



Kimani v Mohan Singh s/o Jamal Singh & 3 others; Kibe (Interested Party) (Environmental and Land Originating Summons 551 of 2013) [2024] KEELC 1552 (KLR) (19 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1552 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 551 OF 2013
MD MWANGI, J
MARCH 19, 2024**

BETWEEN

FREDRICK KIMEMIA KIMANI PLAINTIFF

AND

MOHAN SINGH S/O JAMAL SINGH 1ST DEFENDANT

OFFICIAL RECEIVER OF KENYA (AS THE ADMINISTRATOR OF THE ESTATE OF GURCHAN SINGH SANDHU) 2ND DEFENDANT

SATPAL SINGH SANDHU 3RD DEFENDANT

FRANCIS KAMANDE KIMANI 4TH DEFENDANT

AND

JOHN MBURU KIBE INTERESTED PARTY

JUDGMENT

Background

1. The Plaintiff herein initiated this suit by way of an Originating Summons dated 15th April, 2002 which was subsequently amended on the 13th February, 2004 and Further amended on 23rd July, 2020. The Plaintiff claims that he is entitled to be registered as the sole and absolute proprietor, by adverse possession, of the parcel of land Number N. 9 folio 145/16 also referred to as LR No. 36/1/398. The Plaintiff seeks the following orders:
 - a. That a declaration that the Plaintiff is entitled to be registered forthwith as owner of title number N.9 folio 145/16 also referred to as LR No. 36/1/398 which the Plaintiff has been in adverse possession since 1987 for more than twelve(12) years immediately preceding



the presentation of this suit and, on which he has lived openly and continuously as of right in adverse possession and without any interruption from the Defendants and that the Defendants' title has consequently been extinguished in favour of the Plaintiff under Section 37 and 38 of the Limitations of Actions Act, Laws of Kenya.

- b. That this Honourable Court be pleased to make Orders against the Defendants vesting all their interest in all property known as LR No. 36/1/398 situated at Eastleigh to the Applicant.
 - c. That this Honourable Court be pleased to authorize land registrar Nairobi district registry to cancel the Defendants title of all that property known as LR No. 36/1/398 and register the Applicant Plaintiff as the sole owner/proprietor of this property forthwith.
 - d. An order for costs and interest thereon of this application.
2. The Originating Summons is premised on the Supporting Affidavit sworn on the 23rd July, 2020 by Fredrick Kimemia Kimani, the Plaintiff herein. The Plaintiff's case is that he has been in occupation of the suit property since 1987; first with his parents who later relocated to up-country due to old age, without any interference.
 3. The Plaintiff avers that in 1998, one John Mburu Kibe, now deceased, attempted to claim ownership of the suit property and issued a Demand Notice requiring him to demolish the temporary structure outside the suit property. Around April, 2002 the Plaintiff filed a suit at Milimani Chief Magistrate's Court being Civil Suit No. 2202 of 2002; Fredrick K. Kimani -vs- John Mburu Kibe where a temporary injunction was issued against John Mburu Kibe. However, the court file got lost before the case was concluded. The harassment too stopped and he has since continued to enjoy quiet possession and occupation of the suit property.
 4. The Plaintiff states that it was only upon commencing these proceedings for adverse possession against the registered owners of the suit property, that he learnt of another pending matter being HCCC No. 1769 of 1996 filed by John Mburu Kibe who was claiming ownership of the suit property. John Mburu Kibe passed away however, and the said suit abated since no substitution was ever done.
 5. The Plaintiff alleges that he has continued to enjoy possession of the suit property alongside his tenants until sometime in October, 2012 when some goons hired by the 4th Defendant attempted to evict him. The goons purported to be enforcing a court order from Makadara Law Courts in Rent Tribunal 3001 of 2012. Upon conducting investigations, it turned out that the order was a forgery.
 6. The deponent asserts that he has been in continuous, quiet, peaceful and uninterrupted period the year 1987 which is more than 12 years. That no one has ever claimed ownership or demanded rent from him during his occupation save for the two incidents stated above from persons not proprietors of the suit property. He argued that he is entitled to the orders sought by virtue of being on the suit property for more than 12 years without any interruption.
 7. Despite service of summons upon the Defendants by way of substituted service vide an advertisement in the People Daily Newspaper on 28th March, 2003, the 1st and 3rd Defendants did not enter appearance. The 4th Defendant was equally served but he too did not enter appearance. The Official Receiver entered appearance on behalf of the 2nd Defendant but failed to file any response despite being granted leave to do so by the court.
 8. The court directed that the matter proceeds by way of viva voce evidence. However, on the hearing date Counsel for the Official Receiver did not appear. The evidence of the Plaintiff was therefore uncontroverted by the Defendants.



