



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 116 OF 2020

JACKSON MWANGI WAMBUL....PLAINTIFF/APPLICANT

-VERSUS -

JOHN KIHEREINI KIRIKA.....DEFENDANT/RESPONDENT

JUDGMENT

INTRODUCTION

1. The Judgment herein is in respect of the Applications, namely the Originating Summons Application dated 22nd June 2020, which was filed by and/or on behalf of the Applicant wherein same sought for the following Reliefs;

i. That the rights of the respondent on the land known as L.R No. 12762/167 are barred under Section 7 of the Limitation of Actions Act and his title is extinguished under Section 17 of the said Act, on the grounds that the Applicant have openly and peacefully been in occupation of the suit property for a period for over 12 years.

ii. A declaration that the property L.R No. 12762/167 registered in the name of the Respondent is held by the Applicant.

iii. A declaration the property, if registered in the name of the Respondent be cancelled and transferred to the Applicant's name, Applicant has acquired the title to the property by adverse possession.

iv. An order directing the Respondent to execute and deliver to the Applicant within Ten (10) days, a transfer of the property L.R No. 12762/167 together with the original title of the property, procure, execute and deliver all documents necessary to confer title of the property to the Applicant free from any encumbrances failing which the Deputy Registrar of the High Court should execute the transfer.

v. An order be issued restraining the Respondent whether by himself, agents, servants or otherwise howsoever from interfering with the Applicant, and/or his servants and family members access to, quiet possession, accessing, advertising, offering for sale, leasing, mortgaging, charging, transferring or assigning sub-dividing and/or otherwise dealing with property namely, L.R No. 12762/167.

vi. A declaration that the Respondent is not entitled to enter or use a portion of Applicant's land and where an injunction should issue restraining the Respondent whether by himself or his agents and/or servants or otherwise from entering or using the said parcel of land.

vii. The cost of this summons be borne by the Respondent.

2. The Originating Summons herein is based on the Grounds at the foot thereof and same is further supported by the affidavit of the Applicant herein sworn on the 22nd June 2020, and to which the Plaintiff has attached and/or annexed two bundles of annexures, including a certificate of title and photographs depicting constructions therein.

3. Following the filing of the originating Summons herein, it appears that the Plaintiff endeavored to effect service upon the defendant personally, in accordance with the law, but same did not materialize.

4. As a result of the failure to effect personal service, the Plaintiff herein filed an Application dated the 8th October 2020, whereby same sought for leave of the court to effect service vide substituted mode, in terms of advertisement in one of the local daily's.

5. Pursuant to and in line with the request by the Plaintiff, the honourable court proceeded to and indeed issued orders on the 13th October 2020, whereby the Plaintiff was granted the liberty to effect service vide advertisement.

6. Following the issuance of the orders allowing the Plaintiff to serve by substituted mode, the Plaintiff proceeded to and placed an advertisement with the standard newspaper, whereupon the advertisement pertaining to the service of pleadings and court process herein, was duly published on **the 6th November 2020**.

7. Despite the advertisement of the service vide the standard newspaper, published on the 6th November 2020, the Defendant herein did not find it fit and/or expedient to enter appearance and/or file any Defense.

8. Owing to the foregoing, the subject matter was listed for directions and direction were thereafter given that the same be fixed for formal proof.

DEPOSITION BY THE PARTIES

THE PLAINTIFF'S CASE

9. Vide the Supporting affidavit sworn on the 22nd June 2020, the Plaintiff herein has averred that the suit property *L.R No. 12762/167*, belongs to and is registered in the name of the Defendant. In this regard, the Plaintiff has availed and/or otherwise exhibited a copy of certificate of title.

10. On the other hand, the Plaintiff has further averred that same entered upon and took occupation of the suit property in the year 2005 and that same had remained in occupation thereof to date, without any interruption by and/or at the instance of the Defendant.

11. Besides, the Plaintiff has further averred that his occupation over and in respect of the suit property, has been open, continuous, uninterrupted and as a result of the publicity and notoriety of his occupation, same has therefore acquired prescriptive rights to the suit property.

12. Similarly, the Plaintiff has further averred that despite being the owner of the suit property, the Defendant herein has never visited the suit property and/or attempted to recover vacant possession thereof or at all.

13. In th premises, the Plaintiff herein has implored the court to find and hold that the Defendant herein has been dispossessed of the suit property and therefore his (*Defendant's rights*) to the suit property stand extinguished.

14. On the other hand, the Plaintiff has further averred that the Defendant's rights to the suit property, having been extinguished, it is now imperative that the Defendant's name be deleted from the suit property and be replaced by the name of the Plaintiff.

