



doctrine of adverse

Constitutionality of the

possession

REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO.108 OF 2011 (O.S)

KAHINDI NGALA MWAGANDI.....PLAINTIFF/RESPONDENT

=VERSUS=

MTANA LEWA.....DEFENDANT/APPLICANT

RULING

Introduction

1. This claim was commenced by way of an Originating Summons filed pursuant to the provisions of Order 37 Rule 7 of the Civil Procedure Rules. In the suit, the Plaintiff/Respondent is seeking for a declaration that he has been in possession of land known as Tezo/Roka/374 peacefully, openly, and continuously without interruption for a period exceeding twelve (12) years.
2. Before the matter could be heard, the Respondent filed a Notice of Preliminary Objection in which he has raised the following issues for determination;-
 - a. **That pursuant to the provisions of Article 40 as read together with Article 2 and 3 of the Constitution of Kenya 2010, this court does not have jurisdiction to entertain the claimants claim filed herein;**
 - b. **That pursuant to the provisions of Section 7 to the Sixth Schedule to the Constitution, Section 38 of the Limitation of Actions Act is in conflict and or contravention with the express provisions of section 40 of the Constitution and the same is null and void pursuant to the provisions of Article 2 of the Constitution and the said section 38 of the Limitation of Action Act cannot be the basis on which this Honourable Court can assume Jurisdiction over this matter. The court does not have jurisdiction and;**
 - c. **That under the doctrine of *ex turpi causa non oritur action* and or *ex dolo malo no oritur action* this court as a matter of public policy and the new Constitutional dispensation has no jurisdiction to entertain the claimant's claim.**

Defendant's/Applicant's submissions

3. The Defendant's/Applicant's advocate submitted that adverse possession is a doctrine under which a person in possession of land owned by someone else may acquire a valid title to it, as long as certain common law requirements are met. Counsel submitted that the basis for adverse possession in Kenya was the repealed Constitution, the Limitation of Actions Act, the common

- law and judicial decisions.
4. The Defendant's/Applicant's counsel further submitted that disposition of property under the doctrine of adverse possession was rooted under section 75 (1) and section 75(6) of the repealed Constitution.
 5. According to counsel, Sections 37 and 38 of the Limitation of Actions Act which provides for the acquisition of land by a squatter at the expiry of twelve (12) years had the constitutional backing of the repealed Constitution.
 6. However, with the promulgation of the Constitution in August 2010, it was submitted, the court no longer has jurisdiction to dispose the true and or registered owner of the land in order to give the property to a trespasser.
 7. Counsel submitted that the omission of a clause in the Constitution similar to those of section 75(6)(c) (vi) of the repealed Constitution was not by mistake but by a deliberate design by the people of Kenya with the clear intention to do away with the doctrine or concept of acquisition of property by adverse possession or pursuant to the limitation of action legislations.
 8. According to the Defendant's/Applicant's counsel, any legislation that violates property rights enshrined under the Constitution by giving power to state organs like the judiciary to arbitrarily deprive property owners of their land is unconstitutional, null and void.
 9. Counsel cited Section 7 of the sixth schedule to the Constitution and submitted that the Limitation of Actions Act should conform with the provisions of the Constitution, and in particular Article 40. The deprivations of property as provided under Section 38 of the Limitation of Actions Act, it was submitted, is not one of the constitutional ways of depriving the Respondent of his right to property.
 10. The Defendant's/Applicant's counsel submitted that under the doctrine of *ex dolo malo no oritur actio*, this court, as a matter of public policy, has no jurisdiction to entertain the claimant's claim. Counsel relied on the cases of **Standard Chartered Bank Limited vs Intercom Services Ltd & 4 Others Ltd, Civil Appeal No.37 of 2003** and **Scott vs Brown, Doening McNab & Co.(3), (1892) 2QB 724** to buttress his argument.
 11. According to counsel, if an adverse possessor moves to court under the doctrine of adverse possession, he is a trespasser as defined by the Trespass of Land Act and the court cannot and should not aid such a person.

