



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 662 OF 2017**

**( Formerly Nairobi ELC No. 290 of 2013 – OS)**

**IN THE MATTER OF LAND TITLE NO. KAJIADO/ KAPUTIEI SOUTH/ 44 KAJIADO**

**AND**

**IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTIONS ACT CHAPTER 22 LAWS OF KENYA**

**SAMUEL KIMINTAE MPARO.....1<sup>ST</sup> PLAINTIFF /APPLICANT**

**WANGUI KIMINDAI JOSEPH.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**ANNA MBENEK.....3<sup>RD</sup> PLAINTIFF/APPLICANT**

**ALBERT MPARO.....4<sup>TH</sup> PLAINTIFF/APPLICANT**

**RICHARD TURERE MPARO.....5<sup>TH</sup> PLAINTIFF/APPLICANT**

**ANDREW SAIBULU KIMINTAE.....6<sup>TH</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**ARVIND KANJI PATEL (Being Sued as the Administrator of the Estate of**

**KANJI NARAN PATEL – Deceased) .....DEFENDANT/RESPONDENT**

**JUDGEMENT**

By an Originating Summons dated the 22<sup>nd</sup> February, 2013 and amended on 3<sup>rd</sup> May, 2017, brought pursuant to Order XXXVI Rule 3D of the Civil Procedure Rules and Section 38 of the Limitation of Actions Act, the Plaintiffs pray for orders against the Defendant that:

- a) The Plaintiffs be declared to have become entitled by adverse possession of over twelve (12) years to all that piece or parcel of land registered under the Registered Land Act Chapter 300 of the Laws of Kenya and comprised in Title Number KAJIADO/ KAPUTIEI SOUTH/ 44 measuring approximately 453.2 Hectares and situate in Kajiado.
- b) The said Plaintiffs be registered as the proprietors of the said piece or parcel of land namely Title Number KAJIADO/ KAPUTIEI SOUTH/44 in the place of the abovenamed KANJI NARAN PATEL in whose name the said parcel of land is registered.
- c) In the event that any execution of any documents is required, then the Registrar of this Honourable Court to do so on behalf of the Defendant.
- d) Such further orders or reliefs as this Honourable Court may deem just.
- e) The costs of this suit be awarded to the Plaintiffs.

The Defendant opposed the Originating Summons and filed affidavits sworn by ALIC MUTINDA KALII and ARVIND KANJI PATEL. ALIC MUTINDA KALII in his affidavit deposes that he is an employee of one KANJI NARAN PATEL (deceased). He explains that he was

employed and posted to live on land parcel number Kajiado/ Kaputiei South/ 44 hereinafter referred to as the 'suit land' in 1989. He claims by then Mr. MAVJI (deceased) was also staying on the suit land and using it to cultivate and plant crops. He confirms that he also used to keep goats as well as cultivate local fruits, vegetables and lived in perfect harmony until 2010 when trespassers came and attacked him on the land. Further, that he made a report at Sultan Hamud Police Station in 2012. He contends that the Applicants father died while he was residing on the land and was buried far away from it. He avers that he went back to Sultan Hamud Police Station in 2013 to follow up on his earlier report but in vain. He insists he had been residing on the suit land from 1989 until 2010 when he was chased away.

In the affidavit sworn by ARVIND KANJI PATEL, he deposes that KANJI NARAN PATEL was his deceased father. He confirms that his father bought the suit land in 1984 and posted Mr. Mavji to reside thereon. Further, that Mr. Mavji took in Mr. Alic Mutinda Kalii in 1989. He contends that Mr. Mavji stayed on the suit land and was using the same to cultivate fruits and vegetables as well as keeping goats alongside Mr. Alic Mutinda Kalii. He claims Mr. Kalii was chased away from the suit land in 2010. Further, the Applicants invaded the suit land in 2010. He reiterates that the said invasion was violent and a report was made at Sultan Hamud Police Station however no action was taken.

The 1<sup>st</sup> Applicant SAMUEL KIMINTAE MPARO filed a supplementary affidavit where reiterated his claim above and disputed that ALIC or MAVJI ever resided on the suit land. Further, that ALIC was chased away therefrom.

The matter proceeded for hearing where the Plaintiffs' had four witnesses while the Defendant called two witnesses.

