



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC NO. 9 OF 2021 (O.S)**

**PINA WAITHERA KAMAU.....PLAINTIFF**

**VERSUS**

**SHMINA MANDAL.....1<sup>ST</sup> DEFENDANT**

**SHALEN MANDAL.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1.By way of Originating Summons dated 1<sup>st</sup> March 2021, and filed in court in 2<sup>nd</sup> March 2021, the Plaintiff sought against the Defendant for the following orders;

- a) **THAT a declaration that the Plaintiff is entitled to be registered forthwith as the owner of land title numbers 12715/1223 and 12715/1224.**
- b) **THAT a declaration that the title of the said land number 12715/1223 measuring (0.1000) Ha and 12715/1224 measuring (0.1034) Ha has been extinguished by the Plaintiff's adverse possession and occupancy thereof for a period of more than 12 years in terms of Section 17 and 38 of the Limitation of Actions Act Cap 22.**
- c) **THAT a declaration that the Plaintiff has acquired an interest to land in 12715/1223 measuring 0.1000 Ha and 12715/1224 measuring 0.1034 by virtue of adverse possession thereof for more than 12 years from 2005 to date.**
- d) **THAT the Plaintiff be registered as the proprietor of the whole of 12715/1223 and 12715/1224 in place of the Defendants.**
- e) **THAT the Deputy Registrar and/or the Executive Officer of the Honorable High Court be directed and/or ordered to execute the transfer instruments and all attendant documents to facilitate the transfer and registration of the said parcels of land that are 12715/1223 measuring 0.1000 Ha and 12715/1224 measuring 0.1034 Ha in favour of the Plaintiff, in the event of default on the part of the Defendants.**
- f) **THAT there be an order of permanent injunction restraining the Defendants, either by themselves, agents, servants and or employees from interfering with the Plaintiffs peaceful possession and occupation of the said land parcel number 12715/1223 measuring 0.1000 Ha and 12715/1224 measuring 0.1034 Ha in any manner whatsoever and/or however.**
- g) **Costs of this Originating Summons be borne by the Defendants.**

2.The Originating Summons was supported by the grounds on its face together with the Affidavit sworn on the 1<sup>st</sup> day of **March, 2021** by Pina Waitthera Kamau, the Plaintiff in this case. She deponed that land parcel L.R 12715/1223 measuring 0.1 Ha and parcel L.R 12715/1224 measuring 0.1034 Ha. were registered jointly in the names of the Defendants. She attached copies of titles and recent search results on the property. She stated that she had lived, and carried out business on the suit land for over 16 years, within which period the Defendants have never visited the suit property nor had possession of the same. That she has enjoyed quiet and peaceful possession of the suit properties without any interference and averred that she has not been served with any demand, eviction or vacation notice from any person or entity. She further attached utility bills in her name showing that she had been paying electricity and water bills on the suit property. She sought to be registered as owner of the suit land so as to be able to carry on more developments.

3.By an order of this court made on 13<sup>th</sup> April 2021, the Plaintiff was granted leave to serve the pleadings by substituted service, which she did by advertisement in the *Daily Nation* Newspaper of 17<sup>th</sup> April 2021. The Defendant was allowed 21 days from the date of service to enter

appearance, but failed to enter appearance or file any response to the Summons.

4. On 8<sup>th</sup> June 2021, directions were given by the court that the matter to proceed by *viva voce* evidence. The matter was heard on 23<sup>rd</sup> September 2021. At the trial, the Plaintiff reiterated and adopted the contents of her Affidavit sworn on 1<sup>st</sup> March, 2021 together with the documents annexed to the affidavit, as her evidence in chief. She testified that the suit land is registered in the Defendants' names. She stated that she had been on the suit properties since 2005 without any interference from anyone and no one has contested her stay on the land. She produced copies of title documents and searches to show that the suit properties are registered in the names of the Defendants. She also produced proposed subdivision plans as well as photographs showing structures that she has put up on the suit properties. She stated that she had put up chicken stalls, installed water and fenced the property.

5. PW2-Antony Munyambu Busani, testified that he was a former worker of the Plaintiff. He adopted his witness statement filed on 2<sup>nd</sup> March 2021, as his evidence in chief. He narrated that he had worked for the Plaintiff from 2003 to 2018 as a care taker and knew her to be the owner of the suit properties. It was his testimony that the Plaintiff had put up structures on the suit properties and had connected electricity thereon. He averred that the Plaintiff had developed the property and that no other person has ever claimed ownership of the same.

6. At the close of trial, counsel for the Plaintiff sought for time to file submissions. The Plaintiff's submissions were filed on 28<sup>th</sup> September 2021.

### **THE PLAINTIFF'S SUBMISSIONS**

7. Counsel submitted that the Plaintiff had demonstrated that she had acquired the suit properties by adverse possession. Reliance was placed on the case of **Mbira Vs. Gachuhi (2002) EALR 137** where it was held that for a Claimant to acquire title by adverse possession, they must prove non-permissive, actual, open, notorious, exclusive and adverse use by them of the land in question for the statutory prescribed period without interruption. The Plaintiff argued that any person claiming adverse possession must show the date they came into possession, the nature of their possession, whether the fact of their possession was known to the other party, the length their possession has continued and that the possession was open and undisturbed for the period of 12 years. They placed reliance on the case of **Kasuve vs Mwaani Investments Limited & 4 others 1 KLR 184**, where the court of Appeal held that for a claimant to be entitled to adverse possession, they must demonstrate having had exclusive possession of the land openly and as of right without interruption for 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.

