



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA

ELC NO. 42 OF 2021

(Originating Summons Sections 37 and 38 to the Limitation of Actions, Cap 22 of the Laws of Kenya 37 R. 3D of the Civil Procedure Rules, Cap 21 of the Laws of Kenya and Sections 27 and 28 and 143 of the Registered Laws of Kenya and Sections 27 and 28 and 143 of the Registered Land Act, Cap 300 of the Laws of Kenya)

SEVENTH DAY ADVENTIST CHURCH EA LTD.....PLAINTIFF

=VRS=

ISOGE F.C.S. LTD.....RESPONDENT

JUDGMENT:

This is a case seeking ownership founded on the common law doctrine of adverse possession. The Applicant has moved this court by way of an Originating Summons dated 27/12/11 for a Declaration that he is entitled to be registered as the owner of a portion of land with clearly defined dimensions in land parcel NO. KISII/ISOGE SETTLEMENT SCHEME /170 in which the Applicant claims to have been in adverse possession since 1989 to date, which is more than 12 years immediately preceding the presentation of this suit and on which she has occupied openly and continuously as of right and in adverse to the above Title and that the Respondent's Title to parcel L.R. NO. KISII/ISOGE SETTLEMENT SCHEME /170 measuring 1.4 Hectares has extinguished in favour of the Applicant under Sections 37 and 38 of the Limitation of Actions Act. The alternative prayer is for the Respondent's name, Isoge Farmers Co-operative Society Limited to be cancelled and/or deleted from the Register and/or the same be substituted with the name of the Applicant herein as the new registered owner of the said portion.

On her part, the Respondent has denied the claim in the suit. In a Replying Affidavit filed in Court on 17/1/12 having been sworn on 16/1/2012 by one James Oeri who described himself as the Secretary to the Respondent, the Society avers that she was registered the owner of the suit land in 1998 and disowning the instrument of disposition Mr. Oeri depones that the letter purporting to give the Applicant the portion of land, where the latter put up the camp meeting, was written by people who had no authority to bequeath the said land and does not therefore contain the wishes and intent of the Respondent.

The Plaintiff's case was heard in the absence of the Respondent after the latter failed to turn up in court more than 2 hours subsequent to the case being mentioned online with the Respondent's Advocate being present during the allocation of time for Hearing. At the close of the case, I invited counsel for the Applicant to make submissions but he preferred to leave it to court. The Court had no option but to wade through the evidence tendered in court and juxtapose it on the applicable law.

From the evidence adduced in court by the Applicant's sole witness, Joshua Nyachiro Mogaka, who described himself as chairman of the Applicant's meeting camp centre, the case unfolded itself as follows:

Before 1989 the suit land was being wholly occupied by the Respondent. Later, the Respondent, by an undated letter, allowed the Applicant to take possession of a portion of the said land whose width was not to exceed 35 yards. The length was defined as "from the main road up to the upper boundary". The Applicant took possession of the said portion, put up 4 permanent latrines, a pulpit, some shades made of iron sheets and a worship centre which could accommodate about 100 worshippers and started using part of the suit land for camp meetings. This was some time in 1996. Besides the Applicant, the Respondent (as admitted by the Applicant) has also been using part of the suit land alongside the Applicant. The Respondent also gave out part of the suit land to the community around for the construction of St. Gonzaga Secondary School which was hived out of the larger parcel of land and a Title Deed allegedly registered in the name of the school was issued. But the Applicant offered no evidence in respect to the issue of the Title Deed to the school.

In support of her case, the Applicant produced as Exhibit 1 a copy of certificate of official search which was conducted on 21st December 2011 showing the entire land to belong to the Respondent. Plaintiff's Exhibit 2 is a copy of the undated letter acknowledging receipt of the Applicant's letter dated 12th June 1989. In a further letter dated 20/5/96, the Applicant was allowed to fence the portion given to her and carry on with her activities. While producing these exhibits the Applicant's witness, Mr. Mogaka said that the length of the plot given to the Applicant was 175 yards. But the document giving the society possession does not indicate so.

These are the facts that came out of the evidence that came out of the evidence in court.

A person who seeks to acquire Title to land through the doctrine of adverse possession by way of occupation of the suit land for the applicable statutory period must establish that he has been in occupation *nec per vim, nec clam, nec precario*, a Latin legal term meaning 'without force, without secrecy, without permission' i.e. nonconsensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims, for the statutorily prescribed period without interruption. He must have the right intent to claim and hold the land in opposition to the rest of the world. He must show, on evidence, that the true owner or persons interested in the property have proper knowledge of the adverse assertion of ownership by the occupant who has no colour of right to the land and has the intent to hold solely for himself (donated by the exercise of the act of dominion over the land, which includes making ordinary use and taking ordinary profit of which the land is susceptible in its present state).

