



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

MISC. APPLICATION NO.29 OF 2018(OS)

JOSEPHINE HONGO KAPESA.....APPLICANT

VERSUS

ALEF LIMITED.....RESPONDENT

JUDGMENT

1. Josephine Hongo Kapesa, the Applicant took out an Originating Summons dated 22nd June, 2018 pursuant to Sections 37 and 38 of the Limitation of Actions Act, Cap 22 Laws of Kenya and order 37 of the Civil Procedure Rules against the Respondent, Alef Limited in which she is seeking to be declared to have become entitled by virtue of adverse possession of all that piece of land known as PLOT NUMBER 7880/I/MN registered as TITLE NUMBER CR. 22483 situate in Mombasa municipality containing by measurement 0.0672 Hectares or thereabouts registered in the name of the respondent.

2. The summons is supported by the affidavit of Josephine Hongo Kapesa sworn on 22nd June, 2018 and is based on the grounds that the applicant has been residing on the suit property from the year 2000 to date and that she has built a permanent residential home/structure thereon. The applicant avers that the respondent is the registered owner of the property and the applicant has attached copy of the certificate of title as well as certificate of postal search confirming that the respondent is the registered owner of the suit property.

3. The applicant states that she has been having quiet enjoyment of the suit property without any interruption and that at no time did she ever require permission from the respondent to carry out the activities on the land which include poultry and crop farming thereon. It is the applicant's case that she has been having continuous, open, peaceful and uninterrupted occupation since the year 2000 and therefore has acquired the property by way of adverse possession.

4. Pursuant to leave granted by the court on 2nd October 2019, the respondent was served by way of substituted service through advertisement in the Standard Newspaper on 9th October 2019. The respondent did not enter appearance within the stipulated time or at all and the case proceeded ex-parte.

5. In her evidence, the applicant reiterated the contents of the affidavit in support of the Originating Summons and produced photographs showing the structure the applicant built and which she uses as her home as well as photographs showing crops and animals. The applicant stated that the suit property was vacant and that she cleared it and carried out her farming activities before constructing her house. That nobody has ever come forward to stop the applicant's activities and occupation or to seek her eviction. The applicant urged the court to grant the reliefs sought in the Originating Summons.

6. The law on adverse possession is now well settled and the essential requirements that one has to meet in order to succeed in an application for adverse possession have been discussed by the courts. In **Wambugu –v- Njuguna (1983) KLR 173**, the Court of Appeal held 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.

7. The ingredients were recently discussed by the Court of Appeal in the case of **Mtana Lewa –v- Kahindi Ngala Mwangandi (2015) eKLR** where it was held that:

“Adverse possession is essentially a situation where a person takes possession of land, 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 12 years.”

8. It is also a well settled principle that a party claiming adverse possession ought to prove that his possession was “nec vi, nec, clam, nec

precario”, that is, peaceful, open and continuous. The possession should not have been through force, not in secrecy and without the authority or permission of the owner.

9. This being a claim for adverse possession, the Applicant must show that she has been in continuous possession of the land for 12 years or more; that such possession has been open and notorious to the knowledge of the owner and that she had asserted a hostile title to the owner of the property.

10. In her evidence, the applicant stated that she has been in occupation of the suit property since 2000 which is a period of over 12 years. The applicant also stated that she has been in occupation and possession of the suit property openly and continuously and without interruption for that period. There was no evidence availed to contradict the applicant’s averments. The applicant produced a copy of the title and search confirming that the property is registered in the respondent’s name. She also produced photographs showing the extensive developments, including permanent buildings and crops. I have no doubt in my mind that such vast developments must have been undertaken over time and openly.

11. Considering the totality of the evidence availed in this case, and applying the legal principles as outlined above, it is clear that the applicant has proved her case on a balance of probability and has brought herself within the limits of the doctrine of adverse possession.

12. In the result, the suit by way of Originating Summons dated 22nd June 2018 and filed on 26th June 2018 is allowed and I entered judgment as follows:

a. That the applicant is entitled to be registered as owner of all that piece of land known as PLOT NUMER 7880/I/MN registered as TITLE NUMBER CR 22483.

b. Because the defendant did not participate, there shall be no order as to costs.

DATED, SIGNED and DELIVERED at MOMBASA this 7TH day of July 2020.

C. K. YANO

JUDGE

In the presence

Yumna Hassan Court Assistant