



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 87 OF 2018 (OS)

WAIRIMU MBURU.....PLAINTIFF /APPLICANT

VS

CHEGE THAIYA.....DEFENDANT/RESPONDENT

JUDGMENT

1. The Plaintiff filed an Originating summons on the 13/11/18 expressed under section 7, 17, and 38 and all the other enabling provisions of the Limitations of Actions Act, Cap 22 Laws of Kenya and order 37 (3d) of the Civil Procedure Act and all other enabling provisions of the law.
2. It is her claim that she is entitled to the land LOC5/MIRIRA/783 (suit land) by way of Adverse Possession. She sought the following orders;
 - a. A declaration that the title to the suit land has been extinguished by the Plaintiff Adverse Possession thereof for a period of more than 12 years in terms of the Limitation of Actions Act.
 - b. That the Plaintiff has become entitled by Adverse Possession of all that piece of land known as LOC5/MIRIRA/783 in Mirira Location, Muranga District within Muranga County and registered under the Land Act in the name of Chege Thaiya. An order that the District Land Registrar Muranga do register the Plaintiff as absolute proprietor of all that piece of land known as LOC20/MIRIRA/783.
 - c. That the District Land Registrar Muranga be directed that the order herein shall be instrument of transfer of ownership of the land measuring 1.0 ha to the Plaintiff .
 - d. Costs of the suit to be provided.
3. The application is supported on the grounds annexed to the Originating Summons as well as the supporting affidavit of the Plaintiff.
4. Despite service of summons and the hearing date having been served on the Defendant he neither entered appearance nor filed any Respondent the suit.
5. The Originating Summons were later converted into a plaint pursuant to Order 37 rule 19 of the Civil Procedure Rules.
6. At the hearing the Plaintiff testified and relied on the averments contained in the Supporting affidavit filed on the 13/11/2018. She led evidence that the suit land is registered in the name of the Defendant. She adduced a copy of the official search dated the 1/11/18 in support. That in 1972 her deceased husband namely Andrew Mburu Muhindi was employed by the Plaintiff (perhaps Defendant) as a shamba boy to cultivate and take care of the suit land on behalf of the Defendant. She testified that she found her husband living on the suit in 1972 when she got married to him. That he was the employee of Chege Thaiya. She further informed the Court that the Defendant had given her husband the permission to live on the land as a worker. That they lived on the land until 2007 when her husband died. During the subsistence of their marriage they got 4 children born and bred on the suit lands. That they have built houses on the said land. She carries out subsistence farming on the land.
7. That upon the demise of her late husband she now lives on the suit land. Further she testified that the Defendant does not live on the land. That she has lived on the suit land for over 50 years and urged the Court to grant her prayers.
8. The Plaintiff filed Written Submissions where she submitted that she has locus to bring this suit as she has lived on the land since 1972. That her long stay on the land entitles her rights in possession of the suit land. She relied on the case of **Ng'ati Farmers Cooperative Vs Councilor John Ledidi & 15 others (2009) ECLR** where the Court affirmed the right of the members of the Maasai community to be

declared owners of the suit land which they had been in occupation for more than 20 years.

9. Further it is her submissions that she has been in uninterrupted continuous and exclusive possession of the suit land and the Defendant has not taken any actions to dispossess her of her occupation and possession since 1972 by way of eviction or any other suit to advert his rights in the land. She stated that she is in entire occupation of the suit land measuring 1.0 hectares where she has developed the land by building homes, raising children and practicing subsistence farming.

10. Having considered the pleadings, the evidence and the submissions the issue for determination is whether the Plaintiff is entitled to the orders sought.

11. The object of Adverse Possession as enunciated in the case of **Adnam v Earl of Sandwich (1877) 2QB 485** are;

“The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties.”

12. **Sections 7 and 17** of the Limitation of Actions Act, provide as follows;

"7. 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.

17. Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action, to recover land (including a redemption action), the title of that person to the land is extinguished."

13. The period of twelve years starts to run from the moment the trespasser takes Adverse Possession of the land and the registered proprietor is regarded as having been dispossessed or having discontinued his possession. In the case of **Wambugu Vs. Njuguna [1983] KLR 172** the Court held as thus;

"1. The general principle is that until the contrary is proved, possession in law follows the right to possess.

