



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT**

**AT NAIROBI**

**ELC NO. 1322 OF 2013(O.S)**

**SAIQUA SULTANA HASSAN HAROON**

**NUREEN MAHMOOD AHMED**

**FAIZA KHAN..... PLAINTIFFS**

**VERSUS**

**ABDUL MALIK.....DEFENDANT**

**JUDGMENT**

The plaintiffs brought this suit by way of Originating Summons dated 29<sup>th</sup> October 2013 seeking the following ORDERS:-

1. THAT the plaintiffs are entitled to be registered as proprietors of one half undivided share of the defendant in Land Reference Number 36/1/509 situate in Eastleigh in the City of Nairobi (hereinafter referred to as “the suit property”) under section 38 of the Limitation of Actions Act( Cap.22) Laws of Kenya on the grounds that since 1976, the plaintiffs have been openly, peacefully and as of right been in occupation on the above mentioned parcel of land that is to say, for a period of over twelve(12) years preceding the presentation of the Summons.
2. THAT the defendant’s title to the said one half undivided share in the suit property has been extinguished by virtue of Section 17 of the Limitation of Action Act (cap 22) Laws of Kenya.
3. THAT the Deputy Registrar be authorized to sign all the necessary documents on behalf of the defendant.
4. THAT the costs be provided for.

The Originating Summons was supported by the Affidavit of the 1<sup>st</sup> plaintiff sworn on 29<sup>th</sup> October 2013 in which she stated as follows. The plaintiffs are sisters. They are daughters of one, Mohammed Aslam Khan, deceased who died on 22<sup>nd</sup> September 2003(hereinafter referred to only as “the deceased”). The deceased and the defendant were registered as proprietors of the suit property as tenants in common in equal shares on 13<sup>th</sup> October 1976. The defendant has never entered or occupied the suit property since the year 1976. The deceased had occupied the entire parcel of land comprised in the suit property including the defendant’s share thereof. After the death of the deceased, the plaintiffs continued to occupy the entire parcel of land. The plaintiffs have never met or seen the defendant. The plaintiffs occupied the

whole of the suit property from the year 1976 during the lifetime of the deceased and have continued with such occupation after his death. The deceased and thereafter the plaintiffs have been paying land rates for the whole of the suit property since 1976. The plaintiffs were registered as proprietors of half undivided share of the suit property which was held by the deceased on 13<sup>th</sup> July 2011.

The 1<sup>st</sup> plaintiff attached to her affidavit, a copy of the indenture dated 13<sup>th</sup> October 1976 pursuant to which the suit property was transferred to the deceased and the defendant, copies of receipts for rate payments made to City Council of Nairobi and rates demand notices and a copy of the vesting deed dated 13<sup>th</sup> July 2011.

The defendant was served with the Originating Summons through substituted service but he did not enter appearance. The Originating Summons was thereafter fixed for hearing on 7<sup>th</sup> January 2016 when the 1<sup>st</sup> plaintiff gave evidence on behalf of the plaintiffs. The defendant was once again served with a hearing notice through substituted service but failed to show up at the trial. In her testimony, the 1<sup>st</sup> plaintiff reiterated and adopted the contents of her affidavit in support of the Originating Summons which I have highlighted above. The 1<sup>st</sup> plaintiff also produced as exhibits the annexures to the said affidavit. Upon examination by the court, the 1<sup>st</sup> plaintiff told the court that she was 45 years old and that her usual place of residence was the state of Texas in the United States of America. She stated that as at the time of his death on 22<sup>nd</sup> September 2003, the deceased was residing at Pangani, Nairobi. She told the court further that the suit property was not developed. She stated that the deceased who used to be a contractor had his office on the suit property which office was in a deplorable state as at the time of her evidence. She stated that what is now on the suit property are Kiosks which they have rented out. She stated that the defendant used to be the deceased's partner and that she had not seen him for the last 35 years and did not know any member of his family.

