



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 50 OF 2019(OS)

IN THE MATTER OF:

THE ENVIRONMENT AND LAND COURT 2011 (NO. 19 OF 2011)

IN THE MATTER OF:

THE REGISTERED LAND ACT, 300 LAWS OF KENYA AND REGISTRATION OF TITLES

ACT CAP. 281 OF LAWS OF KENYA (NOW REPEALED)

AND

IN THE MATTER OF:

INTEREST IN LAND ON PLOT NO. SUB-DIVISION 2271/MN/III-CR. 24365

AND

IN THE MATTER OF:

SECTION 38 OF THE LIMITATION OF ACTIONS CAP 22, LAWS OF KENYA

BETWEEN

MARGARET WAMBO KARIUKI.....APPLICANT

VERSUS

JOSEPH KIPROTICH KIPLAGAT.....RESPONDENT

JUDGMENT

1. By an Originating Summons dated and filed herein on 8th July 2019, Margaret Wamboi Kariuki (the Applicant) urges this Court to make a determination and order: -

1. That the Applicant is entitled to be declared as proprietor of Plot No. Sub-Division 2271/MN/III – CR 24365 Mtwapa which she has acquired by adverse possession having lived and worked thereon for over 15 years since late 1997 well beyond the statutory 12 years and used it peacefully and uninterrupted without any interference from the Respondent and/or any other person;

2. That the Applicant is entitled to be registered and issued with certificate of title over the same in place of the Respondent; and

3. That (the) Registrar of Titles Mombasa be directed to open and/or reconstruct a duplicate register regarding Plot No. Sub-Division 2271/MN/III- CR 24365 Mtwapa to enable him to execute (the) decree issued by this Honourable Court.

2. The Originating Summons is supported by an Affidavit sworn by the Applicant wherein she gives details of how she came to be on the

suit property since the year 1997 to-date.

3. Despite service of the Summons in the Daily Nation Newspaper of 10th July 2020, the Respondent- Joseph Kiprotich Kiplagat neither entered appearance nor responded to the summons. Accordingly, this matter proceeded by way of formal proof.
4. Testifying as the sole witness in her case, the Applicant relied on her Supporting Affidavit to the Originating Summons. In the said Affidavit, the Applicant avers that sometime in the year 1997, she was hosted by her friend Mary Nyambura who lived in some rental premises at Mtwapa. The Applicant avers that her friend informed her that she had rented the property and they lived together until 1999 when her friend relocated to an unknown location.
5. The Applicant further avers that she continued living on the suitland continuously and uninterrupted without paying rent to the registered owner of the premises. The Applicant recounts various efforts she made to establish the ownership of the suit property from the Mombasa Land Titles Registry where the records pertaining to the property could not be traced. She eventually traced the Respondent's name from the Country Government of Kilifi having established that he was the one who was supposed to be paying for the rates.
6. I have considered the Originating Summons, the Applicant's sole testimony and the evidence adduced at the trial. I have also looked at the written submissions as placed before me by the Learned Advocates for the Applicant.
7. The Applicant herein Margaret Wamboi Kariuki contends that she has become entitled to a parcel of land described as Sub-Division No. 2271/MN/III- CR 24365 Mtwapa by dint of adverse possession. She accordingly invites this Court to declare herself as the proprietor of the suitland and to direct that a Certificate of title be issued in her name.

8. Due to the punitive nature of adverse possession against a land owner, a claim based on it cannot be affirmed unless certain elements are proven by the Applicant. This ensures that registered land owners will not arbitrarily lose the properties they have worked so hard to acquire. Accordingly, and as for the elements to be considered in an adverse possession claim, the Court of Appeal pronounced itself as follows in ***Mate Gitabi –vs- Jane Kabubu Muga & Others (Nyeri Civil Appeal No. 43 of 2015 (Unreported): -***

“For one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force, and without licence or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin Maxim nec vi, nec clam, nec precario. “

9. Explaining the same requirements in ***Kasuve –vs- Mwaani Investments Ltd & 4 Others (2004) 1 KLR 184***, the Learned Judges of Appeal further observed as follows: -

“In order to be entitled to land by adverse possession, the Claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.”

10. Thus for such a claim to succeed, the Applicant must demonstrate that the occupation was continuous, open and uninterrupted for a period of twelve years. In the matter before me, the Applicant asserts that she first occupied the suit premises in 1997 having been invited thereto by her friend who subsequently left the premises in 1999 never to return. It was the Applicant's case that having stayed on the premises for a long period of time, she tried to find out the ownership thereof but in vain.

11. In this respect, the Applicant stated that she visited the Mombasa Land Registry where she conducted a search to confirm the registered owner of the property. By a letter dated 12th June 2019 addressed to the Applicants Advocates, the Registrar of Titles, Mombasa wrote to the Applicant stating as follows: -

RE: Plot No. Sub-Division 2271/MN/III- CR 24365

Your Letter Ref.....dated 23rd May 2019 refers

We are unable to provide copies of our records due to the fact that the Deed File cannot be found in the registry.

We shall forward the documents once we locate the Deed File in respect of the said parcel of land.”

12. Having failed to locate the records of the parcel of land at the Land Registry, the Applicant turned her attention to the County Government of Kilifi whose records revealed that the Respondent was the registered owner required to pay rates for the parcel of land to the County Government. From the material produced by the Applicant, the Respondent has not paid the rates since August 2010 and the same are now in arrears of Kshs 547.405/-.

13. That the title could not be found is significant as a claim for adverse possession is anchored on the fact that the suit property belongs to a registered owner. That is the reason Order 37 Rule 7 (2) of the Civil Procedure Rules requires evidence in the form of a document of title to be exhibited by an Applicant. Failure to do this must be explained satisfactorily to the Court because it is only through such an exhibit that the existence and ownership of the suit property can be ascertained. (***see Teresa Wachuka Gachira –vs- Joseph Mwangi Gachira Civil Appeal No. 325 of 2003 (2009) eKLR.***)

14. Considering the circumstances herein however, I am satisfied that the Applicant has established that the suit property existed on the

ground and that she was unable to annex a certified extract of the title to the land as the same have been misplaced by the relevant land registry. The Applicant has however produced Rate Statements from the County Government of Kilifi from which it can be discerned that the Respondent is the registered owner of the suit property even though he has not paid the said rates for a considerable period of time.

15. As it were the main justification for the law of adverse possession is the need to discourage land owners from, as it were, sitting or sleeping on their land-related rights. The maxim *vigilantibus Non Dormientibus Jura Subveniunt* in this respect captures the desires of the law to only assist those who are vigilant and not those who sleep over their rights. Accordingly, paper owners of land are encouraged to utilize their land, otherwise those prepared to make use of the land are entitled to invoke the equitable defence of laches and the law will offer protection to them.

16. In the premises, I am satisfied that the Applicant has made out a case for adverse possession and I allow the Originating Summons as prayed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF JULY, 2021.

J.O. OLOLA

JUDGE