### **Evidence of the Plaintiffs**

PW1 confirmed in court that he had authority of the co - Plaintiffs to testify. It was his testimony that the suit land which was a subdivision of Kajiado/ Kaputiei South/ 35 was originally registered in the name of their father Joseph Kimintae Ole Mparo in 1970. He stated that land parcel number Kajiado/ Kaputiei South/ 35 was transferred to Melton Ole Shani who subdivided it into Kajiado/ Kaputiei South/ 44 (suit land) and Kajiado/ Kaputiei South/ 45 respectively. He stated that the Defendant was registered as the proprietor of the suit land on 19<sup>th</sup> August, 1993. He explained that that the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs are his mother and step mother respectively while the 4<sup>th</sup>, 5<sup>th</sup>, as well as the 6<sup>th</sup> Plaintiffs are his brothers. It was his testimony that together with the other Plaintiffs they have continued to live, occupy, use and or possess the suit land as one entity. Further, that the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs have lived thereon from 1969 while the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Plaintiffs were born in the suit land in 1971 and 1974 respectively. He contended that they have lived on the suit land without any hindrance, objection, authority or permission of the Defendant. Further, that they have undertaken construction of their homes thereon, kept livestock, used the land for grazing, grown subsistence crops, constructed water dams, protected the environment and kept off intruders as well as trespassers. He insisted that the Defendants had never occupied the suit land. PW2 in his testimony stated that his land neighboured the suit land. He confirmed that the deceased Joseph Kimintae Ole Mparo who was his neighbour and member of his agegroup was buried on the suit land. Further, that the Plaintiffs were currently residing on suit land and no one had claimed ownership of the same. PW3 in his testimony provided the history of the suit land and contended that both the deceased Joseph Kimintae Ole Mparo as well as his family had always occupied the suit land. He denied knowledge of the Defendants. PW4 also reiterated evidence of the previous witnesses by contending that the Plaintiffs have always occupied the suit land. Further, that developments thereon belonged to the Plaintiffs. He denied knowledge of the Defendants. The Plaintiffs produced the Extract of Title on suit land, Proceedings from the Kajiado Land Disputes Tribunal TC 478/06/08 and Kajiado Senior Resident Magistrate's Court Land Tribunal Case No. 43 of 2008 and four photographs as their exhibits.

### **Evidence of the Defendant**

DW1 in his testimony stated that he is the son to the deceased Kanji Naran Patel who owns the suit land. It was his testimony that his late father took possession of the suit land. Further, that he employed one Mavji Karsan Patel to be the care taker, who lived on the suit land from 1988 upto 1989 until he left the country. He insisted that he saw Mavji residing on the suit land in a temporary structure of half stone and half mabati. It was his testimony that one Alic Mutinda was later employed to take care of the suit land but he was chased away from it in 2010. He explained that he later failed to visit the suit land as his staff was threatened thereon.

DW2 testified that he had been employed by the deceased Kanji Naran Patel and taken to the suit land in 1989. He explained that Mavji had been taken to the suit land before him. Further, that he took over from Mavji in 1989. It was his testimony that he resided on the suit land and reared goats thereon. Further, that he was chased away in 2010 by Maasai Morans and he reported the incident to Sultan Hamud Police Station between 2012 and 2013 but could not recall date. He claimed the Police advised him to take his goats away to his home. He further claimed that the local chief Lekwandai was aware that he was residing on the suit land.

The parties thereafter filed their respective submissions.

### **Analysis and Determination**

Upon consideration of the Originating Summons dated the 22<sup>nd</sup> February, 2013 and amended on 3<sup>rd</sup> May, 2017 including the parties' affidavits, exhibits, witnesses' testimonies and submissions, the following are the issues for determination:

- Whether the Plaintiffs acquired the suit land by way of adverse possession.
- Whether the Plaintiffs are entitled to the orders sought in the Originating Summons.
- Who should bear the costs of the suit.

As to whether the Plaintiffs acquired the suit land by way of adverse possession. The Plaintiffs submitted that they have proved their claim under adverse possession and that the Defendant's right over the suit land was extinguished in 2005. They relied on the cases of **Benjamin**

**Kamau Murima & 3 Others Vs Gladys Njeri CA No. 213 of 1996; Virginia Wanjiku Mwangi v David Mwangi Jotham Kamau (2013) eKLR; Ngati Farmers Cooperative Society Ltd Vs Councillor John Ledidi & 15 Others CA No. 64 of 2014 where the Learned Judges of Appeal cited the case of Littledale vs Liverpool College (1900) 1CH 1912; Sarafina Wanjuki Njiri V David Njeru Nthiga ( 2015) eKLR; John Imbaiza Vodoye Vs Anne Chebet & Another (2017) eKLR where the Court cited in approval the case of Kimani Ruchine V Swift Rutherfords & Co. Ltd (1980) KLR 10 to buttress their arguments. The Defendant in his submissions insisted that the claim for adverse possession is premature since the Defendant's witness was on the suit land upto 2010. Further, that the Plaintiffs' witnesses were not sure whether their claim was on Kajiado/ Kaputiei South/ 44 or not and the witnesses' could not confirm how much each occupied. He further submitted that the Plaintiffs confirmed that they were using all means to prevent intruders from accessing the land and DW2 stated that he was chased away from suit land in 2010. He relied on the case of **Little dale V Liverpool College (1900) 1CH 1912** to oppose the Plaintiffs' claim.**

It is not in dispute that the Defendant is the owner of the suit land as evident in the extract of title produced as an exhibit. What is in dispute is the Plaintiffs' claim for adverse possession in respect to the suit land.

