



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT KISII

CASE NO. 490 OF 2015

GEORGE OGAKE PIUS.....PLAINTIFF

VERSUS

ESTHER NYASANI MAKORI.....1ST DEFENDANT

GIDEON MOSOTI MAKORI.....2ND DEFENDANT

DENNIS ONGUBO ACHIRA.....3RD DEFENDANT

R U L I N G

1. On 19th October 2017 arising from the plaintiffs Notice of Motion dated 4th October 2017 where the plaintiff claimed he had been denied access to his house by the defendant, the court granted the plaintiff authority to remove stones that had been placed in front of his house impeding him access. The court also granted the plaintiff authority to break the padlock to gain access inside his house. The defendants had not filed any response to the plaintiff's Notice of Motion dated 4th October 2017 and were absent on 19th October 2017 when the court made the aforesaid orders.

2. The defendants on 21st November 2017 filed their Notice of Motion dated 14th November 2017 and which is the subject of this ruling seeking inter alia:-

1.Spent

2. **That pending the inter partes hearing and determination of the application herein there be a stay of orders of this court made on 19th October 2017.**

3. **That the orders of the court made on 19th October 2017 be reviewed and the same with the entire proceedings thereof be set aside.**

4. **The court be pleased to strike out the originating summons herein for failure to meet the peremptory requirements of Section 38 of the Limitations of Actions Act Cap 22 Laws of Kenya.**

5. **The costs of this application and the suit be provided for.**

3. The application was supported on the grounds set out on the face of the application and on the affidavit of Edward Aboki Begi sworn in support thereof on 14th November 2017. The plaintiff opposed the defendants application vide a replying affidavit sworn on 17th January 2018.

4. The defendants application came for hearing inter partes on 8th February 2018 by which date the plaintiff had removed the stones placed in front of his premises and had also broken the padlock and gained access into the premises. Mr. Begi Advocate for the defendants properly conceded that prayer (2) and (3) of the defendants application had been overtaken by events. Mr. Begi however indicated he wished to pursue prayer (4) of the application which sought to have the originating summons (OS) struck out for non compliance with Section 38 of the Limitations of Actions Act, Cap 22 Laws of Kenya. The court gave directions for the parties to argue that aspect of the application by way of written submissions.

5. To contextualize the defendants application, it is necessary to revert to the originating summons vide which the plaintiff initiated the suit.

The plaintiff by the OS dated 2nd November 2015 filed in court on 3rd November 2015 claims to have acquired title of a portion of land **LR No. South Mugirango/Bogetenga/3104** being a subdivision of **LR No. South Mugirango/Bogetenga/2481** measuring 25feet by 100feet by prescription and/or adverse possession and seeks the determination of the following issues:-

1. The application herein be certified as urgent and the same be heard ex parte in the first instance.

2. Pending the hearing and determination of the instant application, the honourable court be pleased to grant an interim order of injunction restraining the defendants/respondents either by themselves, their agents, servants and or anyone claiming under the defendants/respondents from entering upon, re-entering, trespassing onto laying any claim to, demolishing or wasting the building standing on land parcel number South Mugirango/ Bogetenga/3104 and/or any portion thereof.

3. The honourable court be pleased to grant an order of temporary injunction restraining the defendants/respondents either by themselves, their agents, servants and/or anyone claiming under the defendants/respondents from entering upon reentering demolishing the building, trespassing onto, laying any claim to the building and/or interfering with and/or in any other manner, whatsoever dealing with the suit land, that is LR No. South Mugirango/ Bogetenga/3104 and/or any portion thereof pending the hearing and determination of this suit.

