



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 39 OF 2019(OS)

(FORMERLY NAIROBI ELC 1064 OF 2013)

BETWEEN

IN THE MATTER OF A PROPERTY OF LAND KNOWN AS PLOT NO. NGONG/4480/45 (ORIGINALLY KNOWN AS NGONG TOWNSHIP/ BLOCK 2 /88 WITHIN NGONG TOWNSHIP KAJIADO DISTRICT

AND

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT CHAPTER 22

AND ORDER 37 RULE 1,2,3,4,5,6,7,8,9,10,11,12,16,17,18, AND 19 OF THE

CIVIL PROCEDURE (REVISED) RULES OF THE LAWS OF KENYA

BETWEEN

SANKALE ALFRED KARASHA.....APPLICANT

VERSUS

SIIMON JOSEPH KARASHA.....RESPONDENT

JUDGEMENT

By an Originating Summons dated 3rd September, 2013, the Applicant seeks the following orders

1. Whether the Applicant whose name is in this suit has acquired a title to all that property known as Plot number Ngong/4480/45 (originally known as Ngong Township/Block /2/88) by way of land adverse possession, having lived and carried out business uninterruptedly and continuously for over twelve (12) years and whether the same should be registered in his name.
2. Whether the Honourable Court can make such direction to have the registration documents to this suit land be duly executed by the Registrar of Environmental and Land Court as provided by the law in the event the Respondent continues to refuse, fail and/ or neglect to comply with the orders of this Honourable Court.
3. Whether a temporary injunction should issue against the Respondent RESTRAINING him either by himself, his agents, servants or otherwise howsoever from interfering, entering, surveying, carrying out any business activities, transferring, alienating, selling, occupying, transacting or in any other manner dealing with the Applicant's peaceful and quiet occupation and usage of the Plot Number Ngong/4480/45 (originally known as Ngong Township/Block/2/88) pending the hearing and final determination of this suit.
4. The Applicant to this suit be granted a DECLARATION having him be entitled by land adverse possession of over twelve (12) years without any interruption and continuously operating business and using all that property registered under the Registered Land Act Cap 300 of the Laws of Kenya (now repealed) comprised of Plot No. Ngong/ 4480/45 (originally known as Ngong Township/ Block /2/88) measuring approximately 0.0287 hectares and situated in Kajiado District.
5. The Applicant be registered as the proprietor of the said property namely Plot No. Ngong/ 4480/45 (originally known as Ngong Township/ Block /2/88) in place of the above-named SIMON JOSEPH KARASHA in whose name the said property is currently

registered.

6. The costs of this suit to be provided for.

The Respondent opposed the Originating Summons(OS) by filing a replying affidavit on 8th October, 2013 where he denied the averments in the OS and confirmed being the owner of the suit property whom he had given to his son, the Applicant herein to run a business. He insists he has always been in control and possession of the said suit property and never gifted it to the Applicant. He reiterates that the Applicant is infringing on his proprietary rights over the disputed property and the application is misguided.

The matter proceeded for hearing where the Applicant and Respondent each had one witness.

Evidence of the Applicant

The Applicant as PW1 adopted his supporting affidavit dated 26th August, 2013 as his evidence in chief and produced the annexures thereon as his exhibits. In the said supporting affidavit, he confirms being a business man running 'Laiser Farmers Bar & Restaurant' situated on plot No. Ngong/4480/45 (originally known as Ngong Township/ Block/2/88) in Ngong Township. It was his testimony that the Respondent who is his father handed over the property to him in 1990 and from then on, he has continuously run the business therein without interruption. He insists there was no contractual agreement between the Respondent and himself, therefore the understanding is that he was gifted the suit property. He testified that he had paid for all the licenses including bills in respect to the said premises. Further, that he has not been issued with any notices to vacate the suit property and has no other source of income. He claims the Respondent is desirous of selling the suit property to a third party as he came across a Valuation Report and prospective buyers have also been visiting the said property.

