



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC. CASE NO. 3 OF 2007 (O.S)

KASIMU SHARIFU MOHAMED.....APPLICANT

VERSUS

TIMBI LIMITED.....RESPONDENT

JUDGMENT

1. This suit was commenced by way of an Originating Summons dated 16th January, 2007. In the Originating Summons, the Applicant is seeking for one substantive order; that he be registered as the proprietor of parcel of land known as Plot No. 503-Watamu instead of Timbi Limited by virtue of adverse possession.
2. The Originating Summons is supported by the Applicant's Affidavit in which he has deponed that for a period exceeding the last twelve (12) years, he has been in exclusive possession of the suit land; that he has occupied the suit land openly, quietly and continuously and that he has over the years erected and maintained structures and other fixtures on the land.
3. According to the Applicant's Affidavit, the Respondent's representatives have never taken possession of the suit land and that they have never interfered with or obstructed him howsoever in regard to his quiet possession and continued use of the suit land.
4. The Respondent's director filed a Replying Affidavit on 9th January, 2008 in which he deponed that the Applicant has not been in exclusive possession of the suit land for the last twelve (12) years; that the only time that the Applicant attempted to occupy part of the suit property was in 1997 when he erected a temporary structure on the land and that the Respondent filed Malindi PMCC No. 238 of 1997 seeking for eviction orders.
5. The Respondent deponed that the court in PMCC No. 238 of 1997 ordered the Respondent to vacate the suit land and that as at the time this suit was being filed, there was a pending suit being Mombasa Miscellaneous Application No. 46 of 2006 (J.R). According to the Respondent, the Applicant vacated the suit land after the orders in PMCC No. 238 of 1997 were granted and that the Plaintiff has not carried out any agricultural or commercial activities on the land.
6. When the Originating Summons came up for directions on 10th May, 2016, the parties' advocates agreed that the matter proceeds by way of Affidavit evidence and written submissions. The only Affidavits on record are the ones I have referred to above.
7. The Applicant's advocate submitted that adverse possession is a situation where a person takes possession of land and asserts rights over it for twelve (12) years; that the process springs into action by default or inaction of the owner and that between the years 1984 when the Defendant got its title and the year 1996 when the twelve (12) years statutory period accrued, the Respondent never sought to assert its proprietary right over the suit property. Counsel submitted that during this period, the Plaintiff was in actual, open, hostile and continuous possession of the land to the exclusion of the Respondent.
8. The Applicant's counsel submitted that the Replying Affidavit by the Respondent is a mere denial; that the Respondent does not claim to be in possession of the suit property and that the Applicant's case is uncontroverted. Counsel relied on several authorities which I have considered.
9. The Respondent's counsel submitted that the Applicant was declared a trespasser on the suit land in Malindi PMCC No. 238 of 1997; that the Applicant was declared the owner of the land under customary law in Land Disputes Tribunal Case No. 19 of 1999 and that the Applicant is making two claims, one under customary law and the other one under the Limitation of Actions Act. According to counsel, the fact that the Plaintiff has raised conflicting and contradicting claims to the suit land raises doubts as to the credibility of the current claim.
10. The Respondent's advocate finally submitted that the Applicant trespassed on the suit land in 1990 and that he was declared a trespasser by the court. According to the Respondent's advocate, the Plaintiff's claim was an afterthought.

11. After this suit was filed, the matter proceeded for hearing ex-parte and the court delivered its Judgment on 11th July, 2007. The court ordered that the Applicant be registered as the absolute proprietor of the suit land in place of the Respondent. However, the said Judgment was later on set aside by the court when the Respondent applied and successfully argued that it was not served with summons.

12. The Applicant's claim is that until the date of filing the suit, he had been in exclusive, uninterrupted and peaceful possession and occupation of plot number 503 Watamu for twenty (20) years and that he had carried out various agricultural and commercial activities on the land for those years.

13. It is the Applicant's case that the Respondent's agents or employees have never taken possession of the suit land or interfered with his possession. The Applicant referred to Malindi PMCC No. 238 of 1997 in which the court found that he was a trespasser on the land.

14. The Certificate of Title annexed on the Applicant's Originating Summons shows that the Defendant was registered as the proprietor of the suit land on 6th March, 1984. Initially, the suit land was in the name of Angel Bay Limited which later changed its name to Timbi Limited.

15. The law on adverse possession is now settled. In the case of *Isaak Adan Mahad & 2 others vs. West End Butchery Limited (2016) eKLR*, the Court of Appeal held that for a claim of adverse possession to succeed, the occupation must be hostile and that such occupation should not have been sanctioned by the registered proprietor. In the case of *Robert Shume & 3 others vs. Samson Kazungu Kalama (2015) eKLR*, the Court of Appeal held as follows:

“By dint of Section 7 of the Limitation of Actions Act, the Appellant ought to have demonstrated that the Respondent had lost the right to bring the action to recover the property on account of the former having been in a quiet and continuous occupation and use of the property in a manner inconsistent with the Respondent's title for a period of twelve (12) and more years. Stated differently and bearing in mind that possession is a question of fact, they were expected to show that their possession was nec vi, nec clam, nec precario, that they were in exclusive possession of the property; that their possession was open, continuous, peaceful and notorious with the knowledge but without permission of the owner.”

16. The above position of the law had earlier on been set by the court in the case of *Kimani Ruchire vs. Swift Rutherfords & Co. Ltd (1980) KLR 10* where it was held that for one to succeed in a claim for adverse possession, the possession must not be broken for any temporary purpose.

17. Adverse possession is therefore a process by which a person can acquire a title to someone else's land by continuously occupying it in a way that is inconsistent with the right of the owner. As was held by the Court of Appeal in the case of *Mtana Lewa vs. Kahindi Ngala Mwangandi (2015) eKLR*, the doctrine of adverse possession is neither an arbitrary nor an unconstitutional limitation of the right to property.

18. An owner of land is always deemed to be in possession of his land until there is intrusion by a third party, and once the intruder has been on the land for twelve (12) years, the owner loses the right to claim the land.

19. In its Affidavit, the Respondent does not claim to be in possession of the suit land. Indeed, the Respondent has never occupied the suit land since it was registered in its favour in 1984.

20. The evidence by the Applicant that he had been on the suit land for more than twenty (20) years as at the time the suit was filed was not tested in cross-examination or controverted. Indeed, the Judgment of the court in Malindi PMCC No. 238 of 1997 that the Applicant was a trespasser on the suit land was a confirmation that the Applicant had been on the suit land without the permission of the Respondent.

21. The Judgment in PMCC No. 238 of 1997 is a prove that the Respondent had admitted that the Applicant was on the suit land. In the said decision, the court rightly observed that it is only the High Court (ELC) that can deal with the claim of adverse possession, thus the filing of the current suit.

22. Having not cross-examined the Applicant on his deposition that he had been on the land for more than twenty (20) years, and in view of the fact that the Respondent did not deny that it has never been in possession of the suit land, I find and hold that the Applicant has proved on a balance of probabilities that it has occupied the suit land *nec vi, nec clam, nec precario* for twelve (12) years.

23. For those reasons, I allow the Originating Summons dated 16th January, 2007 as prayed.

DATED AND SIGNED AT MACHAKOS THIS 6TH DAY OF APRIL, 2018.

O.A. ANGOTE

JUDGE

DATED, DELIVERED AND SIGNED AT MALINDI THIS 19TH DAY OF APRIL, 2018.

J.O. OLOLA

JUDGE