The plaintiffs closed their case with the evidence of the 1<sup>st</sup> plaintiff. The plaintiff's advocate made closing submissions in writing. I have considered the Originating Summons together with the evidence that was adduced in support of the reliefs sought therein. In the case of **Salim vs. Boyd and Another [1971] EA 550**, it was held that for a claimant of land by adverse possession to succeed, he must prove that he has been in open, continuous and uninterrupted occupation of the land for a period of 12 years or more. In the case of **Kimani Ruchine & Another vs. Swift, Rutherford Co. Ltd. & another [1977] KLR 10** Kneller J. stated as follows at page 16;

**“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 evasion).....The possession must be continuous. It must not be broken for any temporary purposes or by any endeavours to interrupt it or by any recurrent consideration.”**

The Court of Appeal in the case of **Wambugu vs. Njuguna [1983] KLR 172** stated as follows:-

**“First 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 entails acts which are inconsistent with his enjoyment of the soil and for the purpose for which he intended to use it. The Limitation of Actions Act (Chapter 22) on adverse possession contemplated 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.”**

In **Dr Ojienda's, Principles of Conveyancing Hand Book, Law Africa Vol II at page 97** the learned author has stated that:

**“Where the claimant is in possession of the land with leave and licence of the true owner in**

**pursuance of a valid agreement, the possession becomes 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.”**

In **Jandu vs. Kirpal [1975] E. A 225** Chanan Singh J. stated that:

**“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”.**

It is on the foregoing principles that the application before me falls for consideration. As I have stated earlier in this judgment, the defendant did not enter appearance. The suit is therefore not defended. The averments contained in the 1<sup>st</sup> plaintiff’s affidavit on how the suit property was acquired, the nature of the title, the developments thereon and the period for which the plaintiffs have been in occupation of the same without any interference was not controverted. The only issue that arises for determination is whether the plaintiffs have established that they have acquired half undivided share in the suit property by adverse possession and whether they are entitled to the reliefs sought. From the material and evidence before the court, the suit property was held by the deceased and the defendant as tenants in common in equal shares. On 9<sup>th</sup> August 2012, the plaintiffs were registered as owners of undivided half share of the suit property in place of the deceased. The other half share of the suit property is still being held by the defendant. This is the share which the plaintiffs claim to have acquired by adverse possession. From what I have set out above, the plaintiffs and the defendant are currently the registered owners of the suit property as tenants in common. The issue that arises for determination is whether a co-tenant in land held under tenancy in common can claim the share of another co-tenant in the same property by adverse possession. I had asked the plaintiff’s advocate to do some research on this issues which I will determine shortly.

The plaintiffs have lodged this claim as of right and not as legal representatives of the estate of the deceased. They are in fact not legal representatives of the deceased. They are beneficiaries of his estate. The plaintiffs have claimed that they had occupied the suit property with the deceased from the year 1976 until September 2003 when the deceased died. They have claimed that they continued to occupy the suit property after the deceased’s death and that as at the time they brought the Originating Summons they were in occupation of the suit property. The 1<sup>st</sup> plaintiff’s testimony before this court was that the suit property is not developed and that what the deceased had on the suit property was an office which is now completely run down. He stated that what are now on the suit property are kiosks which are rented out to tenants. The 1<sup>st</sup> plaintiff stated that her usual place of residence is Texas United States of America and that the deceased was at the date of his death residing at Pangani Nairobi. The 1<sup>st</sup> plaintiff did not tell the court where the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are residing. The 1<sup>st</sup> plaintiff did not put any evidence before the court to show that they have been in occupation of the suit property which she told the court is undeveloped. The plaintiff did not tell the court the type of the Kiosks which are standing on the suit property and the person who put them up. There is no evidence that there have been any residential premises on the suit property. It is not clear to me therefore how the plaintiffs can be believed when they claim that they were occupying the suit property with the deceased since 1976.