From the evidence, it is not in dispute that the Applicant has been on the suit premises since 1989. Through her witness the Applicant testified that she sought permission from the Respondent to occupy part of the suit land therefore making her a licensee. The ingredient of *nec precario*, meaning "but without permission of the landowner" is therefore negated. This evidence came from the Applicant herself. The Court of Appeal held in the case of *Waweru –vs- Richu* (C.A.122 of 2001) at page 406 that :

“.....it is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement for sale or lease or otherwise.....”

In *Wanje -vs- Saikwa (No.2) Civil Appeal Number 72 of 1982 [1984] KLR* Justice Chesoni said at page 289:

“ A person who occupies another person’s land with that other person’s consent cannot be said to be in adverse possession as in reality he has not dispossessed the owner of his land and the possession is not illegal . Again, there is no adverse possession when land is occupied under a license until the license has been determined.”

In the same case at page 293 Justice Nyarangi Ag. JA as he then was said:-

“.....the Appellants have been cultivating the land and reside on the land and those activities, constitute adverse possession. However, the cultivation and the residence was with express permissive possession and did not become adverse during the time the Appellants were allowed to occupy the land.”

In *Benjamin Kamau Murima and others v/s Gladys Njeri (Nrb) C.A. No. 213 of 1996 (unreported)* the court of appeal held:

“One needs only to look at the position of the occupier and if it is found that his occupation is derived from the proprietor of the said land in the form of permission or agreement or grant, then such occupation is not adverse, but if it is not so derived then it is adverse.”

In *Mbira vs Gachuhi Nairobi HCCC No. 2826 of 1997* Kuloba J. held: -

“ It has always been the law that permissive or consensual occupation is not adverse possession. The possession must be adverse. Adverse possession is occupation inconsistent with the Title of the true owner; inconsistent with and in denial of the right of the true owner of the premises. If one looks to the position of the occupier and finds that his right to occupation is derived from the owner in the form of permission or agreement or grant, it is not adverse.....”

When does permissive possession become adverse?

If occupation was originally taken with the permission or agreement or license of the true owner, then you must show that on a certain (stated) specific date after the permissive or consensual entry or occupation, the possession began to become adverse or that on such and such a date, the proprietor deliberately abandoned the land or is dispossessed or she discontinued her possession. Such is not the case herein.

It is the Applicant’s evidence that she was not using the suit land exclusively but alongside St. Gonzaga Secondary School and the Respondent. The Respondent together with another person have been occupying the rest of the suit land. It is therefore not in dispute that the Respondent has never been dispossessed of the suit land but has been in actual occupation of most of the suit land. An owner of land may at one time leave one side to lie fallow or to be temporarily used by someone else. When the need arises, she may then put the other portion to use. But it would be dangerous to suggest that any part which he does not presently use becomes someone else’s land. Here the Applicant used a portion of the Respondent’s land with her permission for as long as she did not need that portion. She did not dispossess her of it, and she did not discontinue her possession of it. There has been no absence of possession by the Respondent. In the case of *N’gati Farmers Co-operative Society Limited –vs- Codicillary Ledidi & Others* the Court of Appeal held that: -

“.....the claim for adverse possession requires that the owner has been in possession but is now out of possession (either because he has been dispossessed or because he has simply discontinued possession).”

It must be shown by the occupier, that there was dispossession of the proprietor, or discontinuance of possession by the proprietor. “Dispossession” means the adverse possessor comes in and drives out the person in possession from the possession of the land; while “discontinuance” is where the person in possession goes out and is followed into possession by another. A person does not necessarily discontinue possession of it merely because he does not use his land, either by himself or by some person claiming through him. That alone

is not sufficient. And for this I wish to associate myself with the strong views of Chesoni JA (as he then was) in the above quoted case of **Wanje -vs-Saikwa (No.2) Civil appeal Number 72 of 1982 [1984] KLR** at page 288 quoting Megarry's manual of the laws of real property:

“If the owner has little present use for the land, much may be done on it by others without demonstrating a possession inconsistent with the owner's Title.....in order to acquire by the statute of limitations a 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.....”

In **Mbui -vs- Maranya Meru HCCC No. 283 of 1990**, Justice Kuloba went to great heights to explain discontinuance or dispossession of the proprietor in order to found a claim for adverse possession by stating as follows: -

“.....A person in possession of land is not entitled to the protection of the statute of limitations as against the owner of the paper Title where the latter and his predecessors in Title have not been kept dispossessed or have not abandoned possession of the land for the statutory period and the person claiming the protection of the statute has been in possession with an animus possidendi for the requisite time. An owner ceases to be in occupation of land by reason of dispossession or discontinuance of possession. The person relying on the statute must prove that he was in exclusive possession and that the true owner was out of possession..... The adverse possession must make out a case of an unequivocal exclusive possession, sufficient to deprive the owner of the soil.....Where it cannot be said that the possession was exclusive, where the true owner and others were free to use the ground in question, and there was no assertion of Title, a case of adverse possession is not made out. It is not sufficient that there should be an actual possession by the person claiming Title by adverse possession; there must be a discontinuance of possession by the owner, or he must have been eliminated from the land, followed by clear actual possession by incoming person. A case of unequivocal exclusive possession sufficient to deprive the owner of the soil must be made out on a balance of probability. It is incumbent on the part of the claimant satisfactorily to establish an exclusive possession by himself or through his predecessors in Title against the past twelve or more years.....”