Plaintiff's/Respondent's submissions

12. The Plaintiff's/Respondent's counsel submitted that the concept of adverse possession is not in conflict with the Constitution and that going by the definition of the word "arbitrary" as used in the Constitution, The Limitation of Actions Act does not provide for the arbitrary acquisition of land as argued by the Applicant.
13. Counsel submitted that a party asking the court to declare him the owner of another person's parcel of land by way of adverse possession must move the court and prove the necessary ingredients for his claim to succeed, and should such a party succeed, he cannot be said to have deprived the title holder of his land arbitrarily.
14. Other than the Limitation of Actions Act, it was submitted, the Land Act also allows a party to acquire land through prescription.
15. The Plaintiff's/Respondent's advocate finally submitted that the rights of the registered owner of land under Article 40 of the Constitution are not absolute but subject to limitations by the law and that under Article 162 of the Constitution, this court has been empowered to determine the right to occupation of land and other rights to land. Counsel relied on the cases of **Kasimu Sharifu Mohamed vs Timbi Limited, Malindi HCCC No. 3 of 2006 (O.S)** and **Mombasa HCCC No. 134 of 2013(O.S) – Kazungu Moli Chogo vs Perihan Twur & Others.**

Analysis & findings

16. Adverse possession is the 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. If the person in adverse possession continuous to occupy land, and the owner does not exercise his right to recover it by the end of the prescribed period of 12 years, the owner's remedy as well as his title to the land

are extinguished by virtue of the provisions of sections 7,9,13,37 and 38 of the Limitation of Actions Act. Section 38(1) of the Act states as follows;

“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 a proprietor of the land.”

17. On the other hand, Section 7 of the Limitation of Actions Act provides that 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.
18. The general impression of the doctrine of adverse possession has been equated with the actions of an aggressive squatter whose wrongful possession is eventually validated with the passage of time. It has been held by some jurists that the law as it exists is extremely harsh for the true owner and a windfall for a dishonest person who had illegally taken possession of the property of the true owner.
19. This mediaeval doctrine, which is based both in statutory actions and common law precepts, is still being practiced in most common law countries including England, Hong Kong and India.
20. During the enactment of the Land Registration Bill 2002 in England, it was reported in Parliament that the Land Registry in England receives over 20,000 applications for registration based on the doctrine of adverse possession and around 60% of those cases succeed (see **English Law Commission, “Land Registration Bill and Commentary’ 2001, Law Com No. 271**).
21. According to **Megarry, R and Wade, W in *The law of Real Property, 6th ed, at page 1304, paragraph 21-003***, the period of limitation of pursuing an action was fixed from time to time in relation to particular events or dates of public knowledge, such as the death of Henry 1 or the voyage of Henry II into Normandy. The practice evolved into the Statute of Westminster I, 1275. In 1540, a law was enacted in England limiting the period to a right of action not predicated upon events with the initial period being 20 years before the period was reduced to 12 years in 1874. The period of 12 years was retained with the enactment of the Land Registration Act, 2002. However, the 2002 Act changed the jurisprudence of the doctrine of adverse possession in England by providing for an early warning system to the paper title holder.
22. According to schedule 6 of the Land Registration Act, 2002 (England), a person may apply to the registrar to be registered as the proprietor of a registered estate in land if has been in adverse possession of the estate for the period of 10 years ending on the date of the application. The registry is then obliged to notify the registered proprietor of the land that an application for possessory title has been made. The registered proprietor then has 65 days to object to the registration. A registered proprietor who objects has a further 2 years to evict the adverse possessor. Failure to secure an eviction of the adverse possessor within these two years gives the adverse possessor the right to re-apply to be registered and such a second application will be successful.
23. The Rules under the 2002 Act are much more difficult to satisfy than the common law rules with regard to adverse possession. The adverse possessor’s is vulnerable and the registered proprietor is protected in all but in the most unusual circumstances.
24. The doctrine of adverse possession has been topical and controversial for a long period. The rationale for the law of limitation for and against the recovery of land has been varied. **Neuberger J in the case of *Pye(Oxford) Holdings Ltd vs Graham(2000) ch 676*** stated as follows:

“A frequent justification for limitation periods generally is that people should not be able to sit on their rights indefinitely. However, if as in the present case the owner of land has no immediate use of it and is content to let another person trespass on the land for the time being, it is hard to see what principle of justice entitles the trespasser to acquire the land for nothing. I believe the result is disproportionate, because it does seem draconian to the owner, and a windfall for the squatter.”

25. On the hand in **Adnam Vs Earl of Sandwich(1877) 2 QBD 485**, the court held as follows;-

“The legitimate object of all statutes of limitation is in no doubt to quiet long continued possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have, by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties.”

26. Closer home, the East Africa Court of Justice (E.A.C.J) in the case of **Attorney General of Uganda vs Omar Awadh & 6 Others(2013) eKLR** held as follows;-

“Both justice and equity abhor a claimant's indolence or sloth. Stale claims prejudice and negatively impact the efficacy and efficiency of the administration of justice. The overriding rationale for statutes of limitations, such as the time limit of Article 30(2) of the EAC Treaty is to protect the system from the prejudice of stale claims and their statutory effect on the twin principles of legal certainty and of response.”

