



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO.215 OF 2017(OS)

EUNICE KAHINDI GUTU.....APPLICANT

VERSUS

MOHAMMED AJAZ MIRZA.....RESPONDENT

IN THE MATTER OF: LAND REFERENCE NUMBER: KILIFI/MTONDIA/165

AND

IN THE MATTER OF: SECTION 38 OF THE LIMITATION OF

ACTIONS ACT CAP 22, LAWS OF KENYA

AND

IN THE MATTER OF: AN APPLICATION FOR DECLARATION THAT THE APPLICANT HAS

OBTAINED TITLE OVER THE SAID LAND REFERENCE NUMBER KILIFI/MTONDIA/165

JUDGMENT

1. By an Originating Summons dated 24th October 2017 and filed herein on 3rd November 2017, Eunice Kahindi Gutu (the Applicant), prays for a determination and order:-

i) That the Applicant is entitled to be declared as proprietor of Land Parcel No. Kilifi/Mtondia/165 which she has acquired by adverse possession, having lived and worked thereon for over 24 years since 1992 well beyond the Statutory 12 years and used it peacefully and uninterrupted without any interference from the Respondent; and

ii) That the Applicant is entitled to be registered and issued with a Certificate of title over the same in place of the Respondent.

2. The summons is supported by the Applicant's affidavit sworn on 24th October 2017 wherein she narrates how she came to be in possession of the subject parcel of land.

3. The summons was served by way of substituted service by advertisement in the Standard Newspaper of 9th March 2018. The Respondent named therein as Mohammed Ajax Mirza has however neither entered appearance nor filed any response to the application. This matter therefore proceeded to hearing by way of formal proof.

4. The Applicant called five witnesses. Testifying on her own behalf as PW1, the Applicant adopted the evidence in her Supporting Affidavit sworn on 24th October 2017 and filed with the Summons on 3rd November 2017. In the said Affidavit, the Applicant avers that sometimes in 1992, her husband, one Kahindi Karu Birya and herself travelled to Kilifi for employment in the farm of one Joseph Naran. The said farm comprised of the said LR No. Kilifi/Mtondia/165 (the suit property).

5. PW1 testified that the said Joseph Naran visited the land only once in late 1992 and informed them that one Janet Wairimu Chokwe had sold the same land to another person known as Mohamed Ajaz Mirza (the Respondent). Since then, the said Joseph Naran stopped paying them salary and even though her husband left the land, she continued occupying the land and took full possession thereof.

6. PW1 further told the Court that she proceeded to build a residential home on the land openly and has since openly occupied it and developed the same with the help of her children who have grown up to become adults during her occupation of the land. It was her testimony that the proprietor of the land has not stepped thereon for the past 24 years.

7. On his part, PW2-Sharrif Kahindi Kalu, told the Court he is the first born son of the Applicant. It was his case that he was born in 1992 and has always known the suitland as their home. It is his mother who occupies and farms the land ever since. After he became an adult PW2 also constructed his house on a portion of the land.

8. PW3- Lillian Ruwa Unda told the Court that she is a neighbour of the Applicant. It was her evidence that she knew the Applicant sometimes in 1992 when she had a small child. The Applicant lived on the suitland then and has continued to occupy the same to-date.

9. PW4- Daniel Bahati Kituto testified that he first saw the Applicant occupy the suitland when the Applicant was still breast-feeding PW2. Since then, the Applicant has occupied the land in which she has built her home and farms maize, beans, cashewnuts and coconuts. The Applicant's stay on the land has never been interrupted by anyone.

10. Finally, PW5-Kahazo Kenga Madago also told the Court that he knew the Applicant in 1992 at a time when the Applicant was breastfeeding Pw2. For more than 20 years, no one has interrupted the Applicant's stay on the land and she has built a home thereof and carries out various farming activities.

11. I have considered the pleadings filed by the Applicant, the testimony of her witnesses and the evidence placed before me. The Respondent neither entered appearance nor filed a defence herein.

12. Section 38 of the Limitation of Actions Act provides that:-

“.....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 the proprietor of the land.”

13. As it were, beyond prescribing the limitation period, the Act does not expressly define “adverse possession” as a term. Section 13(1) thereof however provides that a right of action in recovery of land does not accrue unless the land is in the possession of some persons in whose favour the limitation period can run (which is the possession in the Act referred to as adverse possession). In addition, Section 7 of the Limitation of Actions Act bars the owner of a parcel of land from an action to recover it at the expiry of 12 years.

14. From the above provisions, it emerges that a number of conditions must obtain before a conclusion can be arrived at to the effect that there was adverse possession. First, the parcel of land must be registered in the name of a person other than the Applicant. Secondly, the Applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title owner and lastly, she must have been in that occupation for a period in excess of 12 years having dispossessed the owner or there having been discontinuance of possession by the owner.

15. In the matter before me, the Applicant contends that she first entered the suit property in 1992 with her husband who was then working for one Joseph Naran. When the said Joseph Naran stopped paying a salary to her husband and informed them of the changes to the ownership of the land, the Applicant's husband left, possibly to look for greener pastures. But the Applicant stayed on and started cultivating and developing the land.

16. From an extract of a copy of the Green Card produced herein(Pexh 1), it is not clear what relationship the said Joseph Naran had with the suit property . The extract of the Green Card however shows that on 7th July 1989, the said property measuring 12 acres was transferred from the Settlement Fund Trustees to one Jane Wairimu Chokwe. Subsequently, on 25th May 1992, the title was transferred to the name of the Respondent.

17. It is the Applicant's case that she has lived on the land openly since around 1992 and has never seen the Respondent therein nor has he attempted at any time to eject them therefrom.

18. As it were, the Respondent was served but did not enter any appearance and/or file a defence or response to the Applicant's Claim. The testimony of the Applicant and that of her witnesses remains uncontroverted. If the Applicant is to be believed, and I had no reason to doubt her evidence, she has been in occupation and possession of the Respondent's parcel of land for a period in excess of 12 years.

19. Her evidence and testimony that she has had an open, exclusive and uninterrupted possession of the suit property was corroborated by her neighbours (PW3, PW4 and PW5) who all testified that she has lived on the land ever since the time PW2 was breastfeeding. As at the time he testified herein, PW2 was an adult who informed the Court that he was 25 years old, married and with his own house within the suitland.

20. In the circumstances, I am satisfied that the Applicant has proved his case to the required standard. Accordingly Judgment is hereby entered for the Applicant as prayed in the Originating Summons dated 24th October 2017 and filed herein on 23rd November 2017.

Dated, signed and delivered at Malindi this 18th day of January, 2019.

J.O. OLOLA

JUDGE