SUBMISSIONS

15. The subject came up for hearing on the 22nd November 2021, when the Plaintiff's counsel indicated that same was keen to adopt the Originating Summons and the Affidavit in support thereof, and in this regard an order was then made that the Originating Summons shall proceed on the basis of the affidavit evidence.

16. On the other hand, the Plaintiff herein was directed to file written submissions in support of the originating summons to buttress the claim for adverse possession.

17. Following the orders of the court, the Plaintiff herein proceeded to and indeed filed written submissions, pertaining to and/or concerning the claim vide Adverse Possession.

18. I must point out, that the submissions filed by and/or on behalf of the Plaintiff herein form part and parcel of the court record and that I have taken same into account, towards determining and disposing of the subject matter.

ISSUES FOR DETERMINATION

19. Having reviewed the originating summons, the supporting affidavit thereto and the written submissions filed by the Plaintiff, I am of the opinion that the following issues suffice for determination;

i. Whether the Plaintiff has been in open, continued and interrupted possession of the suit property.

ii. Whether the nature of activities and/or occupation of the suit property have extinguished the Defendant's right to and in respect of the suit property.

iii. Whether the Plaintiff is entitled to the reliefs sought at the foot of the originating summons.

ANALYSIS AND DETERMINATION

ISSUE NUMBER 1

Whether the Plaintiff has been in open, continued and interrupted possession of the suit property.

20. The Plaintiff has sworn an affidavit, in respect of which same has averred and/or testified that he entered upon and took possession of the suit property from the year 2005.
21. It is the Plaintiff's further averment that at the time of entry upon and commencement of occupation of the suit property, same did not seek for and/or obtain the permission and/or consent of the Defendant.
22. Further the Plaintiff has also averred that upon entry onto the suit property, he commenced to carry out assorted developments including construction of buildings and also cultivation, of a portions of the suit property.
23. Owing to the nature and kind of activities that the Plaintiff has been carrying out over and in respect of the suit property, it is evident that the Plaintiff's use, possession and occupation thereof has been free, open, without any force and/or threat, whatsoever.
24. In view of the foregoing, I am prepared to find and hold that the Plaintiff has proven that his occupation has attracted and/or assumed sufficient publicity, notoriety and thus the said actions have been adverse to the rights of the Defendant herein.
25. In support of the foregoing observation, I adopt and invoke the decision of the court of appeal in the case of **Richard Wefwafwa Songoi v. Ben Munyifwa Songoi (2020) JELR 95136 (CA)**, where the honourable court stated as hereunder;

"For a claim founded on adverse possession to succeed, the person in possession must have a peaceful and uninterrupted user of the land. Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are important factors in a claim for adverse possession"

ISSUE NUMBER 2

Whether the nature of activities and/or occupation of the suit property have extinguished the Defendant's right to and in respect of the suit property.

26. The Defendant herein by virtue of being the registered proprietor of the suit property was obliged and/or otherwise at liberty to enter upon the suit property and thereby assert his possessory rights to and in respect of the suit property.
27. On the other hand, the Defendant was also at liberty to file and/or commence civil proceedings to defeat the running of time for purposes of adverse possession. However, in respect of the subject matter, the Defendant herein does not appear to have either entered upon the suit property, with a view to asserting his right and/or filed any suit for recovery of vacant possession.
28. Having failed to take either of the actions, the Defendant herein has therefore effectively been dispossessed of the suit property and in this regard the Defendant's rights and/or interest to the suit property have therefore been extinguished.
29. In support of the foregoing position, I adopt and reiterate the decision of the court in the case of **Njuguna Ndatho v Masai Itumo & 2 Others (2002) eKLR**, where the honourable court observed as hereunder;

"The passage from Cheshire's Modern Law of Real property to which Potter JA made reference in Githua v Ndeete is important and deserves to be read in full. It is at page 894 Section VI under the rubric THE METHODS BY WHICH TIME MAY BE PREVENTED FROM RUNNING and the learned author says –

"Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a merely formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. Such a nominal entry, even though it was secret, entitles him to bring an action within a year afterwards, and as it was possible to make such an entry every year, in this case called continual claim, the title to land might be in doubt for longer than the period of limitation. It was therefore provided by the Real Property Limitation Act 1833, in a section which has been repeated in the Limitation Act 1939, that a person shall not be deemed to have been in possession merely because he has made an entry on the land. He must either make a peaceable and effective entry, or sue for recovery of the land."