27. The Supreme Court of India also had an occasion to express its views on the law of limitation in the case of **Rajender Sigh & Others Vs Santa Sigh & Others(1973) INSC 141, AIR 1973 SC 2537, 1974(1) SCR 381** as follows:

“The Policy underlying statutes of limitation, spoken of “response” or of “peace”, has been thus stated in Halsbury’s Laws of England Vol.24, P.181 (Paragraph 130). The courts have expressed at least three differing reasons supporting the existence of statutes namely, (1) that long dormant claims have more of cruelty than justice in them, (2) that a defendant might have lost the evidence to dispose a stale claim and (3) that persons with good causes of actions should pursue them with reasonable diligence. The object of the law of limitation is to prevent disturbance or deprivation of what may have been acquired in equity and justice by long enjoyment or what may have been lost by a party’s own inaction, negligence or laches”

28. Perhaps the most controversial case that dealt with the pros and cons of the law of limitation, and in particular the doctrine of adverse possession in the recent times is the case of **Pye (Oxford Limited Vs Graham (2000) Ch 676, (2002) UKH130, (2003) 1 AC 419(HL)**.

29. The brief facts of that case are these: The Grahams were a farming family and they claimed a possessory title to 25 ha of agricultural land owned by J A Pye (Oxford) Ltd as part of its land bank. The Grahams based their claim on section 15 of the Limitation Act, 1980 which stipulated a limitation period of twelve(12) years for the recovery of land from the date on which the rights of action accrued to the owner.

30. The Grahams argued that they had taken possession of the land for a period of more than 12 years. Pye’s contention was that the Grahams had at no time dispossessed them of their land.

31. Pye brought possession proceedings and at the first instance, the Judge held that time begun to run against Pye in 1984, after the expiry of the licence agreement, so Grahams had disposed Pye of its land for 12 years. The Court of Appeal reversed this finding and held that there could be no finding of dispossession. The House of Lords reversed the decision of the Court of Appeal and held that on the facts, the Grahams had established both factual and the intention to possess the land for the requisite period.

32. After the House of Lord’s decision, Pye made an application to the **European Court of Human Rights(JA Pye(Oxford)Ltd Vs United Kingdom (2005) 19 BHRC 705** alleging that the English law on adverse possession violated Article 1 of the First Protocol to the European Convention of the Protection of Human Rights and Fundamental Freedoms. By a majority of 4 to 3, the Chamber of the Fourth Section of the Court decided that the English Law on adverse possession

deprived the Plaintiff of its title to land and infringed on the Plaintiff's rights to peaceful enjoyment of its possession and hence a violation of Article 1 of the Protocol.

33. The United Kingdom Government requested for a re-hearing of the case before the Grand Chamber of the Court comprising 17 Judges. In a Judgment delivered on 30th August 2007, it was held, by a majority of ten (10) to Seven (7) that there had been no violation of Article 1 of Protocol No. 1 of the Convention. The court held as follows:-

“Even where title to real property is registered, it must be upon the legislature to attach more weight to lengthy, unchallenged possession than to the formal fact of registration. The court accepts that to extinguish title where the former owner is prevented, as a consequence of the application of the law, from recovering possession of land cannot be said to be manifestly without reasonable foundation.”

34. However, Judge Kovler, while dissenting with the decision of the majority held as follows:

“Where there is no land survey and title to ownership is not registered in a land registry, this institution of adverse possession leading to acquisition of title could undoubtedly be justified on the ground of avoiding uncertainty of land ownership. However, when and where a land registry has been established and ownership of land can easily be ascertained through inspection of the registration of title deeds, I personally have great difficulty in accepting that adverse possession could serve and general in interest....In simple terms, this system of adverse possession looks as if it is intended to punish a registered owner of land for not showing sufficient interest in his suit property and for not sufficiently pursuing a squatter, who as a result is rewarded by gaining title to the property. And in this respect I endorse the statement of Mr. Justice Neuberger when he said that the fact that an owner who had sat on his rights for 12 years should be deprived of his land was illogical and disproportionate. In the circumstances I find that there has been a violation of Article 1 of Protocol No. 1 in this case.”

35. The Defendant/Applicant in this matter has argued that the provisions of Sections 7, 37 and 38 of the Limitation of Actions Act were grounded in the repealed Constitution and not in the current Constitution.

36. Section 75(1) of the repealed Constitution provided for the protection from deprivation of property. However, Section 75(6) (a) (vi) allowed an individual to be deprived of his property “in consequence of any law with respect to the limitation of actions, amongst other limitations capture under sub clauses (i) to (viii). A provision similar to Section 75 (6) (v) of the repealed Constitution does not exist in the 2010 Constitution. Instead, Article 40 (2) provides as follows:

“Parliament shall not enact a law that permits the state or any person-

- a. **to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or**
- b. **to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).**

37. The Defendant's/Applicant's counsel has argued that because the Constitution does not have a provisions which is similar to section 75(6) (vi) of the repealed Constitution, and in view of the provisions of Article 40 (2) (a) prohibiting Parliament from enacting a law which arbitrarily deprives a person of his property, then the provisions of the Limitation of Actions Act purporting to confer ownership of land to a squatter after the expiry of 12 years is unconstitutional and therefore null and void.