2. In order to acquire by the statute of limitations title to land which has a known owner, that 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 soil for the purpose for which he intended to use it.....

3. 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 whether or not the claimant has proved that he has been in possession for the requisite number of years.

4. Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale agreement, the possession become 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 but with permission. The occupation can only be either with permission or adverse; the two concepts cannot co-exist.....

5. The rule on "permissive possession" is that possession does not become adverse before the end of the period during which the possessor is permitted to occupy the land.....

6. Adverse Possession means that a person is in possession, in whose favour time can run. Not all persons in possession can have time run in their favour.....time cannot run in favour of a licensee. A licensee therefore has no Adverse Possession (Hughes v. Griffin [1969] 1 WLR 23."

Apart from the above, the following principles also apply when considering an application under **Section 7** of the Limitation of Actions Act;

i) For the registered owner of land to be dispossessed, the party claiming ownership by Adverse Possession must demonstrate the existence of acts done on the suit property which are inconsistent with the registered owner's enjoyment of the land for the purpose for which he intended to use it. See **Ngati Farmers Co-operative Society Limited V. Councillor John Ledidi & 15 others, Nkr CA No. 94 of 2004.**

ii) The mere change of ownership of land which is occupied by another person under Adverse Possession, does not interrupt such person's Adverse Possession.

iii) Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his rights or when his right is admitted by adverse possessor. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. See **Githu V. Ndeete [1984] KLR 776.** Running of time will not be interrupted by sending a notice or letter from the true owner to the claimant.

iv) Exclusive physical control of the land must depend on the circumstances of each case, the nature of the land and the manner in which land of that nature is commonly used or enjoyed. See **Powell V. McFarlane [1977] 38 P & Cr. 452.**"

14. It is the Plaintiff's case that when she got married, she found her late husband living on the land. She stated in evidence as follows;

"I found my husband living on the land as an employee of Chege Thaiya. The Defendant had given my husband permission to live on the land as a worker. I now live on the land. The Defendant does not live on the land."

15. The Plaintiff stated in her evidence that her husband died in July 2007 and she and her children have continued to occupy the land. She now wants to claim title by Adverse Possession on account of the time she and her late husband have been in occupation since 1972. She avers that 12 years has since long expired and therefore she is entitled to title since the Defendant had knowledge of their occupation and has never taken any constructive steps to evict them and or disposes her of the suit land. She avers that she has not handed over possession to the Defendant.

16. It is trite law, that where an employee is in possession of land or a house, by virtue of employment, he cannot seek to have that land or house by way of Adverse Possession. This was the decision in **Delamere Estates vs Ndungu Njai & Others (2006) eKLR, and Wellington Lusweti Barasa & 75 Others vs Lands Limited & Another (2014)** where the Court held that;

"If a person is an employee of another and by virtue of his employment he is allowed to reside on his employer's property, his entry and occupation thereon is not adverse to his employer's rights because he entered therein with permission of his employer."

17. Similarly, a person who occupies as licensee cannot claim land by dint of the doctrine of Adverse Possession. This was settled in the case of **Hughes v Griffin (1969) All ER 460** where it was held that a licensee or tenant at will, does not have time running in his favour, for the purposes of a claim for Adverse Possession.

18. Following the above principle of law, it means that the period between 1972 -2007 the Plaintiff and her husband occupied the land as a worker and a spouse of the worker respectively. Therefore, they occupied with the permission and under license of the owner, the Defendant herein. I do not agree with the submissions by Counsel of the Plaintiff that the Plaintiff has locus to seek adverse from 1972 to date on her own right. Her previous occupation cannot be divorced from the permitted occupation and possession of her husband as an employee. Her licence then expired with the demise of her husband in July 2007. Time started running in favour of adversity from the year 2007 when her husband died. Barring no contract of employment/license from the Defendant, and taking July 2007 to date gives 11 years 8 months which is less than the statutory period of 12 years provided in law. Her claim therefore has been brought to Court prematurely.

19. In the end the Plaintiff's claim fails and it is dismissed. I make no orders as to costs.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 4TH DAY OF APRIL 2019.

J. G. KEMEI

JUDGE

Delivered in open Court in the presence of:

T M Njoroge HB for J K Kinyua for the Plaintiff

Defendant: Absent

Kuiyaki and Njeri, Court Assistants