



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 70 OF 2015**

**ASHOK KUMAR ANAND.....PLAINTIFF**

**VERSUS**

**PATREMY MWAKWEKA MWALUMA.....DEFENDANT**

**CONSOLIDATED WITH**

**ELC NO. 252 OF 2012(OS)**

**PATREMY MWAKWEKA MWALUMA.....APPLICANT**

**VERSUS**

**DAVID MACHARIA KANG'ETHE**

**ASHOK KUMAR ANAND.....RESPONDENTS**

**JUDGMENT**

***(Suit for adverse possession and parallel suit filed by respondent for eviction of the applicant; applicant being in occupation of suit land; within the period of occupation, applicant having been sued in a civil suit and also having been charged with the criminal offence of Forcible Detainer; possession of applicant in those circumstances cannot be deemed to be quiet and the cases interrupted his possession; claim of adverse possession not proved; respondent's suit for vacant possession and permanent injunction allowed; applicant to also pay damages for trespass)***

1. Through an Originating Summons filed on 8 November 2012 and amended on 21 June 2013, Patremy Mwakweka Mwaluma, sued David Macharia Kangethe (Mr. Kangethe) and Ashok Kumar Anand (Mr. Ashok) , claiming that he has acquired, by way of adverse possession, title to the land described as Plot No. 1956/337, CR No. 35001, Voi Municipality (the suit land). That land was initially owned by Mr. Kangethe, who later sold it to Mr. Ashok. The suit land is held under a leasehold title issued under the Registration of Titles Act (repealed). Mr. Kangethe was issued with title to the land on 29 October 2001 and the title shows that he was granted a 99 year old lease commencing on 1 December 1998. In his suit, Mr. Mwaluma has claimed that he has been resident on the suit land for over 15 years and has thus acquired title to the suit land by way of adverse possession. The suit was resisted through a replying affidavit by Mr. Ashok.
2. Mr. Ashok on his part filed the suit Mombasa ELC No. 70 of 2015 where he sued Mr. Mwaluma for vacant possession, general damages for trespass, and a permanent injunction to restrain Mr. Mwaluma from the suit land.
3. The two matters, being related, were consolidated with the file ELC No. 70 of 2015 being declared the lead file.
4. In his evidence, Mr. Ashok testified and produced his witness statement. Inter alia, he stated that he purchased the suit land from Mr. Kangethe on 14 June 2012 and the land became registered in his favour. He stated that Mr. Mwaluma has erected some temporary buildings on the land which are an eyesore and he is unable to make economic use of the plot.
5. On his part, Mr. Kangethe testified inter alia that he purchased the land from one David Mbinga through a sale agreement entered into on 7 August 1999. David Mbinga held an allotment letter to the land and upon the transfer of his interest to Mr. Kangethe, title was issued to the latter. He testified that when he bought the property, the same was vacant, but later, Mr. Mwaluma entered the land and put up a kiosk. He filed a complaint with the Municipal Council of Voi who issued Mr. Mwaluma with a notice to remove the kiosk but Mr. Mwaluma continued to build more kiosks. He later sued Mr. Mwaluma in the case Voi SRMCC No. 40 of 2002 but the case was dismissed because the

Magistrate was of opinion that he did not have jurisdiction. He testified that subsequently Mr. Mwaluma was charged with a criminal case being Voi Criminal Case No 30 of 2011 and he was convicted. I have seen from the documents that the case was one of Forcible Detainer and the conviction was on 23 October 2012. Mr. Mwaluma was fined the sum of Kshs. 60,000/= or serve one year in jail. He must have paid the fine because he shortly filed this suit on 8 November 2012.

6. In his evidence, Mr. Mwaluma also relied on his statement where he inter alia stated that he had occupied the plot even before it was allocated to Mr. David Mbinga and he expected that the same will therefore be allotted to him. I have seen from his documents that he has bitterly been complaining about the allocation of the land to somebody else. He acknowledged being asked to vacate and him refusing to do so which led to the several cases against him.

