



**Wasike v Fedha (Environmental and Land Originating Summons
E013 of 2021) [2024] KEELC 823 (KLR) (20 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 823 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E013 OF 2021**

EC CHERONO, J

FEBRUARY 20, 2024

**IN THE MATTER OF THE LIMITATION OF ACTIONS ACT
AND ORDER 37 RULE 7 OF THE CIVIL PROCEDURE RULES
IN THE MATTER OF LAND PARCEL L.R NO. BUNGOMA/KABUYEFWE/1331
AND**

BETWEEN

JOYCE KHISA WASIKE PLAINTIFF

AND

STEPHEN WANGUSI FEDHA DEFENDANT

JUDGMENT

1. The Plaintiff filed an Originating Summons under Section 17 & 38 of the Limitations of Actions Act Cap 22 and under section 7 (d) of the *Land Act* and Order 37 rule 7 of the Civil Procedure Rules seeking the following orders;
 - a. That the Plaintiff be declared the owner of the parcel land measuring approximately 2 acres known as Bungoma/kabuyefwe/1331 which she has been in possession of for over 56 years.
 - b. That an order do issue that the Plaintiff has become entitled to be registered as the owner of a parcel of land measuring 2 acres known as Bungoma/kabuyefwe/1331 by operation of the law viz Section 7,17 and 38 of the *Limitation of Actions Act* in place of the Respondent.
 - c. That the name of the Defendant on the said title be removed and cancelled from the aforesaid land parcel no Bungoma/kabuyefwe/1331 and be replaced with the name of the Applicant.
 - d. That in the alternative to the foregoing a declaration that the Defendant holds title to the land parcel no. Bungoma/kabuyefwe/1331 in trust and for the benefit of the Applicant.



- e. That costs be borne by the Respondent.
2. The summons are premised on the grounds shown on the face of the application and the Supporting Affidavit of the Plaintiff sworn 6th November, 2021.
3. In her supporting affidavit, the applicant/plaintiff deposed that the Defendant is the registered owner of land parcel No. Bungoma/Kabuyefwe/1331, a subdivision from land parcel No. Bungoma/Kabuyefwe/393 that was registered in the names of Samson Wasike Mukhamari (Deceased) who was also the Applicant's/plaintiff's late husband. The Plaintiff further states that one Moses Wamalwa Mukhamari transferred the title to himself and sold the same to the Defendants as an administrator of the estate.
4. The Plaintiff also deposed that she has been on the land peacefully, openly and uninterrupted for a period of 56 years since the year 1965. It was further stated that she has settled therein with her family and has extensively developed the land by building permanent and semi-permanent houses and are even cultivating the said land.
5. In response to the originating summons, the Defendant vide a replying affidavit sworn on 1st December 2021 stated that on or about 21st July 2010, he purchased land parcel No. Bungoma/Kabuyefwe/1331 measuring 0.81 Ha from one Moses Wamalwa Mukhamari after conducting an official search at the Bungoma Lands Office and physically visiting the land. He averred that upon purchasing the suit property, he was registered as proprietor sometime in the year 2013. He averred that the Plaintiff lacks locus standi to institute this suit and that the same was premature and ill informed.
6. After pre-trial directions were taken, the parties agreed to conduct the Hearing by way of viva voce evidence.
7. In support of her claim, the Plaintiff called 4 witnesses.
8. PW1 Joyce Khisa Wasike adopted her witness statement dated 12th February, 2022 as her evidence-in-chief. The witness equally referred to three items contained in her list of documents dated 14th March 2022 and produced the same in her evidence. In cross-examination, the witness testified that she was not aware that the suit land had been sold to the Defendant by Moses Wamalwa Mukhamari. It was her testimony that she has never seen the alleged sale agreement between the Defendant and the said Moses Wamalwa Mukhamari and she refuted claims that she was a witness in a purported sale agreement. It was her testimony that the signature appearing in the purported sale agreement does not belong to her since she cannot read or write but affixes her thumbprint as a signature whenever required to.
9. The witness further stated that the said Moses Wamalwa Mukhamari was her brother-in-law and that he had acquired letters of administration of the estate of her late husband Samson Wasike Mukhamari without her consent. It was her testimony that in Kimilili Land Case No. 7 of 2005, the Land District Tribunal issued a decree to the effect that she was entitled to 3 ¼ Acres of the suit land.
10. PW2 David Barasa Wasike adopted his witness statement dated 14th March, 2022 as his evidence-in-chief. In cross examination, he stated that he was the Applicant's son and reiterated PW1's testimony but added that the said Moses Wamalwa Mukhamari alleged that he would sell the suit property and buy them land elsewhere but failed to do so.
11. PW3 John Emuria Murunga referred to his witness statement dated 14th March 2022 and sought to be adopted in his evidence in chief. In cross examination he testified that he has been the applicant's neighbour since 1965 and that the Plaintiff has been in occupation of the suit land ever since.



