



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC MISC CASE NO. 13 OF 2018

JOHN MBATIA KIBE.....APPLICANT

VERSUS

JOASH ADAMBA.....DEFENDANT

JUDGMENT

1. John Mbatia Kibe, the Applicant took out an originating summons pursuant to Section 37 and 38 of the Limitation of Actions Act Cap 22 Laws of Kenya and Order 37 of the Civil Procedure Rules against the Respondent Joash Adamba in which he is seeking to be declared to have become entitled by virtue of adverse possession of land known as LR. No. MN/1/3190 registered as CR.27388 in Mombasa measuring 0.2525 hectares or thereabouts.

2. The Originating Summons dated 28th February, 2018 was amended on 4th May 2018 and is based on the grounds that the Applicant has since the year 2000 been in peaceful uninterrupted and open occupation of the suit property which is a period exceeding 12 years and that having lived on the suit property for the foregoing period of time, he has acquired prescriptive rights over it and that the Respondent has never upset that status.

3. The summons is supported by the affidavit of John Mbatia Kibe, the applicant sworn on 2nd March 2018 and a further affidavit sworn on 4th May 2018. The applicant's case is that he has been residing on LR.NO.MN/1/3190 registered as CR.27388 from the year 2000 to date and has built permanent residential homes/structures thereon. The applicant has exhibited a copy of the Title document showing that the suit property is registered in the respondent's name. The applicant avers that his efforts to obtain a postal search at the Mombasa Lands Registry in relation to the property have been futile since the file ostensibly cannot be traced.

4. The applicant states that he is man of indigent needs and presently struggling to make ends meet and accordingly unable to settle any outstanding payments in respect of the suit property, hence the application for an order that he be released from any obligation to pay outstanding rates in respect of the suit property. It is further the applicant's case that during his livelihood, he has been having quiet enjoyment of the property without any interruption and that at no time as he ever required permission of the respondent to carry out the activities of poultry farming that he undertakes on the suit property. Relying on legal advice, the applicant avers that having continuously occupied the suit property since the year 2000 openly, peacefully and uninterrupted, he has acquired the property by way of adverse possession.

5. Pursuant to leave granted by the court on 5th April 2018 the respondent was served through advertisement in the Star Newspaper on 11th April 2018. The Respondents did not enter appearance within the stipulated time or at all and the case proceeded ex-parte.

6. In his evidence, the applicant who testified as PW1 reiterated the contents of the affidavits in support of the amended Originating Summons and stated that he lives on the suit property with his wife and children and that they plant maize on it which they use for their domestic use and even sell the excess. The applicant produced photographs showing the house they live in and the maize allegedly planted on the land. He also produced a copy of the title document showing that the property is in the name of the respondent and property rates statement which shows an outstanding rates of Kshs.4,656,066.00.

7. The Applicant testified that he was working as a shamba boy in a neighbouring plot and that when the owner sold the plot, he left him some items and did not have means of transport to ferry them and decided to move with them into the suit property which was not in use and the he has lived there since the year 2000 to date. He added that nobody has come to lay claim or to remove him from the suit property. The applicant urged the court to grant the reliefs sought in the amended Originating Summons.

8. The law on adverse possession is now well settled and the essential requirements that one has to meet in order to succeed in an application for adverse possession have been discussed by the courts. In **Wambugu –v- Njuguna (1983) KLR 173**, the Court of Appeal held that adverse possession contemplates two concepts: possession and discontinuance of possession. It further held that the proper way of assessing proof of adverse possession would 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 or she has been in possession for the requisite number of years.

9. In **Jundu –v- Kirplal & another (1975)EA 225**, it was held:

“...to prove title by adverse possession, it is not sufficient to show that some acts of adverse possession must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner. It must be actual, visible, exclusive, open and notorious.”

10. The ingredients were recently discussed by the Court of Appeal in the case of **Mtana Lewa –vs- Kahindi Ngala Mwangandi (2015)eKLR** where Makhandia, JA state as follows:

“adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglect to take action against such person in assertion of his title for a certain period, in Kenya is twelve (12) years.”

11. It is also a well settled principle that a party claiming adverse possession ought to prove that his possession was “*nec vi, nec clam, nec precario*,” that is, peaceful, open and continuous.

12. This being a claim for adverse possession, the applicant must show that he has been in continuous possession of the land for twelve (12) years or more; that such possession has been open and notorious to the knowledge of the owner and that he has asserted a hostile title to the owner of the property.

13. The applicant has stated that he has been in occupation of the suit property since the year 2000. He also stated that he has built permanent residential homes/structures on the suit property where he has lived ever since with his family. The applicant produced photographs showing the alleged houses or structures. I have looked closely at the said structures. To me, they all seem temporary mud houses with fairly new iron sheets. None of the structures look like permanent homes that one has lived in since the year 2000. They all appear newly constructed. I have no doubt in my mind that if such developments were undertaken about 18 years ago, the same would not look like the photographs produced by the applicant. For one, the iron sheets or at least some of them would have been rust by now.

14. The applicant has stated that he moved into the suit property from a neighbouring plot where he was working as a shamba boy. He did not mention the name of his then employer or produce any evidence of

such employment to support his assertion. The applicant has also deponed and stated that he has been carrying out poultry farming on the suit property. However, there was no evidence either in the photographs produced or otherwise to support his claim.

15. Considering the totality of the evidence availed in this case, and applying the legal principles as outlined above, it is clear that the applicant has failed to prove his case on a balance of probabilities and has not brought himself within the limits of the doctrine of adverse possession. The applicant therefore, in my considered view, is not entitled to the suit property by adverse possession because the evidence adduced does not support possession for a period of over twelve (12) years.

16. For the foregoing reason, the applicant's case should be dismissed and I hereby dismiss it with no order as to costs as the respondent did not participate.

Judgment, signed, dated and delivered at Mombasa this 19th day of December, 2018.

C. YANO

JUDGE