The doctrine of adverse possession is embodied in sections 7, 13, 37 and 38 of the Limitation of Actions Act. Section 7 of the Limitation of Actions Act provides that: **' An action may not be brought by any person to recover land after the end of twelve 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.'**

While section 38 (1) of the Limitation of Actions Act stipulates thus: **' (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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. '**

The requirements to be fulfilled in a claim for adverse possession were well articulated in the case of **Wambugu V Njuguna (1983) KLR 173** where the Court of Appeal stated that: **' Adverse possession contemplates two concepts: Possession and discontinuance of Possession. It further held that the proper way of assessing proof of Adverse Possession would 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 or she has been in possession for the requisite number of years.'**

In the case of **Daniel Kimani Ruchine & Others versus Swift Lothorford & Co. Ltd and Anor (1977) eKLR** the court held that in a claim for adverse possession the following has to be proved: **' The Plaintiffs have to prove that they used the land as of right, nec vi, nec clam, nec precario ( no force, no secrecy, no evasion)'**.

In the evidence before Court, PW1 testified that the suit land was initially part of land parcel number Kajiado/ Kaputiei South/ 35 which was owned by their late father. Further, the said parcel of land was subdivided into two land parcel number Kajiado/ Kaputiei South/ 44 and 45 respectively. PW1 averred that they all resided on the land including his two mothers and brothers from 1970s when their father was registered as owner of the said land. Further, that they had built their homes thereon, cultivated the land, built dams, conserved the environment, reared livestock and blocked trespassers and intruders therefrom. He claimed to have fenced a portion of the land but did not furnish the Court with pictures of the said fence. He insisted no one has ever resided on the suit land nor removed them therefrom. He contended that the Defendant never took possession of the suit land from the date he was registered as his owner. He disputed that the Defendant had caretakers thereon as he did not know them and insisted they were hired witnesses. During cross examination, PW1 claimed each of the Plaintiff's occupied 200 acres of the suit land but confirmed they had not brought in a surveyor to undertake measurements of the portions they each occupy. For a party to fulfil a claim for adverse possession, it is pertinent for them to be specific on the exact portion they occupy, when they entered the said portion and if the registered owner was well aware of their presence thereon. In respect to this point I wish to make reference to the case of **Wines & Spirits Kenya Limited & another v George Mwachiru Mwango [2018] eKLR, where the Court of Appeal held that: ' The law is clear on when time starts running for purposes of adverse possession. The possession or occupation must be with the knowledge of the registered owner (See Kimani Ruchine & Another vs. Swift Rutherford & Co. Ltd (1980) supra. Time cannot therefore start running until the registered owner becomes aware that there is a trespasser occupying his/her property and does nothing to assert his rights on the property for at least 12 years. That being so, time in this case only started running in 2012. '**