12. PW4 Christopher Wanyonyi Mukhamari also referred to his witness statement dated 14th March 2022 and sought to be adopted as his evidence in chief. In cross examination, he testified that Samsom Wasike Mukhamari and Moses Wamalwa Mukhamari were his brothers and that Moses Wamalwa conducted a succession cause in the respect of the estate of Samson Wasike without their consent.
13. PW5 Mark Makheta asked the court to adopt his witness statement dated 14th March 2022 as his evidence- in -chief. In cross examination, he testified that the suit land was owned by his grandfather Samson Wasike Mukhamari-deceased and that they live in the suit land with the Applicant. Upon the death of his grandfather, Moses Wamalwa Mukhamari instituted succession proceedings over his estate without informing his family and eventually acquired the suit property and sold it to the Respondent. In re-examination, the witness clarified that the land was initially land parcel No. Bungoma/Kabuyefwe/393 which was later subdivided and land parcel No. Bungoma/Kabuyefwe/1331 a resultant residential plot which was then sold to the Respondent.
14. The Plaintiff closed her case at this point and the Defendant called one witness.
15. DW1 Stephen Wangusi Fedha adopted his witness statement dated 5th April, 2022 as his evidence- in -chief. The witness referred six items contained in his list of documents dated 5th April and produced the same as DExhibit No. 1 to 6. It was his testimony that one Moses Mukhamari approached him offering to sell him the suit land. As an interested purchaser, he visited the suit property and found the Plaintiff and two others in occupation of the land who informed him that the land was indeed for sale as they were to be relocated by the registered owner at the time i.e Moses Mukhamari. DW1 testified that he proceeded to conduct an official search at the land registry in Bungoma which confirmed that Moses Mukhamari as the registered owner.
16. It was the defendant's further testimony that he expected the Plaintiffs to move out from the suit land upon his purchase as the consideration was meant to purchase for them land elsewhere to facilitate their relocation but they failed to move out prompting him to issue a demand letter. In cross-examination, DW1 confirmed that the Plaintiff was in occupation of the suit land at the time he allegedly purchased the same and that after the purported purchase, he has never taken possession to date.
17. The witness further stated that he entered into a sale agreement with one Moses Wamalwa Mukhabari and that he has since paid to him the full purchase price. He testified that he could not confirm that the Plaintiff signed the sale agreement as a witness. It was his testimony in re-examination however that the Plaintiff witnessed the sale agreement at the advocate's office.
18. The Respondent thereafter closed his case and parties took directions to file written submission within given timelines.
19. In her submissions, the Plaintiff stated that she had established all the requirements necessary to succeed in a claim for adverse possession as was outlined in the case of Alfeen Mehdi Mohammed Vs. Basil Feroz Mohamed & 223 Others (2016) Eklr. It was further submitted on behalf of the plaintiff that the Defendant was not an innocent purchaser for value as he purchased the suit property having noted the presence of the Plaintiff and the developments thereon. It was the Applicants submission that the Defendant forged the Applicants signature as a witness to the agreement and acted in cahoots with Moses Wamalwa Mukhambari to defraud the applicant.
20. The Plaintiff urged the court to find in their favour on the basis of constructive trust. The Plaintiff also submitted that the Defendant failed to call Moses Wamalwa Mukhambari as a witness in support of his defence and therefore the circumstances of his acquisition of title over the property were never explained. The Applicants placed reliance in the case of Dina Management Limited Vs. County



Government Of Mombasa & 5 Others (Petition 8 (E010) Of 2021)(2023)Kesc 30. The court was urged to allow the Applicants prayers with costs.

21. The Court has considered the pleadings, attachments, submissions and authorities cited by both parties; the main issue for determination in this case is whether or not the Plaintiff has acquired title by way of adverse possession and ideally if she is entitled to the orders sought.

22. The concept of adverse possession and its essential elements have been explored and laid down by various courts. The requirements for adverse possession have also been set out in the case of Mbira – v- Gachuhi (2002) IEALR 137 in which the court held that:

“..... a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption....”