8. The Plaintiff submitted that the evidence on record demonstrates that she has been in open, peaceful, continuous and uninterrupted occupation of the suit land for over 12 years. The Plaintiff cited Section 17 of the Land Registration Act which provides that a person's title to land is extinguished upon expiry of the period to bring an action for recovery of land. Counsel also relied on Section 38(1) and (2) where it is provided that any person who claims to be entitled to land by adverse possession, he may apply to the High court for an order to be registered as proprietor of the land in the place of the proprietor.

9. The Originating Summons was unopposed.

### **ANALYSIS AND DETERMINATION.**

10. I have considered the Originating Summons filed, the evidence adduced in court as well as submissions filed by the Plaintiff and the authorities cited. The issue that arise for determination is whether or not the Plaintiff has acquired title of the suit properties by adverse possession.

11. The doctrine of adverse possession stems from the provisions of the Limitation of Actions Act, Cap 22 Laws of Kenya as follows;

Section 7 states as follows;

**“An action may not be brought by any person to recover land after the end of 12 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.”**

Section 13 provides as follows;

**(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), and, whereunder Section 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.**

**(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.**

**(3) For the purposes of this Section, receipt of rent under a lease by a person wrongfully claiming, in accordance with Section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.”**

Section 17 states as follows;

**“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.”**

Section 38 (1) and (2) provides as follows;

**“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 of the 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.**

12. Consequently, the above provisions point to the fact that the title of a registered proprietor is extinguished upon possession by the adverse possessor of the land in dispute, in a manner that dispossess the registered proprietor for a period of over 12 years.

13. To successfully acquire ownership rights under adverse possession, a Claimant must demonstrate that they have had peaceful, uninterrupted possession as of right, of the land in dispute for a period of at least 12 years. The possession must be open and without violence or secrecy. The Applicant also needs to demonstrate that he has the requisite intention to acquire the land.

14. The law on adverse possession is now settled. Courts have held that to prove adverse possession, the Claimant has to show that they have dispossessed the registered owner of the land or that they have discontinued their possession of the property. In the case of **Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR**, the Court of Appeal held as follows;

**“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 in assertion of his title for a certain period, in Kenya is twelve (12) years. The process springs in to action essentially by default or inaction of the owner. The essential prerequisite being that the possession of the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”**

15. The rationale for adverse possession was stated in the case of **Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR** where the Court of Appeal cited with approval the case of **Adnam v Earl of Sandwich (1877) 2 QB 485** where it was held as follows;

**“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 or immunity to which they have in some sense been tacit parties.”**

16. In the instant case, the Plaintiff has testified that she has been in possession of the land since 2005 to date. The period between 2005 and 2021, when this suit was filed, is 16 years. She produced utility bills for electricity and water paid in respect of the suit properties. She did affirm that she intends to pursue registration as the owner of the suit properties to enable her proceed with further development of the properties. The evidence of PW2 further collaborates the fact that she has been developing the suit properties and no one else has ever laid claim over the same. The evidence adduced in court by the Plaintiff has not been contested. The Plaintiff has therefore proved that she entered the suit property in 2005 and has been in occupation of the same openly, continuously, adversely, and as of right for a period of over 12 years.

17. It is clear from both case law and statutes that adverse possession allows a person who has occupied another person's land to obtain its title from the registered owner as long as he demonstrates that his occupation was open, continuous, as of right and without the registered owner's permission for a period of over 12 years. A deduction of the facts must lead to a legal conclusion, that the possession in issue amounts to adverse possession. I reiterate the findings of the court in the case of **Wilson Njoroge Kamau v Nganga Muceru Kamau [2020] eKLR** where it was held that;

**“In deciding the issue of Adverse Possession, the primary function of a Court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is a matter of legal conclusion to be drawn from the findings of facts”**

18. Having considered the evidence in this matter, I find that the Plaintiff has proved her case for adverse possession on a balance of probabilities. I therefore allow her claim and grant the following orders;

**a) A declaration that the Plaintiff is entitled to be registered forthwith as the owner of land title numbers 12715/1223 and 12715/1224.**

**b) A declaration that the title of the said land number 12715/1223 measuring (0.1000) Ha and 12715/1224 measuring (0.1034) Ha has been extinguished by the Plaintiff's adverse possession and occupancy thereof for a period of more than 12 years in terms of Section 17 and 38 of the Limitation of Actions act cap 22.**

**c) A declaration that the Plaintiff has acquired an interest to land in 12715/1223 measuring 0.1000 Ha and 12715/1224**

measuring 0.1034 by virtue of adverse possession thereof for more than 12 years from 2005 to date.

d) An order that the Plaintiff be registered as the proprietor of the whole of 12715/1223 and 12715/1224 in place of the Defendants.

e) An order that the Deputy Registrar and of this Honorable Court is directed to execute the transfer instruments and all attendant documents to facilitate the transfer and registration of the said parcels of land that are 12715/1223 measuring 0.1000 Ha and 12715/1224 measuring 0.1034 Ha in favour of the Plaintiff, in the event of default on the part of the Defendants.

f) An order of permanent injunction restraining the Defendants, either by themselves, agents, servants and or employees from interfering with the Plaintiff's peaceful possession and occupation of the said land parcel number 12715/1223 measuring 0.1000 Ha and 12715/1224 measuring 0.1034 Ha in any manner whatsoever and/or however.

g) Costs of this Originating Summons are awarded to the Plaintiff.

19.It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 18<sup>TH</sup> DAY OF NOVEMBER 2021.

A. NYUKURI

JUDGE