



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA COURT AT MACHAKOS

CIVIL SUIT NO.38 OF 2008 (O.S)

**IN THE MATTER OF AN APPLICATION UNDER SECTION 38 OF THE LIMITATION OF
ACTIONS ACT. CAP 22 LAWS OF KENYA**

AND

**IN THE MATTER OF ACQUISITION OF TITLE BY ADVERSE POSSESSION UNDER
SECTION 30 OF THE REGISTERED LAND ACT CAP 300 LAWS OF KENYA**

AND

IN THE MATTER OF LAND PARCEL NO. MULANGO/WIKILILYE/599

BETWEEN

LOICE KALUMU NGWILI.....APPLICANT

VERSUS

ELIUD MUTENGU MAKAU.....DEFENDANT

JUDGEMENT

The Plaintiff moved this court by way of an Originating Summons dated 12th April 2008 and filed it on 14th April 2008.

In the Originating Summons, the Plaintiff sought for the following orders:

1. That the Plaintiff herein be declared to be entitled by adverse possession of over 12 years to 0.9 Hectares of land comprised in Land Parcel No. Mulango/Wikililye/599 registered under the Registered Land Act Cap 300 of the Laws of Kenya, situated in Kitui District.
2. That the Plaintiff be registered as the absolute proprietor of 0.9 Hectares comprised in Land Parcel No. Mulango/Wikililye/599.
3. That the costs of this suit be awarded to the Plaintiff.

The O.S is based on the annexed affidavit of LOICE KALUMU NGWILI. According to the Plaintiff 's affidavit sworn in support of the Originating Summons, She states that in 1979 having been married to Joseph Ngwili Mwanja (deceased), she entered and established a homestead in the land parcel number Mulango/Wikililye/599 registered in the name of the Defendant and to date she is living and cultivating the said land. She avers that the aforesaid land had been acquired by her late husband from the Defendant

when the deceased constructed a house for the Defendant who then surrendered the land to offset the labour costs. She reiterates that she took vacant possession with her late husband Joseph Ngwili Mwanja who later passed away on 4th May, 2001 leaving her residing in the suit land. She confirms that she has lived on the suit land for over 12 years and that her late husband lodged a caution over the said parcel in 1997 to protect his purchaser's interest. Further that in 1980, the Defendant sold the land to one Frederick Mutua who upon discovering that the Plaintiff and her late husband were settled in the land, sued the Defendant for recovery of the paid purchase price vide Kitui DMCC No. 49 of 1980, where the said Frederick Mutua Mbuvi sought to attach the land to recover Kshs. 8000 being the decretal sum. She states that her husband settled the decretal sum and redeemed the land and to date she is in occupation.

The Defendant was duly served with the Originating Summons and he instructed Messrs JM Muinde & Company Advocates to act for him. The said firm filed a Memorandum of Appearance on 24th February, 2009. The Defendant however never filed any replying affidavit to rebut the Plaintiff's allegation. On the 23rd July, 2009 the Plaintiff requested for interlocutory judgment against the Defendant and on 7th August, 2009, the same was entered in favour of the Plaintiff who was directed to proceed in accordance with the then Order 9 B Rule 1 (Now Order 10 Rule 10) of the Civil Procedure Rules. Further on the 11th November, 2011 the Court provided the following directions:

- i. The Originating Summons in this case do proceed as to the cause had been begun by filing a plaint
- ii. That the affidavits filed therewith do stand as pleadings in the cause with liberty to add supplementary affidavits if need be.
- iii. The parties to call viva voce evidence at the trial.