In cross examination he confirmed having been in possession of the suit property from 1990 and was still in possession thereon. He clarified that he did not reside on the suit property. Further, that the suit property was handed over to him by Peter Nganga whom he purchased the said property from by paying Kshs. 100,000 as good will. He stated that the suit property is registered in the name of the Respondent. He recanted his evidence by stating that the suit property was not gifted to him. Further, that he bought the business but not the land where it is situate.

Evidence of the Respondent

The Respondent as DW1 testified that he holds a Lease of Ninety-Nine (99) years from the 1st Day of October, 1990 against the disputed land which is still subsisting. He explained that the Lease was purposely revised and/ or extended by the Commissioner of Lands in his favour and a Letter of Allotment dated 20th July, 1994 issued to that effect, which culminated in his being issued with a Certificate of Lease dated 18th September, 1996. He contended that he is the one who developed the disputed property in the early 1960s and erected the premises that 'Laiser Farmers Bar & Restaurant' now runs. He averred that he has always been in control and possession of the dispute property and rented it to several business people. He confirmed issuing notices to the tenants in the disputed property after which he permitted the Applicant to take it over and run the business. Further, that on 16th October, 1996, he charged the disputed property to National Bank (K) LTD to enable his son WILLIAM L KARASHA secure a loan of Kshs.700,000 and upon his demise he cleared the outstanding balance of Kshs. 94, 578. 95/= after which the Charge was discharged to him on 14th April, 2013. He denied having gifted the disputed property to the Applicant and contended that the said Applicant cannot dictate how he should run his property.

In cross examination he confirmed having given his son the suit property to run a business. He explained that he removed the tenants who had been thereon and allowed the Applicant to occupy it. Further, that the Applicant only paid him for three months for use of the premises and when he sought for payment the Applicant declined to pay.

Submissions

The Applicant in his submissions insist he has acquired the suit property through adverse possession as he has been in open, actual, exclusive and hostile possession of the same. Further, that the Court should make direction to have the registration documents to the suit property executed by the Registrar, Environment and Land Court. To buttress his averments, he has relied on the following decisions: **Wambugu V Njuguna (1983) KLR 173; Mbira Vs Gachuhi (2002) 1 EALR 137; Jandu V Kirpal & Another (1975) EA 255; Koech Kangogo Vs Chebii Yego (2018) eKLR; Nyaga Rungu Vs Stanley Nyaga Kuvuta (2020) eKLR; Gabriel Mbui V Mukindia Maranya (1993) eKLR and Mtana Lewa V Kahindi Ngala Mwangandi (2015) eKLR.**

The Respondent in his submissions insists the Applicant has not fulfilled the requirements for adverse possession. Further, that the suit is fatally defective as the Applicant failed to annex an Extract of the Certificate of Title. To support these arguments, he relied on the following decisions: **Munyaka Kuna Company Limited V Bernado Vicezo De Masi (The Administrator of the Estate of Domenico De Masi – Deceased) (2018) eKLR; R V Oxfordshire County Council ex P. Sunningwell Parish Council (2000) 1AC 335 at 350; Wilson Kazungu Katana & 101 Others V Salim Abdalla Bakshwein & another (2015) eKLR and Golf Range Limited V Registered Trustees of National Olympics Committee & 3 Others (2018) eKLR.**

Analysis and Determination

After consideration of the pleadings filed herein including the testimonies of the witnesses, exhibits and rivalling submissions, the following are the issues for determination:

- Whether the Applicant has been occupation of Plot number Ngong/ 4480/45 (originally known as Ngong Township/ Block /2/88).

- Whether the Applicant is entitled to orders of adverse possession over Plot number Ngong/ 4480/45 (originally known as Ngong Township/ Block /2/88)
- Who should bear the Costs of the suit

I will deal with all these issues jointly.

Adverse possession is governed by Section 38 (1) and (2) Limitation of the Actions Act which stipulates thus:

(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.

For adverse possession, to mature into title to land, it must be demonstrated that there was actual, open, continuous, notorious, exclusive and uninterrupted possession for a period of at least twelve years. Further, for a party to qualify as an adverse possessor, they have to prove they did not have permission to enter into the suit land. Further, that claimant's interest has to be inconsistent to the interests of the true owner of the land; who has been on notice that there is a trespasser on his /her land. The Applicant is also expected to furnish in court evidence to prove that the suit land where he/she is claiming adverse possession indeed belongs to the Defendant.

