



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 318 OF 2015

MBARO JOHNSONPLAINTIFF

KASUNGU GONA MASHAPLAINTIFF

SALIM WANJALA KILISWAPLAINTIFF

BAKARI HAMISI KATANAPLAINTIFF

CHARO KARISA JEFWAPLAINTIFF

ATHMAN SALIMPLAINTIFF

KARASU MWARANDU MUMBAPLAINTIFF

KAJUMWA MWAMBOZEPLAINTIFF

KASIMU KHAMISIPLAINTIFF

JOYCE MADZO POLE.....PLAINTIFF

(SUING ON THEIR OWN BEHALF AND ON BEHALF OF THE SQUATTERS/

RESIDENTS OF JUNDA KASARANI NDOGO RESIDING UPON PROPERTY

TITLE NO. 771/II/MN NUMBERING 430 APPEARING IN THE SCHEDULE

OF MEMBERS OF BAHATI JUNDA SELF HELP GROUP ATTACHED TO

THE ORIGINATING SUMMONS HEREIN)PLAINTIFF

AND

TAVETA TEACHERS INVESTMENT LIMITED.....DEFENDANT

JUDGEMENT

The plaintiff's claim on behalf of themselves and other squatters numbering about 430 people appearing in the Schedule of Members of Bahati Junda Self Help Group attached herein by Adverse possession of the suit property/title No. 771/II/MN CR. 8594 measuring 47.62 acres or thereabouts for determination of the following questions:-

1. Has the plaintiffs been in un-interrupted possession of the suit property for more than 12 years?
2. Are the plaintiffs entitled to adverse possession of the suit property?
3. Whether the possession and occupation by the plaintiffs of the suit property constitutes over riding interest in terms of the provisions of the land Act 2012 or section 30 of the Registered Land Act, Cap 300, laws of Kenya (now repealed.)

4. Are the plaintiffs, entitled to be registered as the owner of suit property?
5. Whether a permanent injunction order can be issued against the defendant by himself, servants, family members authorized agents or independent contractors not to demolish or damage the plaintiffs structures built on the land or interfere with their crops on the land and or evict the plaintiffs from the suit land?
6. Whether damages are adequate remedies to the plaintiffs and/or whether compensation to the plaintiffs by the defendant is a viable remedy?
7. Are the plaintiffs entitled to costs of the suit?

The plaintiffs pray for the following orders:-

1. That this honourable court do find and declare that the plaintiffs are the rightful owners of the suit land under customary law.
2. That the honourable court do find and declare that the plaintiffs have acquired title to the disputed land by adverse possession having lived on the suit land for over twelve (12) years openly and without any interference by anyone.
3. That the defendant, by self, agents, servants family members and other authorized person and independent contractors be restrained by a permanent injunction from entering the suit property or demolishing the houses, structures or damaging or harvesting the plaintiffs crops therein and or evicting or interfering with the plaintiffs user and occupation of the suit property with their families.
4. That costs of the suit be provided for.

The defendant in their defence stated that, the defendant is the registered owner of the suit property as evidenced by the certificate of searches. That the plaintiffs cannot claim adverse possession of the suit property against the defendant as they have never occupied the suit property at any point in time. That the plaintiffs cannot therefore claim that their no-occupation of the suit property constitutes an overriding interest since they cannot claim adverse possession of a property they have never occupied. That the plaintiffs have not tendered any evidence before this honourable court to support their allegation of being in occupation of the suit property for more than 12 years. That it is not certain which plot is being referred to by the plaintiffs as they have not brought to this honourable court a copy of the title of the suit property to which they are claiming adverse possession. That the plaintiffs have not produced to this honourable court a survey report to aid this court ascertain the size of the suit property to warrant the court to give audience to the plaintiffs and grant the orders sought.

This court has considered the application and submissions herein. In determining whether or not to declare that a party has acquired land by adverse possession, there are certain principles which must be met as quoted by Seron J in the case of Gerald Muriithi v Wamugunda Muriuki & Another (2010) eKLR while referring to the case of Wambugu v Njuguna (1983) KLR page 172 the Court of Appeal held as follows;

1. *In order to acquire by statute of limitations title 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 continued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed of the suit land for a continuous period of twelve years as to entitle him, the respondent to title to the land by adverse possession.*
2. *The limitation of Actions Act, on adverse possession contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not the claimant has proved that he has been in possession for the requisite number of years.*
3. *Where a claimant pleads the right to land under an agreement and in the alternative seeks adverse possession, the rule is: the claimant's possession is deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least 12 years after such payment.*

The court was also guided by the case of Francis Gicharu Kariri - v- Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (Nairobi) the Court of Appeal approved the decision of the High Court in the case of Kimani Ruchire -v - Swift Rutherfords & Co. Ltd. (1980) KLR 10 where Kneller J, held that:

"The plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion)".

So the plaintiff must show that the defendants had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it by way. The case of **Kasuve vs Mwaani Investments Ltd. & 4 others (2004) KLR 184** the court states that;

"In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of land openly and as of right and without interruption for a period of 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition".

In the instant case, it is not disputed that the suit land is registered in the defendants name. The issue for this court to determine is whether or not the plaintiff's have been in un-interrupted possession of the suit property for more than 12 years and are the plaintiffs entitled to adverse possession of the suit property. PW1, testified that he has lived on the suit land since 1998. He is the Chairman of Bahati Junda Self Help Group which has 430 members and they had given him and nine others authority to represent him. Members of this group had lived on that and for over 12 years uninterrupted, openly and peacefully. They have built houses, schools, shops clinics, churches and mosques. PW2 and PW3 corroborated his evidence. PW1, produced a letter from the Chief confirming their stay PEx3. The plaintiffs' evidence has not been challenged. I find that the plaintiffs have *been in exclusive possession of land openly and without interruption for a period of over 12 years. I find that the plaintiffs' have proved their case on a balance of probabilities and I grant the following orders;*

1. That the plaintiffs have acquired title to the disputed land by adverse possession having lived on the suit land for over twelve (12) years openly and without any interference by anyone.

2. That the defendant, by self, agents, servants family members and other authorized person and independent contractors be restrained by a permanent injunction from entering the suit property or demolishing the houses, structures or damaging or harvesting the plaintiffs crops therein and or evicting or interfering with the plaintiffs user and occupation of the suit property with their families.

3. Costs to the plaintiff

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA IN OPEN COURT THIS 29TH DAY OF MARCH 2019.

N.A. MATHEKA

JUDGE