On the 27th March, 2017 the matter proceeded for hearing by way of viva voce evidence. Plaintiff stated in court that she had resided on the suit parcel of land Mulango/Wikililye/599 and cultivates it. She took possession of the suit parcel of land in 1979, lived thereon and established a homestead; and nobody had asked her for anything. She averred that ever since she took possession, 12 years had lapsed and she has never moved therefrom. Further that nobody has interrupted her occupation of the suit parcel of land. She said she wanted the court to permit her to obtain title to the suit parcel of land in her name. She estimated the size of the suit land to be around 0.9 hectares. She produced a Search Certificate indicating it is the Defendant who owned the suit parcel. She reiterated that the land belonged to her husband who is deceased. No evidence was offered to rebut the Plaintiff's evidence. Further, at the time the suit was set down for hearing, interlocutory judgement had already been entered against the Defendant.

The Plaintiff's counsel filed her written submissions on 26th April, 2017.

The Plaintiff's counsel submitted that the suit property should be registered in the Plaintiff's name because she has been in actual, open, hostile, exclusive and continuous possession since 1979. The counsel submitted that at the time of filing the Originating Summons (14th April, 2008), the Plaintiff had lived in the suit parcel of land for 29 years. Further, that no counter evidence was adduced to controvert what the Plaintiff stated on oath in her affidavit and testimony in court. The Plaintiff is clear in her mind that she is an adverse possessor. The Plaintiff's counsel relied on section 7 of the Limitation of Actions Act Cap. 22 and on several case law including **Patrick Magu Mwangi Kimunyu versus Joreth Limited 2015 eKLR** at paragraph 12 where the Court of Appeal held that ' to succeed in a summons for adverse possession, it must be shown that there was open, continuous and uninterrupted possession for a period of at least 12 years.

The Plaintiff's counsel also relied on the case of **Ndatho. Versus Itumo & 2 others (2002) 2KLR 637** where the court of appeal held that ' The possessor must show that the possession was adequate, continuous and exclusive. In other words, such possession to be adverse, must be adequate in continuity, in publicity and in extent to show that the possession was adverse to the proprietor.

The Plaintiff's counsel further cited the case of **Daniel Kimani Ruchine & Others versus Swift**

Lothorford & Co. Ltd and Anor (1977) eKLR where the court held that ' 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)'.

Analysis and determination

The Law on Adverse possession is now well settled.

Adverse possession is described as a process by which a person can acquire title to someone else's land after continuously occupying the said land, in a way that is not consistent with the owner's rights.

For adverse possession, to mature into title to land the following conditions must be fulfilled:

- (1) The trespasser has to demonstrate that he/she has been in *Continuous and uninterrupted* possession without the consent of the owner of the land;
- (2) The trespasser's interest has to be *inconsistent* to the interests of the true owner of the land;
- (3) The possession has to be *Open and notorious*, to enable the owner be on notice that there is a trespassing on his/her land;
- (4) The possession has to be *actual*, to enable the owner have a cause of action which if he/she fails to act on within the required legal period then he/she will be estopped by the law of Limitation to claim back the land.
- (5) The possession has to be *Exclusive*, to avoid confusion on who is entitled to obtain the title to the suit land once the limitation period lapses.

Section 38 (1) and (2) Limitation of Actions Act of the Laws of Kenya gives the right to a person claiming to be entitled to someone else's land by way of adverse possession to seek the remedy in court by stipulating as follows:

- (1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in [section 37](#) of this 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.

Order 37 Rule 7 of the Civil Procedure Rules further prescribes the procedure on how an application for adverse possession should commence. It provides that 'Application under Section 38 of the Limitation of Actions Act shall be made by Originating Summons and the summons shall be supported by an affidavit to which a certified extract of the title of the land in question has been annexed.

For a party to succeed in summons for adverse possession, it must be demonstrated that there was open, continuous, notorious and uninterrupted possession for a period of at least twelve years. Further, for a party to qualify as an adverse possessor, they have to prove they did not have permission to enter into the suit land.

The Plaintiff is expected to furnish in court evidence to prove that the suit land where he/she is claiming adverse possession indeed belongs to the Defendant.