I agree that the mere filing of a suit for recovery of possession may not disrupt the possession of the adverse possessor, it being a physical thing, but as regards the stopping of time for the purposes of the Act, I would fully subscribe to the position expounded by Potter JA in Githu v Ndeete, and which has solid backing in the passage I have read from Cheshire. It is the sensible step to take instead of going into the disputed land armed to dislodge the adverse possessor, an act which can only result in a serious breach of the peace or even loss of life. It may well be true that in India the position as set out by Kneller JA in Muthoni v Wanduru does work, but I do not regard it as a practical approach to take in land disputes in Kenya. As there are authorities of this Court going both ways I am free to decide which way to go. An on this particular point I will go with the Potter JA. The only reason I can think of for the apparent contradiction in the decisions I have discussed is the total absence of law reports during the period under review, a calamity which has yet to be redressed."

30. To the extent that the Defendant herein, who is the known owner of the suit property, has not taken any action, whether by asserting his ownership rights or filing of a suit, same has effectively been dispossessed of the suit property.

31. On the other hand, the Defendant has similarly lost his rights to and in respect of the suit property. *See the provisions of Sections 7,13 and 17 of the Limitations of Actions Act, Chapter 22, Laws of Kenya.*

ISSUE NUMBER 3

Whether the Plaintiff is entitled to the reliefs sought at the foot of the Originating Summons.

32. The Plaintiff herein has placed before the court sufficient and credible evidence confirming his entry upon, possession and occupation of the suit property and by extension, the developments undertaken onto the suit property thereon.

33. On the other hand, the Plaintiff have similarly shown that ever since the year 2005, his activities over and in respect of the suit property, have been open continuous and interrupted. For clarity, the occupation has lasted for a period in excess of a statutory period of twelve (12) years.

34. In view of the foregoing, I come to the conclusion that the plaintiff has established and satisfied the requisite ingredients to warrant pronouncement of acquisition of title over the suit property by way of Prescription.

35. In support of the foregoing pronouncement, I am minded to adopt and reiterate the decision of the court of appeal in the case of Samuel Nyakenogo v Samuel Orucho Ony'aru (2010) eKLR, where the court stated as hereunder;

“In order to acquire by statute of limitations 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 his having discontinued his possession of it. The Limitation of Actions Act, on adverse possession, contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession will then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite period. See Wambugu vs. Njuguna – Civil Appeal No. 10 of 1982.

“Adverse possession means that a person is in possession in whose favour time can run.”

36. Based on the foregoing, it is my finding that the Plaintiff herein has therefore acquired adverse possessory rights over and in respect of the suit property and same is thus entitled to the requisite declaration.

FINAL DISPOSITION

37. Having reviewed the issues for determination, I hereby come to the conclusion that the Plaintiff has proved and/or established his case on a balance probabilities.

38. Consequently, I am disposed to and do hereby make the following Orders;

i. A Declaration is hereby issued that the rights of the Respondent on the land known as L.R No. 12762/167 be and are hereby barred under Section 7 of the Limitation of Actions Act and his title is extinguished under Section 17 of the said Act, on the grounds that the Applicant have openly and peacefully been in occupation of the suit property for a period for over 12 years.

ii. A declaration be and is hereby issued that the property L.R No. 12762/167 registered in the name of the Respondent, is so held albeit on trust for the Plaintiff/Applicant herein.

iii. The title over and in respect of the suit property namely L.R No. 12762/167 be and is hereby cancelled and the registered thereof be rectified to reflect the name of the Plaintiff, namely Jackson Mwangi Wamboi as the lawful owner thereof

iv. The Defendant/Respondent be and is hereby ordered or directed to execute the transfer instrument in respect of L.R No. 12762/167, to and in favor of the Plaintiff and similarly to surrender and/or avail the original title and all incidental instruments, necessary to facilitate the transfer and registration of the suit property to and in favor of the Plaintiff.

v. In default by the Defendant to execute the necessary transfer instruments as well as to avail the relevant certificate of title and incidental documents, within a duration of 30 days from the date hereof, the Deputy Registrar of this court be and is hereby mandated and/or authorized to execute the relevant transfer instrument and to procure such other incidental instrument to aid and/or facilitate the transfer and registration of the suit property in favor of the Plaintiff.

vi. An order of permanent injunction be and is hereby issued restraining the Respondent whether by himself, agents, servants or otherwise howsoever from interfering with the Applicant, and/or his servants and family members access to, quite possession, accessing, advertising, offering for sale, leasing, mortgaging, charging, transferring or assigning subdividing and/or otherwise dealing with property namely, L.R No. 12762/167.

vii. Cost be and are hereby awarded to the Plaintiff.

39. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2021

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT.

MILIMANI.

In the Presence of;

Ms. June Nafula

Mr. Makau for the Plaintiff.

N/A for the Defendant.