



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC No. 6 OF 2020 (OS)

SAMMY NGUGI KAREMERI.....1ST PLAINTIFF
JOSEPH KAREMI MUGITU.....2ND PLAINTIFF
CHRISTOPHER AHURA MUSINZI3RD PLAINTIFF
DAVID MUTURI MUHORERI 4TH PLAINTIFF
GEOFFREY MUHURI KAMAU 5TH PLAINTIFF
MARIA NJERI KIMOTHO6TH PLAINTIFF
LUCY NJERI KAMAU.....7TH PLAINTIFF
MARY NJERI MUIGAI.....8TH PLAINTIFF
SUSAN WANJIRU NGARI.....9TH PLAINTIFF
SARAH NYOKABI KAMAU.....10TH PLAINTIFF
JOSEPH KIMATHI KAMAU.....11TH PLAINTIFF
ANNA WARENGA NDUATI.....12TH PLAINTIFF

VERSUS

KANJI DEVJI.....1ST DEFENDANT
JHAVERCHAND MORARJI.....2ND DEFENDANT

JUDGMENT

1. The plaintiffs moved the court through Originating Summons dated 24th January, 2020 seeking determination of the following: -

(1) Whether the plaintiffs have been in continuous open and adverse possession of that piece or parcel L.R 519/7/XXV I.R. 1677 for a period in excess of twelve (12) years.

(2) Whether the defendants' title to the said portion measuring approximately acres to the said parcel of land in their capacity as the registered proprietors have now been extinguished as a result of such continuous, open and adverse possession by the plaintiffs.

(3) Whether the plaintiffs are entitled under Section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya to be registered as the absolute proprietors of the parcel of land measuring approximately acres under the applicant's occupation and which land title L.R No. 519/7/XXV I.R. 1677.

(4) Whether in default of the defendants transfer of the land to the plaintiffs by signing all the requisite forms, documents and conveyance documents, the Deputy Registrar of this honorable court should execute all such documents as may be necessary for the registration of the plaintiffs as the proprietor of the land.

(5) Whether the defendants should pay the costs of these proceedings.

2. The originating summons is supported by an affidavit sworn by Sammy Ngugi Karemeri, the plaintiff. He deposed that the plaintiffs are members of a group known as Akiba Haiiozi which was started to uplift its members and that around the year 1969, the then chairman of the group Mr. James Kamau Wainaina entered into a sale transaction in respect of land title L.R No. 519/7/XXV I.R. 1677 (the suit property) on behalf of the group with J.C Shah who was a representative of the defendants herein, the registered owners. That the transaction was to be carried out through advocates acting jointly for the parties and that the defendants left the title with the advocates but failed to execute the transfer instruments.

3. He further deposed that the members of the group took possession of the suit property in 1969 and that the plaintiffs have been enjoying quiet, uninterrupted and peaceful possession of the land for a period of more than 40 years. He added that they have constructed buildings on the property and that they have been paying land rates to the County Government of Nakuru. He annexed photographs and copies of payment requests and receipts.

4. He further deposed that their occupation is well known to people who live in the environs of the suit land and that there has been no claim by over the land by the defendants. He annexed a copy of a letter dated 3rd October 2019 from H. K. Kimeto, the Chief Njoro Location.

5. The originating summons was served upon the defendants by way of substituted service with leave of the court. The defendants' neither enter appearance nor filed any response. As such, the matter proceeded unopposed.

6. The originating summons was heard by way of affidavit evidence and written submissions. The plaintiffs argued that they have been in continuous, open and adverse possession of the suit property for a period in excess of twelve (12) years and have thus acquired proprietary rights over it. They relied *inter alia* on the cases of **Benard Otieno Momanyi v Paul Ogango Ogada [2020] eKLR** and **Ngenda Investment Rural Sacco Ltd v Suraj Kunvar Pratapsingh Parmar & Another [2020] eKLR** and urged the court to make an order vesting the land in them.

7. I have carefully considered the originating summons, the affidavit in support and the submissions. As noted earlier, the defendants did not file any response. The plaintiffs case thus remains wholly uncontested.

8. The law and principles relating to adverse possession are well settled and are founded on **Sections 7, 13, 17 and 38 of Limitation of Actions Act**. In the case of **Wines & Spirits Kenya Limited & another v George Mwachiru Mwangi [2018] eKLR**, the Court of Appeal discussed the circumstances under which the cause of action accrues as follows:

So when does the cause of action accrue? Section 13 provides that:

“(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession.....” ...