6. Inter alia the OS is supporting on the following grounds set out on the body of the application:-

a) The building standing on land parcel South Mugirango/ Bogetenga/ 3103 belongs to the applicant as he had purchased the suit land and had been in possession to date since 20th day of December 2010.

b) By virtue of being the owner and in possession of the suit land South Mugirango/Bogetenga/3104 the defendants/respondents entered on the suit land by night and started demolishing by force using thugs and hooligans.

c) That by virtue of the applicant/respondent being in occupation has rights and or interests over the suit land.

d) The actions of the defendants/respondents of entering by night with thugs and hooligans started demolishing the building belonging to the applicant/plaintiff amounts to trespass.

e) The activities of the defendants/respondents on the suit land are bound to cause a heavy fight between the parties herein and the effect may loose life which is precious.

f) The actions of the defendants/respondents constitute a violation of the plaintiffs/applicant indefeasible rights over the suit land by virtue of purchase occupation and possession of the same.

g) Consequently, the plaintiff/applicant has a prima facie case against the defendants/respondents

h) The actions of the defendants/respondents shall occasion loss to the plaintiff/applicant.

i) At any rate, the balance of convenience tilts in favour of the plaintiff/applicant.

j) In the circumstances, this is a fit and proper case to grant orders of temporary injunction.

k) It is in the interest of justice that the application herein be granted ex-debito justitiae.

7. From the foregoing pleadings, it is clear and evident that the plaintiff's claim is grounded on the doctrine of adverse possession and the issue therefore is whether on the facts and material placed before the court the doctrine of adverse possession would on the face of it be applicable. The provisions of Section 38 of the Limitations of Actions Act, Cap 22 Laws of Kenya enables a person who has adversely occupied the land of another person (registered owner) openly and peacefully for a period of 12 years to apply to court to be issued a title for the land as the title of the registered owner is deemed to have been extinguished. Section 7 of the Limitations of Actions Act, Cap 22 Laws of Kenya bars the owner of land from recovering the land after the expiry of 12 years from the date the cause of action accrued.

8. Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya provides:-

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.

Section 37(a) of the Act provides as follows:

37. This Act applies to land registered under the Government Lands Act, the Land Titles Act, or the Registered Land Act, in the same manner and to the same extent as it applies to land not so registered, except that-

(a) Where, if the land were not so registered, the title of the person registered as proprietor would be extinguished, such title is not extinguished but is held by the person who, by virtue of this Act, has acquired title against any person registered as proprietor, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is

not extinguished by this Act.

Section 38(1) of the Act provides:-

38(1) 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 proprietor of the land.

9. There is no express definition of adverse possession in the Limitation of Actions Act. However, Section 13(1) of the Act provides that a right of action in recovery of land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession in the Act is referred to as adverse possession). It is evident thereof, that the doctrine of adverse possession is invariably tied to Section 7 of the Act (reproduced above) which bars an owner of a parcel of land from an action to recover it after the expiry of twelve years. In Black's Law Dictionary, 10th Edition adverse possession is defined as:-

“The enjoyment of real property with a claim of right when that enjoyment is opposed to another person's claim and is continuous, exclusive, hostile, open and notorious.”

For a claimant to succeed in a claim of adverse possession to land such claimant has to satisfy the following:-

- 1. The parcel of land must be registered in the name of a person other than the claimant.**
- 2. The claimant must be in open and exclusive possession of that parcel of land in an adverse manner to the title of the real owner.**
- 3. The claimant must have been in that occupation/possession for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.**

10. The concept of adverse possession has been the subject of many judicial pronouncements and decisions. In the cases of **Wambugu -vs- Njuguna [1983] KLR 172, Wanje -vs- Saikwa (No. 2) [1984] KLR 284 and Kasuve -vs- Mwaani Investments Ltd & 4 Others [2004] KLR 184** the courts endeavoured to set out what would constitute adverse possession. For instance the Court of Appeal in the **Wambugu -vs- Njuguna** Case [Supra] inter alia held:-

“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. The respondent could and did not prove that the appellant had either been disposed or had discontinued possession of the suit land for a continuous statutory period of twelve years as to entitle him, the respondent, to title to that land by adverse possession.”

