* [2014] eKLR.

10. The defendant did not defend the suit and further that no material was placed before the court to contradict the plaintiff's evidence. It is therefore my finding that the plaintiff has proved his case on a balance of probabilities.

11. I enter judgment for the plaintiff against the defendant as follows;

- a. That the plaintiff be and is hereby registered as the proprietor in common of the land comprised of plot NoKwale/Ng'ombeni/967 measuring 0.47Ha or thereabout.
- b. The registrar of titles Kwale be and is hereby ordered to delete entry in favour of the defendant and issue certificate of title in place of to the plaintiff.
- c. That the defendant his servant and/or any other authorized person or independent contractor be and are hereby restrained by permanent injunction from demolishing the houses and/or property and structures thereon and/or evicting the plaintiff, his family and/or tenant or any other manner whatsoever interfering with the plaintiff and his family peaceful occupation of the suit land.
- d. The costs of this suit shall be borne by the defendants

It is so ordered.

DELIVERED AND DATED AT KWALE THIS 3 DAY OF NOVEMBER, 2022

AE DENA

JUDGE

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

Mr Oduor plaintiff /applicants

Mr Denis Mwakina- court assistant.