Further, under Section 17, if the registered proprietor fails to recover the land within 12 years of uninterrupted adverse occupation, the proprietor's title to the land stands extinguished. The legal implication of the doctrine was well summarized by this Court in the case of Benjamin Kamau Murima & Others vs. Gladys Njeri, C A No. 213 of 1996 where it was held that:

“The combined effect of the relevant provisions of sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.”

Once an adverse possessor is eligible for title under the doctrine, he must move court Section 38 of the Act; ...

[13] Having the above pre-requisites in mind, it therefore follows that the onus is on the person or persons claiming adverse possession to prove that they have used this land which they claim as of right. This is the Latin maxim of nec vi, nec clam, nec precario (which means that the occupation of the land must have no force, no secrecy, no evasion). Accordingly, the respondent herein was beholden to not only show his uninterrupted possession, but also that the 1st appellant had knowledge (or the means of knowing) actual or constructive of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration; (See Wanyoike Gathure v/s Berverly (1965) EA 514, 519, per Miles J.)

[14] Consequently and as rightly submitted by the appellants' counsel, the burden of proof in adverse possession lies primarily with the adverse possessor who wishes to rely on the doctrine. ...

9. The materials placed on record by the plaintiffs include a copy of title No. I.R. 1677 in respect of land known as Land Office Number 519/7/XXV measuring 0.11478 of an acre as delineated on Land Survey Plan Number 23522. The copy was certified as a true copy of the original on 5th August 2019 by P M Mengi, Registrar of Titles. The title is a leasehold for a term of 99 years from 1st January 1926 to 1st January 2025. The initial grantee was Jhaverchand Morarji Shah. Entry number 2 is a transfer dated 4th November 1926 to Kanji Devji and Jhaverchand Morarji. I am therefore satisfied that the defendants herein are the registered proprietors of the suit property.

10. The plaintiffs' claims that they have been in continuous possession of the suit property since the year 1969 without any claim over it by the defendants have not been denied by the defendants. In the absence of any evidence to the contrary, I have to accept those aspects as proven. Although the plaintiffs came into the property pursuant to a sale transaction that was initiated between them and the defendants in 1969, the defendants' failure to execute transfer so as to complete the transaction or to regain possession rendered the plaintiffs' possession to be adverse to the interest of the defendants. In that context, I see the sale transaction only as demonstrative of the circumstances in which the plaintiffs came into possession.

11. In the circumstances, I persuaded that the plaintiffs have been in continuous, open, peaceful and uninterrupted possession of the suit property for a period of over 12 years. They have acquired title to remainder of the term of the leasehold interest in respect of the suit property and are entitled to be registered as proprietors.

12. I note that the plaintiffs seek to be registered as absolute proprietors of the suit property. They can only acquire such title as the defendants hold and no more. In this case, the defendants' title is a leasehold title.

13. I therefore make the following orders:

a) It is hereby declared that the plaintiffs have been in continuous open and adverse possession of that parcel of land known as Land Office Number 519/7/XXV I.R. 1677 measuring 0.11478 (zero decimal one one four seven eight) of an acre as delineated on Land Survey Plan Number 23522 for a period in excess of twelve (12) years.

b) It is hereby declared that the defendants' title to that parcel of land known as Land Office Number 519/7/XXV I.R. 1677 measuring 0.11478 (zero decimal one one four seven eight) of an acre as delineated on Land Survey Plan Number 23522 has been extinguished as a result of such continuous, open and adverse possession by the plaintiffs.

c) It is hereby declared that the plaintiffs are entitled to be registered as lessees in respect of the remainder of the term of the lease in respect of the parcel of land known as Land Office Number 519/7/XXV I.R. 1677 measuring 0.11478 (zero decimal one one four seven eight) of an acre as delineated on Land Survey Plan Number 23522.

d) In default of the defendants transferring of the aforesaid land to the plaintiffs by signing all the requisite documents, the Deputy Registrar of this court is authorized to execute all such documents as may be necessary for the registration of the plaintiffs as the lessees in respect of the aforesaid land.

e) For the avoidance of doubt, the interest acquired by the plaintiffs pursuant to this judgment is a leasehold title for the remainder of the term of 99 (ninety-nine) years from 1st January 1926 to 1st January 2025.

f) Considering that the defendants did not resist this case, I make no order as to costs.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 7TH DAY OF OCTOBER 2021.

D. O. OHUNGO

JUDGE

DELIVERED THROUGH MICROSOFT TEAMS VIDEO LINK IN THE PRESENCE OF:

NO APPEARANCE FOR THE PLAINTIFFS

NO APPEARANCE FOR THE DEFENDANTS

COURT ASSISTANT: E. JUMA