In the current scenario, from the testimonies of the Plaintiffs' witnesses, it is evident that the Defendant was not aware of their presence on the suit land. I note the Plaintiffs had lodged a complaint to reclaim the father's land, with the Kajiado Land Disputes Tribunal vide Kajiado Land Disputes Tribunal TC 478/06/08 whose Award was later adopted at the Kajiado Senior Resident Magistrate's Court Land Tribunal Case No. 43 of 2008. From the proceedings therefrom which were produced in court as an exhibit, it is evident the same were lodged from 2008 upto 2009 after their father had died and the Defendant was not a party to the said proceedings. I note that during this period time could not have been deemed to run as the Plaintiffs were engaged in litigation in respect to the suit land. Further, on perusal of the said proceedings, the Plaintiffs' were claiming land from one Melton Melita Ole Shani and Mathare Investments and Properties Limited who purportedly owned Kajiado/ Kaputiei/ 44 and 45 respectively. I opine that this is ironical for the Plaintiffs' to claim the Defendant's right over the suit land ceased in 2005 then proceed to lodge a complaint at the Kajiado Land Disputes Tribunal in respect to the suit land in 2008 against a different party. In cross examination PW1 claimed that the Plaintiffs occupied the whole parcel of the suit land. I note the whole parcel of the suit land measures 1000 acres which is a huge area and it was pertinent for each of the Plaintiff's to have provided specific evidence by proving the exact acreage or location they occupied. PW1 said he occupied 200 acres, while his mother and step mother each occupied 200 acres respectively. He further claimed that each one had fenced a homestead. Except for the four photographs produced as exhibits, Plaintiffs did not produce evidence in court to prove each of the fenced portion of the 200 acres each of them occupied. From the evidence presented especially the four photographs, it is not conclusive of their claim of the construction they had undertaken all over the suit land and dams built. Further, from the photographs, except for the vegetation and herds of goats therein, it cannot be deemed conclusive that there were livestock all over the land as well as cultivation undertaken. PW1 in his testimony contended that the Plaintiffs were utilizing both Kajiado/ Kaputiei South/44 and Kajiado/ Kaputiei South/ 45 which I note jointly measure 2000 acres. However, at this juncture they only lodged a suit against the Defendant who owns Kajiado/ Kaputiei South/ 44. PW1 admitted that they wad off intruders and trespassers from the suit land. He claimed 4<sup>th</sup> and 6<sup>th</sup> Plaintiffs also reside in Kajiado/ Kaputiei South/ 45. In re examination he confirmed that upon his father's demise, he moved his mother to reside with him which is a clear pointer that she does not occupy the 200 acres within the suit land as he earlier claimed. He stated that the father was buried on suit land but he later stated that after his father's death, they re-established

homesteads elsewhere as they do not reside where there are graves. PW2 was categorical that the Plaintiffs reside on suit land and insisted the Defendant was not thereon but later admitted that his land was slightly far from suit land which was expansive and one could not see someone on the far end. PW3 in his testimony stated that the land occupied by the Plaintiffs is 2000 acres but did not know where the deceased was buried and names of deceased children who reside on it. He was still categorical that DW2 never resided on suit land and admitted that Plaintiffs blocked intruders therefrom. PW4 reiterated the Plaintiffs' claim and insisted that the deceased family resided on 2000 acres of land. As for the Defendant, DW1 explained that his father initially hired Mavji to take care of the land and later put DW2 thereon who was chased away in 2010 by morans. DW2 in his testimony was emphatic that he resided on the land and was chased away but when he reported matter to Sultan Hamud Police Station, he was advised to remove his goats therefrom. Further, that he left suit land in 2010. Based on the Plaintiffs own admission that they blocked trespassers and intruders from the suit land, as a Court I hold the evidence of DW2 that he was chased away from the suit land by morans, in 2010 as credible. Asike-Makhandia, JA in the case of **Mtana Lewa v Kahindi Ngala Mwagandi [2015] eKLR** while dealing with the issue of adverse possession stated as follows: **'The process springs into action essentially by default or inaction of the owner. The essential prerequisites 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. ... [Emphasis supplied]**

As this juncture, and in associating myself with the decisions cited above, it is my considered view that the Plaintiffs have failed to discharge their burden of proof to demonstrate that they have fulfilled all the requirements in their claim for adverse possession in respect to the suit land. By their own admission of chasing away intruders or trespassers without defining who these were and not demonstrating the mechanisms they used to do so, I find that they indeed engaged in an element of force to enable them occupy the suit land. From the evidence before me and relying on the principle established in the case of **Wambugu V Njuguna (1983) KLR 173** supra, insofar as they have led evidence to prove they have been on the suit land, they have failed to indicate the exact location each of them occupy or if they reside on Kajiado/ Kaputiei South/ 45. In the case of **Kweyu V Omuto [1990] KLR 709**, the Court of Appeal (Gicheru JA) stated at page 716 thus:

**"By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (Colour of title is that which a title in appearance, but not in reality ). Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford colour; and, second, such possession under it as will be adverse to the right of the true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms ("claim or colour of title") mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land for the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant's use, done publicly and notoriously." Emphasis supplied**

Since the Plaintiffs denied knowledge of the Defendant nor meeting any of the Defendant's workers on suit land and in relying on this decision, I find that the Defendant was not aware of their presence thereon, hence they cannot claim to have dispossessed him from the said land after which he discontinued to be in possession therefrom.

In the circumstances, I find that the Plaintiffs have failed to prove their claim for adverse possession in respect to the suit land and hence not entitled to the orders sought.

It is against the foregoing that I find that the Plaintiffs have failed to establish their case on a balance of probability and will proceed to dismiss the Originating Summons dated the 3<sup>rd</sup> May, 2017 with costs to the Defendant.

**Dated Signed and Delivered via email this 30<sup>th</sup> day of April 2020.**

**CHRISTINE OCHIENG**

**JUDGE**