In the case at hand, although the Plaintiff's husband had permission to enter the Defendant's land in 1979, this permission lapsed in 1980 when the Defendant sold the suit land to a third party Frederick Mutua who upon realizing that the Plaintiff and her late husband were residing on the land, sued the Defendant for recovery of the paid purchase price vide Kitui DMCC No. 49 of 1980, where the said Frederick Mutua

Mbuvi sought to attach the land to recover Kshs. 8000 being the decretal sum. There is no evidence disputing that the Plaintiff's husband paid the decretal sum and redeemed the land and to date the Plaintiff has been in open occupation. In the case at hand, the time to claim adverse possession hence started running from 1980 because the Plaintiff did not have permission from the Defendant to enter the suit land and reside thereon. Further, the Plaintiff testified in court that she has been on the suit land since 1979 and openly continuously, notoriously occupied the same. After 1980, the Plaintiff and her husband did not have the Defendant's permission to enter the suit land. Further, that their occupation of the suit land has been uninterrupted from 1980 to date. I must say when this period is computed, it amounts to thirty seven (37) years which is well over the legal requirement of twelve (12) years for one to prove adverse possession. She stated in court that she cultivates the land and has moved nowhere else since she entered the suit land. She further stated that no one had ever attacked her nor interrupted her stay on the suit land. No evidence was adduced in the contrary to disprove this.

The Plaintiff had attached a copy of the Certificate of Official Search of the suit land to the supporting affidavit of the Originating Summons. She also produced the Search Certificate as exhibit 1. The Search Certificate indeed proved that the Defendant was the lawful proprietor of the land parcel number MULANGO/WIKILILYE/599 measuring 0.9 hectares since 13th August 1979 and he was issued with a title on 31st December, 1979. I must say the Plaintiff fulfilled the provisions of Order 37 Rule 7 of the Civil Procedure Rules that requires an extract of title to be attached to the affidavit at the time of filing the suit.

The court finds that the Plaintiff's claim for adverse possession over the suit land parcel Mulango/Wikililye/599 measuring 0.9 hectares started running in 1980 and not 1979 when the Plaintiff and the husband entered the suit parcel of land. Their initial entry into the suit parcel of land in 1979 was lawful and allowed by the Defendant who had paid the Plaintiff's husband for labour he had offered to the Defendant.

Professor Tom Ojienda's Principles of Conveyancing Hand Book, Law Africa Vol II at page 97 clarifies this position further when the author stated as follows:

"Where the claimant is in possession of the land with leave and licence of the true owner in pursuance of a valid agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse."

The Plaintiff's occupation of the suit parcel of land has been open, continuous, and uninterrupted. She has been cultivating the suit land and established her homestead thereon. Further, she has not moved from the suit land ever since she commenced residing thereon in 1979. She has fulfilled the requirements of granting adverse possession as held in the case of Wambugu Versus Njuguna 1983 KLR 174 cited in Karuntimi Raiji Vs. M'makinya (2013) eKLR, where the court of appeal held that 'in order for a person to acquire title by the operation of the statute of limitation to land which has a known owner, the owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the suit for purposes for which he intended to use it. The Plaintiff is required to prove that he has dispossessed the defendant of the suit land or that the Defendant had discontinued possession of the suit land for a continuous period of 12 years so as to entitle the plaintiff to the title to the suit land by adverse possession.'

For the above reason, I find and hold that the Plaintiff has proved her case on a balance of

probabilities that her right of action as against the Defendant for adverse possession over the suit land had accrued from 1980 as at the time of filing this suit because the Plaintiff and her husband continued to reside on the suit land without the permission of the Defendant and have continued to do so to date. The Plaintiff's rights have hence accrued pursuant to section 38 (1) of the Limitation of Actions Act.

In the foregoing, and for the reasons I have given above, I allow the Plaintiff's Originating Summons dated 12th April, 2008 and filed on 14th April, 2008 with costs.

I further make the following orders:

The District Land Registrar Kitui is hereby ordered to register the Plaintiff as the owner of land parcel number Mulango/Wikililye /599

Dated and Delivered in Machakos this 15th day of May, 2017

CHRISTINE OCHIENG

JUDGE