In the **Kasure -vs- Mwaani Investments Ltd** case [supra] the Court of Appeal again inter alia held:-

- 1. Section 38(1) of the Limitation of Actions Act authorizes a person who claims to have been entitled to land by adverse possession to apply to the High Court for an order that he be registered as proprietor in place of the registered proprietor.**
- 2. In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the 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 of his own volition.**

11. In the case of **Wanje -vs- Saikwa (No. 2)** [supra], the Court of Appeal inter alia held:-

- 1. In order to acquire by the Statute of Limitations a 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.**
- 2. What constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.**
- 3. A person who occupies another person's land with that person's consent cannot be said to be in adverse possession as in reality he has not dispossessed the owner of the land and the possession is not illegal.**

12. The above referenced judicial decisions illustrate what would constitute adverse possession. It is clear that a claimant to bring an action under the provisions of Sections 37 and 38 of the Limitation of Actions Act, he has to have adversely possessed a known owner's land continuously and openly for a period of 12 years prior to the initiation of the action.

13. In the present matter it is evident that the plaintiff entered and took possession of a portion of land measuring 25feet by 100feet pursuant to an agreement of sale dated 20th December 2010. Though the agreement of sale was not annexed to the affidavit sworn in support of the OS by the plaintiff as alleged, it is clear there was such an agreement. The plaintiff under paragraph (2) of his witness statement states that he purchased the land measuring 25feet by 100feet from Esther Nyasani Makori on 20th December, 2010 and paid the full purchase price of

kshs. 170,000/=. In the grounds in support of the OS the applicant affirms he took possession on 20th December 2010 following the purchase and had remained in possession up to the time of the institution of the suit on 3rd November 2015. Under paragraph (3) and (4) of the supporting affidavit, the plaintiff deposes as follows:-

3. That pursuant to the sale agreement the plaintiff/applicant purchased the suit land measuring 25feet by 100feet on the 20th day of December 2010.

4. That subsequently, the plaintiff/applicant took possession and occupation, constructed the building on the suit land.

14. The defendants have sought to have the originating summons by the plaintiff struck out as the peremptory requirements of Section 38 of the Limitation of Actions Act, Cap 22 Laws of Kenya had not been met for the originating summons to be sustainable. For the principle of the doctrine of acquiring title to land by virtue of adverse possession, a party has to prove possession for a period of not less than twelve years. The possession has to be shown to have been hostile and inconsistent with registered owner's right of ownership and has to be open, continuous and uninterrupted for a period of 12 years for the registered owner's right to be deemed to have been extinguished. In the present case, the applicant's possession even if it is held to have been adverse was only for a period less than 6 years as at the time the suit was instituted.

15. While I am keenly aware, that striking out a suit before the parties are heard on merits is a draconian step, because it invariably entails driving a party out of the seat of justice without affording him or her a hearing, it is my view that a court should not shy away from doing so where it is patently clear the suit is unsustainable. Where it is clear the suit is unsustainable, the court would be engaging in a futile exercise in prolonging the suit through hearing when the ultimate result would be the dismissal of the suit.

16. In the case of **D.T Dobie & Company (K) Ltd -vs- Muchina [1982] KLR 1** the Court of Appeal observed as follows:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a semblance of a cause of action, provided it can be injected with life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

17. The plaintiff in the present case has placed reliance on the doctrine of adverse possession and as has been illustrated it is evident that the **“adverse possession”** which the plaintiff relies on was only for a period of no more than 6 years by the time the suit was filed. The doctrine of adverse possession is inapplicable unless the period of adverse possession is demonstrated to be for a period of 12 years and above. I am satisfied the present suit cannot be resuscitated even by amendment. The suit raises no reasonable cause of action and is misconceived and amounts to an abuse of the process of the court.

18. I accordingly order the originating summons dated 2nd November 2015 struck out. The costs for the application and the struck out originating summons are awarded to the defendants.

19. Orders accordingly.

RULING DATED, SIGNED and DELIVERED at KISII this 12TH DAY of OCTOBER 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

M/s Ollando for Sagwe for the plaintiff

Mr. Godia for Begi For the 1st, 2nd and 3rd defendants

Ruth Court Assistant

J. M. MUTUNGI

JUDGE