38. The doctrine of adverse possession, being a common law principle was applicable in this country way before the enactment of the Limitation of Actions Act in 1967 and even thereafter. Indeed,

before 1967, this country applied the Indian Limitation Act of 1877 by virtue of the provisions of the East Africa Order in Council of 1897 and the Kenya Colony Order in Council of 1921 which provided as follows:

“Subject to the other provisions of this Order, such civil and criminal jurisdiction shall, so far as circumstances admit, be exercised in conformity with the Civil Procedure and Penal Codes of India and any other Indian Acts which are in force in the Colony at the date of the commencement of this Order....”

39. Section 75 (6) (a) (vi) of the independence Constitution recognized the existence of the Limitation of Actions Act and by extension the doctrine of adverse possession.
40. Unlike the current Constitution, the repealed Constitution stated the circumstances under which the bill of rights could be limited. The proviso to section 70 provided as follows:-

“the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms of others or the public.”

41. It is because of the proviso to Section 70 that the repealed Constitution had to specifically state the circumstances under which the right to own property could be limited, which included any law with respect to the limitation of actions, amongst other limitations.
42. However, Article 40 of the current Constitution does not specifically mention that the right to own property can be limited by any law relating to limitation of actions; neither does it state that such a law cannot be enacted.
43. Indeed, the reading of Article 40 (2) (a) and (b) of the Constitution shows that Parliament can enact a law to limit the right to own property or to pass a law allowing the State or any person to deprive a person of his property unless the said deprivation is arbitrary or the limitation to own property is on the basis of any of the grounds specified in Article 27(4), that is, on the ground of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
44. Article 24(1) of the Constitution provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law as long as the limitation is reasonable and justifiable in an open and democratic society taking into account all relevant factors including the importance of the purpose of the limitation.
45. Can the doctrine of adverse possession therefore be said to be arbitrarily, and if not is it a reasonable and justifiable limitation to own land in an open and democratic society?
46. The Black's Law dictionary, has defined the word “arbitrary” to mean something or a decision founded on prejudice or preference rather than on reason or fact. From this definition, it follows that the Constitution prohibits the enactment of a law to deprive a person of his property if such a law is founded on prejudice, lacks reason and is capricious in nature.
47. I have already quoted in detail the decisions of the various courts why a person may lose his property if he does not use it for the intended purpose for a particular period of time.
48. Indeed the House of Lords and the Grand Chamber of the European Court of Human Rights have stated that the doctrine of adverse possession as captured by the laws of limitation has reasonable foundation. One of the reasonable foundations that is acceptable in an open and democratic society is that persons with causes of actions should pursue them with reasonable diligence.
49. If one is unwilling to pursue a cause of action within a reasonable period of time, then he cannot allege that the law is arbitrarily just because it says that he must assert his rights within a prescribed period. Indeed, the principle that pervades statutes of limitation is that limitation extinguishes the remedy, but not the right. This means that the legal right to own property is not defeated but only the right to lay a claim over the property is extinguished.
50. In my view, it is against public interest and the Constitution to allow land, a scarce resource, to lie abandoned in perpetuity. While the Constitution provides for the protection of property rights, such rights must be quantified by regulation in the use of land, which includes how long the owner

- of the land can abandon his land without utilizing it.
51. I say so because the Constitution at Article 60 (1) provides that land shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable. These principles of the Constitution therefore behoove the owners of land to use their land lest they lose it to those who are enthusiastic in utilizing the said land.
52. The law of limitation therefore cannot be equated with a law which arbitrarily deprives one of his land because it protects individuals and the society at large from stale claims; prevents land from falling into disuse; facilitates conveyancing, an important component in the growth of the economy of an agrarian society like ours and prevents disturbance or deprivation of what may have been acquired in equity and justice by long use and enjoyment. The law of limitation has been accepted in all the open and democratic states and plays a constructive, not a destructive one.
53. For the reasons I have given above, I find and hold that the provisions of Sections 7, 9, 13, 37 and 38 of the Limitation of Actions Act are consistent with the provisions of the Constitution. The Defendant's/Applicant's Preliminary Objection dated 13th March, 2014 is therefore dismissed with costs.

Dated and delivered in Malindi this **31st** day of **July**, 2014.

O. A. Angote

Judge