Even if I give the plaintiffs the benefit of doubt that, indeed, they did occupy the suit property with the deceased who was their father from 1976 until his demise in the year 2006 and that they continued in occupation of the suit property after his death, I doubt if time could run in their favour during this period under the Limitation of Actions Act. In the Land Act, 2012, tenancy in common is defined as;

**“a form of concurrent ownership of land in which two or more persons possess the land simultaneously where each person holds an undivided interest in the property and each party has the right to alienate, or transfer their interest.”**

In the case of **Gatimu Kinguru vs. Muya Gathangi [1976]e KLR** Madan J. stated that;

**“each tenant in common is the owner of the whole land but limited to the extent of his share therein because it is not subdivided, in conjunction with his co-tenant in common...”**

It is clear from the foregoing that until the tenancy in common is severed by the subdivision of land so that each tenant in common can have his share of the land, each tenant in common owns the “whole” land. Until the subdivision is done, the portion of land that belongs to each tenant in the entire parcel which is jointly owned is unidentifiable. It follows that, when the deceased occupied the suit property, he occupied the whole of it by virtue of his interest therein as a tenant in common. It cannot be said that he was occupying his share in the said property and that of the defendant. The plaintiffs are the daughters of the deceased. Between 1976 and the year 2003 when the plaintiffs are said to have been occupying the suit property with the deceased, they must have been occupying the premises with the permission of the deceased. The deceased’s and the defendant’s interest in the suit property were common and undivided. The plaintiff’s occupation of the suit property could not therefore be said to have been adverse to the interests of the defendant and the deceased. In addition to the authorities which I have referred to above in support of this issue of permissive possession, I wish also to cite the Court of Appeal case of **Wilson Kazungu Katana & 101 Others vs. Salim Abdalla Backshwen & another [2015] e KLR**, in which the court cited with approval its decision in the case of **Samuel Miki Waweru vs. Jane Njeri Richu, Civil Appeal No. 122 of 2001(UR)**, where it had stated that;

**“..it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in (accordance with) provisions of an agreement of sale lease or otherwise. Further as the High Court correctly held in Jandu vs. Kirpal[1975]EA225 possession does not become adverse before the end of the period for which permission to occupy has been granted....”**

From the foregoing, I am of the view that if at all the plaintiffs were in possession of the suit property between 1976 and 2003 when the deceased died, such occupation was with the permission of the deceased who had occupied the whole of the property and as such their occupation was not adverse to the deceased and the defendant. As I have illustrated above, the interest of the deceased and that of the defendant in the property was undivided, it is not practical therefore for the plaintiffs to claim that their occupation was only adverse to the interest of the defendant in the suit property. The question that one may ask is, which portion of the suit property belonged to the deceased and which one belonged to the defendant in respect of whom the claim herein has been brought? Without the subdivision, the suit property is one for all intents and purposes and it is illogical to say that during a particular period the plaintiffs were occupying a portion of that property which belonged to the defendant.

The deceased died on 22<sup>nd</sup> September 2003. The plaintiffs have claimed to have continued to occupy the suit property even after the death of the deceased and were in occupation when this suit was filed. I have held above that between the years 1976 and 2003, the plaintiffs if they were in occupation of the suit property, were occupying the same courtesy of the deceased and as such their interest could not be adverse to the deceased and the defendant who had undivided interest in the suit property. What of the position after the death of the deceased? This suit was filed on 4<sup>th</sup> November 2013. If it is assumed that the limitation period ran in favour of the plaintiffs after the death of the deceased in September 2003, twelve(12) years had not lapsed by 4<sup>th</sup> November 2013 when this suit was brought. The suit is in the circumstances premature. From what I have set out above, it is my finding that the Plaintiffs have not met the threshold for adverse possession claim. The Plaintiffs have not proved that they have occupied the land which they are claiming for the statutory period of 12 years and that their occupation was adverse to the interest of the defendant in the suit property.

In the final analysis therefore, I am not satisfied that the Plaintiffs have proved their claim against the defendant on a balance of probabilities. Consequently, I find the suit herein to be without merit. The same is dismissed accordingly with no order as to costs.

**Delivered and Dated at Nairobi this 4<sup>th</sup> Day of November, 2016**

**S. OKONG'O**

**JUDGE**

**In the presence of**

**Mr. Mwangi**

**for the Plaintiffs**

**N/A**

**for the Defendant**

**Kajuju**

**Court Assistant**