7. I invited counsel to file written submissions and gave a mention date of 3 February 2020 to confirm the filing and exchange of these submissions. On the mention date, only Ms. Waihenya, learned counsel for the plaintiffs had filed her submissions. Mr. Odhiambo learned counsel for the defendant had not filed any submissions and was not present in court. I then gave 10 March 2020 as the date for delivery of judgment. I probably need to mention that on 3 March 2020, there was an attempt to bring written submissions of the defendant to me in Chambers, which I declined. I declined to receive the same, first because they had been filed out of time, but more importantly, because a clear date for receiving submissions had been given, and it would be unfair to the other party, for me to take in submissions in Chambers in their absence. It is time that counsel make it a point to file and serve their documents in time.

8. I have considered the respective cases of the parties. I can only deny Mr. Ashok the prayer for vacant possession if Mr. Mwaluma succeeds in his suit for adverse possession and I opt to first delve into the question whether Mr. Mwaluma has proved his adverse possession claim.

9. It is trite law, and I need not cite any authority, that to succeed in a suit for adverse possession, one needs to demonstrate that he/she has been open, quiet, peaceful and uninterrupted possession of the land claimed for a continuous period of at least 12 years. It could be that the occupation of the suit land by Mr. Mwaluma may have been open, but it was certainly not quiet, for he faced several suits including a criminal case for the offence of Forcible Detainer. It has been held before that the filing of a case by the land owner against one in occupation, interrupts the possession of that person. Indeed, this was the basis of the decision in the case of *Lucy Wahu Gichaga vs Mwihaki Muturi (2006) eKLR* where the court declined to give an order for a decree for adverse possession as it emerged that the respondent had sued the applicant and this was held to constitute an interruption. Even if it is not an interruption, the filing of a suit for vacant possession would mean that the land owner is asserting his right to the land, and thus the possession cannot be termed to be quiet and peaceful. How can Mr. Mwaluma claim to have been in quiet and peaceful possession when he was being dragged to court and even convicted? The land owner had an option of physically removing him from the land but he opted to use legal methods to do so, and when one uses such legal methods, it is akin to a physical confrontation to disposses, and apart from interrupting possession, one cannot, under such circumstances, claim to be in quiet possession. In my view, the previous suit filed by Mr. Kangethe in the year 2002 and the criminal suit commenced in the year 2010, interrupted the possession of Mr. Mwaluma.

10. From the above, I do not see how Mr. Mwaluma can succeed in his suit for adverse possession and his suit is hereby dismissed. I am aware that in conducting his case, Mr. Mwaluma tried to demonstrate that the land was unfairly allotted and also tried to show that the subsequent sales may not have been above board. I regret however, that these are not issues for determination, for what Mr. Mwaluma sued for is an order for adverse possession and in doing so, he acknowledged that it is Mr. Ashok who has title to the suit land. This case is not about whether or not the title of Mr. Ashok is impeachable but whether Mr. Mwaluma has proved that he is entitled to the land through the doctrine of adverse possession of which he has failed to so prove.

11. Having dismissed his suit, it follows that Mr. Mwaluma has no recognisable interest in the suit land. Given that position, and considering the fact that Mr. Ashok is the registered proprietor, I am unable to deny Mr. Ashok his prayer for vacant possession and a permanent injunction to restrain Mr. Mwaluma from the suit land. Mr. Mwaluma must give vacant possession forthwith, and if he does not, he be forcibly evicted. Mr. Mwaluma is hereby permanently restrained from entering, being upon, visiting, or in any other way interfere with possession of the suit land for he has no right in it. There was a prayer by Mr. Ashok for general damages and I think that Mr. Mwaluma unfairly continued being in possession despite being asked to leave. In my discretion, taking into account the time that this case has taken while Mr. Mwaluma has been enjoying unmerited possession, I think an award of Kshs. 1,000,000/= in general damages would come close to compensating the registered proprietor. Mr. Mwaluma will also pay the costs of both suits.

12. Judgment accordingly.

**DATED, SIGNED and DELIVERED at MOMBASA this 10<sup>th</sup> day of March, 2020.**

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**MUNYAO SILA**

**JUDGE.**

**IN THE PRESENCE OF:**

Mr Odhiambo S. E for applicant in the OS and defendant in ELC No. 70 of 2015

Ms Nzamba for respondent in the OS and plaintiff in ELC No. 70 of 2015.

Court Assistant; David Koitamet.