In the instant case, both the Applicant and Respondent admit the Applicant has been on the suit property since 1990. They further admit that the suit property is registered in the name of the Respondent. The Applicant in his cross examination claimed he bought the suit property from a third party but later averred that he bought the business thereon but not the land. In his supporting affidavit he contends that he has been openly on the suit property for 23 years hence he has acquired the same through adverse possession. I note in his supporting affidavit, he had actually admitted that he was gifted the suit property by the Respondent and inherited all the bills therefrom. The Respondent on the other hand denied gifting the Applicant the suit property. He explained that since the Applicant who is his son and had a young family, lost his job with Uchumi Supermarkets, he removed the tenants from the suit property which he had developed and allowed the Applicant to undertake the business therefrom. Further, that he is the one who had established the aforementioned business in the 1960s'. He claimed the Applicant only paid him rent for three months but declined to pay the rest.

In the case of **Daniel Kimani Ruchine & Others versus Swift Lothorford & Co. Ltd and Anor (1977) eKLR** the court held that **'The Plaintiffs have to prove that they used the land as of right, nec vi, nec clam, nec precario (no force, no secrecy, no evasion)'**.

Professor Tom Ojienda's Principles of Conveyancing Hand Book, Law Africa Vol II at page 97 clarifies the position on adverse possession by stating thus:

"Where the claimant is in possession of the land with leave and licence of the true owner in pursuance of a valid agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse."

Further in the case of **Wambugu Versus Njuguna 1983 KLR 174 cited in Karuntimi Raiji Vs. M'makinya (2013) eKLR**, the court of appeal held that **'in order for a person to acquire title by the operation of the statute of limitation to land which has a known owner, the 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 suit for purposes for which he intended to use it. The Plaintiff is required to prove that he has dispossessed the defendant of the suit land or that the Defendant had discontinued possession of the suit land for a continuous period of 12 years so as to entitle the plaintiff to the title to the suit land by adverse possession.'**

While Judge Angote in the case of **Haro Yonda Juaje V Sadaka Dzenzo Mbauro & Another (2014) eKLR** aptly outlined the ingredients of adverse possession and summarized them as thus: **' a) That one has made physical entry on the land and is in actual possession of the land for the statutory period; b) That the said occupation is non permissive; c) That the occupant has the clear intention of excluding the owner from the property (animus possidendi) ; d) The acts done by the claimant are inconsistent with the owners enjoyment of the land for the purpose which he intended to use it; and e) that the possession was continuous, uninterrupted and unbroken for the statutory period.'**

See also the case of **Mwinyi Hamisi Ali Vs The Attorney General & Another [1997] eKLR**.

Based on the evidence that I have enumerated above, I find that the Applicant entered the suit property with permission of his father who is the Respondent. The Applicant continued to run the business on the suit property which was not inconsistent with the owner as the same had been established by the Respondent. The Applicant further admitted he is not resident on the suit property but only runs a business therein.

It is against the foregoing while associating myself with the judicial authorities cited above and the quoted legal provision that, I find that insofar as the Applicant has been on the suit property for more than 12 years, the entry was permissive and the acts he is undertaking thereon are not inconsistent with what the Respondent had used the suit property for as he confirmed in his evidence that he is the one who established it. Further, I note the Applicant has not proved he dispossessed the Respondent from the suit land as the father even used the title of the said property to secure a loan which he fully repaid. To my mind, the Applicant who is a son to the Respondent seems to want to take advantage of his father's love and support to shortchange him of his business by seeking to acquire the land through the doctrine of adverse

possession but this must fail.

On the issue of costs, since this is a dispute involving a father and a son, I direct each party to bear their own costs.

It is in those circumstances and for the reasons I have given above, that I find the Applicant has not proved his claim on a balance of probabilities and hence find the Originating Summons dated the 3rd September, 2013 unmerited and will disallow it.

Each party to bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 16TH DAY OF SEPTEMBER, 2021

CHRISTINE OCHIENG

JUDGE