23. In the case of Maweu vs. Liu Ranching and Farming Cooperative Society 1985 KLR 430 the Court held;

“Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”.

24. From the foregoing therefore, a party claiming title to land under doctrine of adverse possession ought to prove that the possession was “nec vi, nec clam, nec precario,” that is, without force, secrecy, permission, or alternatively put, not by force, nor stealth, nor the license of the owner.

25. The first element to consider in determining this matter is whether the plaintiff is in actual possession of the portion (2 Acres) of the suit property claimed. From the evidence presented before this Honourable Court, it is not in contention that the Plaintiff is in actual possession of the suit property. The Defendant in his testimony testified that prior to purchasing the suit property, he visited the suit land and found that the Plaintiff was residing therein and that she has since been in possession prompting him to issue a letter demanding vacant possession.

26. The second element to consider is whether the actual possession of the suit property by the Plaintiff was without permission, peaceful, notorious and uninterrupted for at least twelve (12) years. This court is guided by the principle outlined in the case of Gabriel Mbui Vs Mukindia Maranya [1993] eKLR where the learned judge stated: -

“a)

c) The occupation of land by the intruder who pleads adverse possession must be non-permissive use, i.e. without permission from the true owner of the land occupant.

d) The non-permissive, actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced unmistakable animus possidendi, that is to say occupation with the clear intention of excluding the owner as well as other people.” (emphasis added).



27. The evidence tendered by the Plaintiff is to the effect that the suit property which was initially owned by her late Husband Solomon Wasike Mukhamari and also brother to Moses Wamalwa Mukhamari was unprocedurally by the said Moses Wamalwa Mukhamari through transmission and eventually sold the parcel of land to the Defendant. It has emerged from the evidence that the Plaintiff was in occupation of the property since she was married to-date. It is also clear that her late husband Solomon Wasike Mukhamari being the initial owner of the property together with the plaintiff and their children have been in occupation of the suit property with permission up until her husband's death which is said to have occurred in 1984.
28. Further, the testimony by the defendant on the presence of the Plaintiff in the suit property at the time of his alleged purchase coupled with the demand letter dated 26th April, 2021-DEhibit3 by the Defendant addressed to the Plaintiff and others is a clear indication that the Defendant was aware of the presence of the Plaintiff and her family in the suit property at the time of the purported purchase. The defendant in my view took a risk by purporting to buy a property without establishing the interest of those in occupation at the time and having them removed first.
29. The Defendant cannot claim purchaser for value for the reasons enumerated hereinabove. It has been held in multiple cases that If anyone buys land without knowing who is in possession of that land, he risks his title the way he would lose it if he fails to inspect it for 12 years after acquiring it.
30. That the foregoing leads the court to the irresistible conclusion that the Plaintiff's continued occupation of the two acres portion of the suit land after the death of her husband was without permission and therefore became adverse to the title of the registered proprietor. As earlier mentioned, time started running after the demised of her husband in the year 1984 who had granted her permission to be on the suit land and simple arithmetic from that time to the filing of this suit in 2021 comes to 37 years.
31. On the issue of costs, Section 27 of the *Civil Procedure Act* grants the Court discretion to award or not to award costs of the suit. Ordinarily, costs do follow the event and is normally awarded to the successful litigant. The Plaintiff being the successful litigant is entitled to costs of the Originating Summons.
32. From the foregoing reasons, I hereby make the following orders;-
 - a. That the Plaintiff is hereby declared the owner of the parcel land measuring approximately 2 acres known as Bungoma/kabuyefwe/1331 by operation of the law (adverse possession) and/or by acquiring prescriptive rights thereon.
 - b. That the name of the Defendant on the said title be removed and cancelled from the aforesaid land parcel no Bungoma/kabuyefwe/1331 and be substituted with the name of the Applicant.
 - c. In default of paragraph (c) above, the District Land Registrar Bungoma to dispense with the original Title deed and authorise the registration of the Applicant as Proprietor of the Suit property.
 - d. The Defendant shall bear the costs of this suit
 - e. It is so ordered.

DATED AND SIGNED AND DELIVERD AT BUNGOMA THIS 20TH DAY OF FEBRUARY, 2024.

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HON.E.C CHERONO

ELC JUDGE



In the presence of;
Nabibia H/B Were for Applicant
Defendant/Advocate-absent
Bett C/A

