



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MISC. APPLICATION NO. 8 OF 2019

CATHERINE FURAHA MWANDAWA.....PLAINTIFF

VERSUS

NASSER ALIBHAI.....1ST DEFENDANT/RESPONDENT

LAND REGISTRAR MOMBASA.....2ND DEFENDANT/RESPONDENT

JUDGMENT

1. The plaintiff filed an originating summons dated 31st January, 2019 and filed in court on 1st February, 2019 expressed under Order 37 Rule 3 of the Civil Procedure Rules and Section 38 (1) of the Limitation of Actions Act, Cap 22 Laws of Kenya claiming to be entitled to the parcels of land known as PLOT NO. MN/III/190 TITLE NO.CR.4244 measuring 3.9 acres and PLOT NO. MN/III/191 TITLE NO.CR.4245 measuring 0.75 acres by virtue of adverse possession. The plaintiff sought for determination of the following questions:

- 1. Whether the plaintiff is entitled to be declared as owner of the owner of the parcels of land known as MN/III/190 and MN/III/191 by virtue of adverse possession of the same.**
- 2. Whether the plaintiff is entitled to be duly registered by the 2nd defendant/respondent as the absolute proprietor of MN/III/190 and MN/III/191 by virtue of adverse possession of the same and be issued with respective title deeds.**
- 3. Whether the plaintiff is entitled to costs of these proceedings to be paid by the defendant.**

2. The application is supported by the grounds on the face of the originating summons as well as the affidavit of the plaintiff sworn on 31st January, 2019.

3. Despite service of summons on the defendants, they neither entered appearance nor filed any responses to the suit, although the 2nd defendant through the Attorney General participated in the proceedings.

4. At the hearing the plaintiff testified and relied on the averments contained in the supporting affidavit filed on 1st February, 2019. She led evidence that the suit properties are currently registered in the name of the 1st defendant. She produced copies of the titles for both parcels of land as well as certificates of official searches dated 5th December, 2018. The plaintiff testified that she has lived on the suit properties together with her family for about 25 years and have built residential homes thereon made up of permanent and semi-permanent houses. That they have been cultivating the remaining part of the parcels of land.

5. The plaintiff testified that in the year 2013, she applied for permission seeking consolidation and subdivision of the two parcels of land and received approval from the District Lands Office, Kilifi. She produced copies of the letters as exhibits. That as at 26th June, 2018, the suit properties had been amalgamated. Copies of the relevant documents were also produced as exhibits. It was the plaintiff's evidence that her occupation and physical possession of the suit parcels of land has been open and uninterrupted and adverse to the rights of the 1st defendant. It was her evidence that the 1st defendant holds the title to the suit properties in trust for the plaintiff and therefore the plaintiff is entitled to be registered as the proprietor of the suit properties in the place of the 1st defendant. She urged the court to grant her the prayers.

6. The plaintiff filed written submissions where she submitted *inter alia* that she has been in the suit premises for more than 12 years without the consent of the registered owner and has enjoyed quiet and uninterrupted possession and thus by operation of Section 7 of the Limitation of Actions Act, the 1st defendant's claim over the suit properties **have been extinguished. The plaintiff relied on the case Samuel Nyakenogo –v- Samuel Orucho Onyaru Civil Appeal No. 24 of 2004; Mbira –v- Gachuhi (2002)1EALR 137; Jandu –v- Kirpal &**

Another (1975) EA 225; *Mtana Lewa –v- Kahindi Ngala Mwangandi* (2005)eKLR; *Littledale –v- Liverpool College* (1900)1 Ch.19, 21; *Adnam –v- Earl of Sandwich* (1877) 2 QB 485. The cases relied on elaborated the essential requirements that one has to meet in order to succeed in an application for adverse possession. The plaintiff submitted that she has proved her case on a balance of probabilities and is entitled to the prayers sought.

7. Having considered the pleadings, the evidence and the submissions the issue for determination is whether the plaintiff is entitled to the orders sought.

8. Adverse possession is a common law doctrine under which a person in possession of land owned by someone else may acquire valid title to it. The object of adverse possession as enunciated in the case of *Adnam –v- Earl of Sandwich* (1877) 2 QC 485 are:

“The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment to which they have in some sense been tacit parties”

9. In Kenya this doctrine is alive in Sections 7 and 17 of the Limitation of Actions Act which provide as follows:

“7. 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

17. 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.”

10. The period of twelve years starts to run from the moment the trespasser takes adverse possession of the land and the registered proprietor is regarded as having been dispossessed or having discontinued his possession. In the case of *Wambugu –v- Njuguna* (1983) KLR 173, the Court of Appeal held thus:

“1. The general principle is that until the contrary is proved, possession in law follows the right to possess.

2. In order to acquire by the statute of Limitations title to land which has a known owner, that owner must have lost his right to, the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it....

3. The Limitation of Actions Act, on adverse possession, contemplates two concept; dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.”

11. The ingredients were recently discussed by the Court of Appeal in the case of *Mtana Lewa –v- Kahindi Ngala Mwangandi* (2015) eKLR where it was stated:

“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 as assertion of his title for a certain period, in Kenya its twelve (12) years. The process springs from action essentially prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in public and in extent to show that possession is adverse to the title owner.”

12. In the instant case, it has not been disputed that the plaintiff has been in possession of the suit property continuously and uninterrupted for more than twelve (12) years. It has also not been contradicted that her possession has been hostile to the 1st defendant who is the registered owner as per the copies of titles and certificates of official search produced as exhibits. In this case, the plaintiff has not only given evidence that she has been in occupation and possession for over twelve (12) years, but also applied for permission for consolidation and subdivision and obtained approval from the Ministry of Lands and the 2nd defendant as though she was the owner of the property. It is clear therefore that the plaintiff’s possession of the suit properties infringes on the rights of the 1st defendant as the true owner.

13. The plaintiff has tendered evidence that has not been challenged or controverted by the defendants. The plaintiff uses the land at the exclusions of everyone else as if she is the actual owner. Presented before this court is undisputed and undefended evidence by the plaintiff. On the balance of probabilities the plaintiff has proved to this court that her possession has been open and notorious.

14. I find that the plaintiff has on a balance of probabilities proved that she is entitled to be registered as owner of the suit properties by way of adverse possession.

15. I find the originating summons dated 31st January, 2019 has merit and is hereby allowed. I enter judgment as follows:

1. That the plaintiff is hereby declared to be entitled as owner of the parcels of land known as MN/III/190 and MN/III/191 by virtue of adverse possession.

2. The plaintiff is entitled to be duly registered by the 2nd defendant as the absolute proprietor of the parcels of land known as MN/III/190 and MN/III/191 and to be issued with title deeds.

3. Since the suit was not defended there is no order as to costs.

16. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19TH DAY OF MAY, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE