



**Nimambeya v Mazzonetto (Environment & Land Case E003 of 2021)
[2024] KEELC 4145 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 4145 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E003 OF 2021**

AE DENA, J

MARCH 20, 2024

BETWEEN

MWANAMKASI HAMISI NIMAMBEYA PLAINTIFF

AND

ORAZIO MAZZONETTO DEFENDANT

JUDGMENT

1. Mwanamkasi Hamisi Nimambeya commenced this action by way of Originating Summons dated 9th November 2021 supported with an affidavit sworn on the same date. It is the Plaintiffs case that the Respondent is the registered owner Kwale/Diani/390 (hereinafter suit property). That she has been living and farming in the suit property with her extended family continuously and uninterrupted by the Respondent for over 40 years. That the Respondent has never shown up at the suit property to take possession from the time the Applicant has been in physical occupation and possession. The Applicant prays to this court to be declared the owner of the suit property.
2. In response to the suit the Respondent filed a preliminary objection together with Grounds of Opposition. Upon hearing the parties by way of submissions, I dismissed the same on 19th Day of October 2022 for want of merit. I also directed that the parties comply with order 11.
3. Subsequently the Originating summons was amended with leave of the court granted on 23/2/23 to incorporate subdivisions Kwale/Diani/5143 to Kwale/Diani/5170 arising from the suit property. It is alleged the same were undertaken during the pendency of the proceedings. The Applicant also swore a supporting affidavit on 28th February 2023 where she deponed further that the said subdivisions were undertaken by unknown persons to ensure the subject matter does not exist at the time of determination of the suit to defeat her claim for adverse possession.
4. The Respondents did not respond to the suit despite this court granting them a further 21 days to do so on 16/11/22. The matter came up for hearing on 30/01/23. Mr. Rukwaro informed the court that



the Respondent had appointed a new counsel to represent him in the matter and which Mr. Mungai was aware of but had not served. He asked that the matter of representation is resolved first though he had no particulars of the newly appointed advocate. Mr. Mungai denied any knowledge of a new counsel having been appointed and reiterated he had not been served with any notice of appointment or at least a letter informing him of such appointment. The court directed that if Mr. Rukwaro did not have instruction he should file an application to cease from acting. I was gracious enough to give a date for the hearing of the application on 3/5/23. On the material day counsel did not attend court neither was the said application filed. I set down the suit for hearing on 5/10/23 and satisfied with service the matter proceeded *ex parte*.

5. The Applicant Mwanamkasi Hamisi Nimambeya gave evidence in support of her case as PW1. The witness adopted her affidavit sworn on 28/2/23 as her evidence in chief. The witness also produced the documents annexed to the affidavit as her exhibits in court PEX 1-4. The witness further testified that the Government Surveyor visited the suit property and was shown the beacons. That after she had filed the suit she obtained a map confirming the land had been subdivided but was not able to obtain a search from the lands office. PW1 stated she was before court to get back her land.
6. Mr. Mungai for the Applicant sought the courts leave to obtain the said searches in support of the subdivisions and produce them as part of his submissions. The court noted that this would be unprocedural. However there was an option not to close the case and recall the witness once ready to produce the same. Counsel agreed with the Courts proposal. Subsequently the Applicant filed a further list of documents dated 1/12/2023.
7. On 7/12/23 PW1 took the witness stand again and testified that the suit property was subdivided and which had been confirmed by the Land Registrar vide a letter dated 1/12/23 which she produced as PEX5. The Plaintiff's case was marked as closed.
8. Submissions were filed on behalf of the Applicant on 19/12/23 and which the court has considered.
9. Before I delivered this judgement the court invoked the provisions of section 173 (1) of the *evidence Act* and called for the production of the applicant Identity Card for purposes of confirming the age of the litigant. The Applicant appeared before court on 12/3/24 where the same was produced. The same was produced as PEX6. The court noted the date of birth is indicated as 1960. I also had occasion to ask the witness some questions as to proximity of Bongwe to where she stayed that is the suit property and she clarified it was not far from where she stayed. She reiterated she has lived on the suit property since childhood.

Analysis and Determination

10. Having considered the pleadings, the evidence and submissions the court has identified the following issues for determination.
 - a. Whether the Plaintiff has acquired title over land parcel no. Kwale/Diani/390 under the doctrine of adverse possession.
 - b. Costs
11. I will first lay out the legal foundations of the doctrine of adverse possession. The Court of Appeal in the case of *Gideon Mwangi Chege v. Joseph Gachanja Gitutho* (2015) eKLR stated as follows; -

Simply put, 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 continues 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.

12. It is a doctrine that has found clear exposition in many previous decisions of this Court and perhaps the decision of Makhandia J (as he then was) in [Muraguri Gititho v Mathenge Thiongo](#) [2009] eKLR would suffice to crystallize it thus: -

“The law on adverse possession is in my view well settled. It is anchored on sections 7, 13 and 38 of the [Limitation of Actions Act](#).

Section 7 provides *inter alia*: -

“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 is first accrued to some person through whom he claims, to that person”.

Whereas Section 13 of the same [Act](#) is in these terms:

“(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession.....”

Finally, section 38 is as follows: -

“38. where a person claims to have become entitled by adverse possession to land (1) 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.”

The onus is on the person claiming adverse possession to prove, in the words of Kneller J (as he then was) in [Kimani Ruchine v Swift, Rutherford & Co. Ltd](#) (1980) KLR 10 that: -

“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). So, the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration;” see [Wanyoike Gathure v Berverly](#) (1965) EA 514, 519, per Miles J.

No right of action to recover land accrues unless the lands are in the possession of some person in whose favour the period of limitation can run. The possession is after all adverse possession, so the statute does not begin to operate unless and until the true owner is not in possession of his land. Dispossession and discontinuance must go together; See Section 9 (1) and 13 of the [Limitation of Action Act](#). So where the use and enjoyment of the land are possible there can be no dispossession if the registered and rightful owner enjoys it. Also, if enjoyment and use are not possible (See generally paragraphs 481 and 482 on pages 251, 252 of 24 [Halbury's Laws of England](#) (3rd Edition).



More recently, Kariuki J restated the law on the subject in the case of *Omukaisi Abulitsa v Albert Abulista*, Kakamega HCCC No. 86 of 2005 (UR) in these terms:-

“Section 38 of the [Limitation of Actions Act](#), Chapter 22 of the Laws of Kenya entitles a person to be registered as proprietor instead of the registered proprietor where such person establishes by evidence that he or she has become entitled to be registered on account of his or her occupation of the land, openly and continuously and without interruption and with the knowledge of the registered owner for a period of twelve years or more adversely to the title of the registered owner. In other words, where a person trespasses on the land of another with the knowledge of the latter who does not assert his right to the title to the land by evicting the trespasser or by suing him or her in court for eviction or ejection but instead lets the trespasser openly occupy the land for a continuous and uninterrupted period of not less than twelve years”.

13. Guided by the above dictum the onus lies on the Applicant to prove that the suit property is registered in the name of another person. PW1 produced as part of her evidence a copy of a title deed in respect of Kwale/Diani/390. The title shows that Orazio Mazzonetto PP/No.D776907 is registered as the absolute proprietor. The title is issued on 16/07/2009. An extract of the green card also produced shows that the said Orazio Mazzonetto (the Defendant) is the 4th proprietor. A certificate of official search signed by the Land Registrar dated 26/10/21 shows the Defendant as the proprietor as at 16.7.2009. Based on this evidence there is therefore no doubt that land is registered to a third party and not the Plaintiff.
14. The next requirement is to interrogate if the Applicant has occupied the property to the exclusion of the registered owner for a consecutive period of 12 years. It is trite that the registered owner cannot claim his interest after the lapse of the 12 years as stipulated above. The burden was still on the Applicant to prove this fact. PW1 adopted the affidavit sworn by herself on 28/2/23 as her evidence in chief. It is her testimony that she has lived on the suit property for over 40 years together with her family. I will focus on the 12 years required by statute. From the exhibits produced the Defendant was registered as the proprietor in July 2009. This suit was filed in November 2021 and which makes the 12 years. But this alone is not enough.
15. To succeed in a claim for adverse possession the Applicant must prove occupation and which occupation must have been open and without the permission/consent of the registered owner without any interruption during the period. The witness testified that she has built on the suit property permanent dwelling structures and keeps animals. She annexed photographs of the same. My review of the same shows a house and some cows grazing. It is important to note that on 1st February 2022 I made an order requiring the County Land Surveyor Kwale to visit the suit property and file to this court a ground status report. PW1 confirmed in her oral testimony that a surveyor attended and she showed him the beacons.
16. The surveyors report by T. Mulusa is dated 16/3/2022 and was filed with the court on 21/3/2022. The visit is indicated to have happened on 11/3/2022. It confirms the beacons and which he states conform to the map boundaries. On occupation, the report states that on the ground the Applicant and heirs/dependents enjoy physical possession and noted physical features namely Residential house and wall fenced sub portion, mature mango, coconut and cashewnut trees among others, livestock including cattle, goats and chicken. It is my view this corroborates the Plaintiff evidence.
17. But what about the aspect of continuous possession. The Respondent did not tender evidence before court to show that he interrupted this occupation. It is noted that one of the grounds raised in the



preliminary objection herein is that the Respondent upon purchase constructed a wall in the year 2010 thus interrupting the occupation. The court dismissed the preliminary objection as this required evidence. In any case these were statements made from the bar. The Respondent did not file any replying affidavit to confirm the statement and squandered the opportunity to defend the title. PW1 evidence was therefore not controverted.

18. I have noted the additional information on the alleged subdivision of the land which necessitated the amendment of the Originating summons but I will not dwell on the issue since it is not supported by the register. I will proceed with the suit property as Kwale/Diani/309.
19. Based on the foregoing it is the finding of this court that the Applicant has proved her claim on a balance of probabilities and is entitled to the reliefs sought. I therefore enter judgement for the Applicant against the Respondent in the following terms; -
 - I. A declaration that the title deed of Orazio Mazzonetto of all that Parcel of Land registered as Kwale/Diani/390 has been extinguished by the Applicants adverse possession thereof for a period of 12 years hereby issues.
 - II. An order hereby issues directing the Land Registrar Kwale Land Registry to register the Applicant Mwanamkasi Hamisi Nimabeya as the absolute proprietor of the land comprised in the Land Parcel Number Kwale/Diani/390.
 - III. Costs to the Applicant.

Orders accordingly.

JUDGEMENT DATED SIGNED AND DELIVERED THIS 20TH DAY OF MARCH 2024.

A.E. DENA

JUDGE

**JUDGEMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM IN THE PRESENCE OF:-**

Mr. Mungai for the Applicant

No appearance for the Respondent.

Mr. D. Disii- Court Assistant.