Evidence adduced by the Plaintiff

9. Mr. Fredrick Kimemia Kimani, the Plaintiff herein, testified as PW 1 affirming his case. He adopted his Witness Statement dated 9th November, 2021 as his evidence in-chief. He also produced documents on the consolidated trial bundle dated 9th November, 2021, a further Supplementary bundle of documents dated 20th June, 2023 and a Further List of documents dated 15th February, 2024. The documents were marked as PE 1-7 respectively as listed.
10. The Court then directed the Plaintiff to file his submissions, which he did. The Plaintiff's submissions are dated 29th February, 2024.

Plaintiff's submissions

11. The Plaintiff's counsel identified three issues in his submissions as follows;
 - a. Whether the 1st, 2nd and 3rd Defendants are the registered owners and/or beneficial owners.
 - b. Whether the Plaintiff's is entitled to the ownership of title number N.9 folio 145/ 16 also referred to as LR No. 36/1/398 by adverse possession
 - c. Who should bear costs of the suit?
12. On the first issue, the Plaintiff submits that there is no dispute that the 1st, 2nd and 3rd Defendants are the registered owners and/or beneficial owners of the suit property. This is evidenced by the extract of the certified copy of the title of the suit property produced as PE 2 and the survey plan indicating the location of the suit property.
13. On the second issue, Counsel submitted on the law of adverse possession and stated that a party claiming adverse possession must prove that there has been non-permissive or non-consensual actual, open, notorious, exclusive and adverse use by the Plaintiff and those under whom he claims for the statutory prescribed period without interruption. Counsel submits that the Plaintiff has met the said conditions.
14. Finally, on costs, the Plaintiff cites Section 27 of the *Civil Procedure Act* that costs are discretionary and awarded to a successful party. He submits that having incurred costs in prosecuting this matter, he is entitled to costs.

Issues for determination

15. Upon considering the Plaintiff's Originating Summons, the Supporting Affidavit, the evidence and submissions, the issue for determination is whether the Plaintiff has acquired title to the suit property by way of adverse possession.

Analysis and determination

16. The doctrine of adverse possession in Kenya is embodied in Section 7 of the *Limitation of Actions Act*, (Cap 22) in these terms:

“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.”



17. Section 13 of the 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.....”)
18. Section 17 of the said Act stipulates that upon the expiry of the period (12 years) prescribed by the Act for a person to bring an action to recover land, the title of that person to the land stands extinguished.
19. The Court of Appeal in the case of Benjamin Kamau -vs- Gladys Njeri, CA No. 2136 of 1996 held as follows:
 - “The combined effect of the relevant provisions of sections 7, 13 and 17 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.”
20. The onus is on the person or persons claiming adverse possession:
 - “.. 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 Applicants 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 endeavors to interrupt it or by any recurrent consideration.”
21. In the case of Samuel Miki Waweru vs. Jane Njeru Richu, Civil Appeal No. 122 of 2001, the Court of Appeal held 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 of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in *Jandu v Kirpal* [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted.”
22. I have considered the evidence on record, the Plaintiff stated that he has been in possession openly without secrecy since 1987 translating to a period of over 15 years at the time of filing the suit. The registered owners have not laid any claim on it.
23. Although the 4th Defendant attempted to evict the Plaintiff, he had no basis at all as he is not a registered owner. The Interested Party’s claim to the land was not substantiated.
24. Having considered the pleadings, the evidence, submissions and the relevant authorities, I find that the Plaintiff herein has made a case for adverse possession. He is entitled to the orders sought. The Further Amended Originating Summons dated 23rd July, 2020 is therefore allowed as prayed.
25. The Plaintiff, having succeeded in his case is also entitled to costs which he is hereby granted.
26. Consequently, the court makes the following orders: -
 - a. A declaration be and is hereby made that the Plaintiff, Fredrick Kimemia Kimani is entitled to be registered forthwith as owner of title number N.9 folio 145/16 also referred to as LR No. 36/1/398 by virtue of adverse possession and the Defendants’ title has consequently been



extinguished in favour of the Plaintiff under Section 37 and 38 of the Limitations of Actions Act, Laws of Kenya.

- b. It is hereby ordered that the property known as LR No. 36/1/398 situated at Eastleigh is hereby vested in the Plaintiff, Fredrick Kimemia Kimani.
- c. The Land Registrar, Nairobi District Registry is hereby directed to cancel the Defendants title of all that property known as LR No. 36/1/398 and register the Plaintiff, Fredrick Kimemia Kimani as the sole owner/proprietor of this property forthwith.
- d. The Plaintiff is granted the costs of this suit.

It is so ordered

JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 19TH DAY OF MARCH, 2024.

M. D. MWANGI

JUDGE.

In the virtual presence of:

Mr. Onsembe h/b for Mr. Ongegu for the Plaintiff

N/A for the Defendants

Court Assistant: Yvette

M. D. MWANGI

JUDGE.