The Applicant herein can also not be a beneficiary of the doctrine because she cannot say with exactness the definite portion he occupies. **The land, or portion of land, adversely possessed must be a definitely defined or at least an identifiable portion, with a clear boundary or identification.** The portion given to her was by description but its acreage was not even defined. From the evidence adduced in Court, it is not possible to ascertain where or what portion the Applicant occupies. Nor can we say what acreage it is. On this point the Court of Appeal in the case of **Kasuve -vs- Mwaani Investment Ltd & Others (C.A. No 35 of 2002)** held at page 87:-

“Moreover, the Appellant did not prove the location of the distinct portion of land he is claiming or its acreageIn the circumstances ,there was no concrete evidence that the Appellant was in exclusive adverse possession of any definite and distinct land ascertained to be 40 Acres”

From prayer No. 2 the Applicant even wants the Respondent's Title of the entire 1.4 Hectares cancelled and her name inserted in place thereof. I cannot imagine of any better expression of gluttony.

One question that puzzles me is why the letter requesting for the suit land, and which was referred to in the letter allocating the suit land, was never produced in court. Could it have been adverse to the Applicant's case or could it have shed more light to the terms of the agreement. I wish not to speculate.

It is important to state here that the doctrine of adverse possession was not meant to be an instrument of fraud and ingratitude. In Kenya, it is not uncommon for landless people to approach good hearted landowners and ask the latter to allow them cultivate their land for their upkeep or even to earn a living. The person pleading for such a favour does so with the clear understanding that the favour is not meant to be permanent or to dispossess the rightful owner. But with time he thinks he can dislodge his benefactor. The benefactor may have given the needy person the parcel of land not because he didn't need the land at the moment or because he had plenty but because he wanted to share the little he had. There are also those who for some reason are not in immediate need of the land e.g. someone leaving the country for further studies or for some temporary engagements and then comes back after 12 years only for the yester-needy person to tell him that he is now dispossessed. As long as you obtained the land with the owner's permission it does not matter how long you are in possession of the land. You still remain a licensee. Possession arising from permissive entry, occupation and use by virtue of mutual understanding and affinity does not give rise to adverse possession after the statutory period of limitation. The doctrine of adverse possession was not intended to be used by those who enter or remain on another's land on rapport, whether by blood or by any other relationship. You enter or remain on my land under mutual understanding you must remain there as such under the presumed or actual permissive or consensual entry and accommodation, and occupation remains permissive and consensual for whatever period I am disposed to allow you to be there. Clearly the occupier must have "adverse" as distinct from "permissive" or "**consensual**" possession which is inconsistent with and in denial of the Title and right of the true owner of the land.

In the instant case it is unfortunate that the Applicant wanted a place to prepare a camp meeting centre for prayer and worship and the Respondent gave the same to her. The Applicant must have reaped enormous benefits (**some of which are invaluable and of everlasting nature**) for all that period she was in possession. What was initially not made clear was that the latter would turn around and move the court to apply the doctrine of adverse possession in her favour. This is a case of a person being shown kindness but later turns around to want to benefit from the common law doctrine of adverse possession when in actual fact she never put in motion any circumstances that were adverse to the actual owner. A case of a person who bites the hand that has fed her for the last 30 years.

A holding such as is sought for by the Applicant would be of calamitous practical consequence on cherished positive cultural practices and traditions amongst our people, meant to provide social and economic security in the event of misfortune befalling a member of society. The law would be very inauspicious to allow this sort of ungrateful, immoral, horrifying and unconscionable behavior. I refuse to be part of such retrogressive expansion of the law.

The upshot of the above is that although the Applicant has occupied an indeterminate portion of the suit land for a period of over 12 years, she did so with the Respondent's permission and had the intention of occupying the land until the owner of the said land thought otherwise. This permission never came to an end and therefore her use of the land was not adverse to the owner's. She also occupied the suit land not exclusively but together with its rightful owner as well as another legatee.

The suit therefore fails, and it is hereby dismissed with costs.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 21ST DAY OF OCTOBER, 2021.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Mobisa.

Plaintiff's Counsel: Not present.

Applicant's Representative Mr. Joshua Nyachiro Mogaka present.

Defendants' Counsel: Not present.