



REPUBLIC OF KENYA



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**Gavala v Atonya (Environmental and Land Originating Summons
E006 of 2022) [2024] KEELC 1433 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1433 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E006 OF 2022**

E ASATI, J

MARCH 14, 2024

IN THE MATTER OF: THE LIMITATION OF ACTIONS ACT CAP. 22 LAWS OF KENYA

AND

IN THE MATTER OF: LAND PARCEL NO. KAKAMEGA/MUDETE/563

BETWEEN

SIMEON GAVALA PLAINTIFF

AND

PATRICK ATONYA DEFENDANT

JUDGMENT

Introduction

1. This suit was commenced by Simeon Gavala, now deceased, as the Plaintiff/applicant vide the Originating Summons dated 27th October 2022. While the suit was pending delivery of this judgment, Simeon Gavala passed on and was substituted vide the court order made by consent on 11th March, 2024 with Wycliffe Lizinga Gavara. The plaintiff who claims to have acquired land parcel known as Kakamega/Mudete/563 sought for orders against the Defendant: -
 - a. the Applicant be declared to have become the legal owner entitled by adverse possession to land parcel known as L.R No. Kakamega/Mudete/563 situated within Vihiga County.
 - b. The applicant be registered as the sole proprietor of the said parcel of land namely L.R No. Kakamega/Mudete/563 in place of the above-named Respondent in whose favour the land is currently registered.
 - c. A permanent injunction restraining the Respondent whether acting by himself or through his agents, servants and /or his assigns from interfering with the applicant's quiet possession and use of L.R No. Kakamega/Mudete/563



- d. The last original indentures in respect of L.R No. Kakamega/Mudete/563 which are with the Respondent be dispensed with.
- e. Costs be provided for.
2. The Originating Summons was supported by the averment in the Supporting Affidavit of the Simeon Gavala sworn on 27th October, 2022.
3. The plaintiff's case was that he bought the suit land from one Jezina Khazila alias Jezina Kazira Litsinga now deceased in the year 1970. That he was given vacant possession of the suit land upon purchase and he established his home thereon, has developed the land exclusively and uninterruptedly to the knowledge of the Defendant. He therefore sought to be declared owner of the land by adverse possession as he has had occupation for a period of over 12 years.
4. The Respondent's response to the plaintiff's claim was vide the Statement of Defence dated 28th February 2023. The Respondent's case is that the suit land was given by the Defendant's grandfather by the name Zachel Lizinga to the Defendant's mother by the name of Jezina Khazila Khagali. That when the plaintiff forcefully invaded the suit land in the year 1989 the Defendant's mother reported him (plaintiff) to the village elders and the plaintiff was told to vacate the suit land but he refused. That the suit is frivolous, vexatious, an abuse of the court process and is res judicata. That there have been previous suits namely; Vihiga SRMCC No. 34 of 1998, Vihiga SRMCC NO.34 of 2010, Hamisi Succession Cause No. 139 of 2019 and Vihiga ELC OS No. E002 of 2022. The Respondent prayed that the suit be dismissed.
5. Directions were taken that the matter be disposed of by way of viva voce evidence.

The Evidence

6. The plaintiff testified, produced exhibits and called four (4) witnesses. The plaintiff who testified as PW1 adopted the contents of his Supporting Affidavit sworn on 27/10/2022 as his evidence in chief. He produced land sale agreement, photographs, minutes of meetings that took place and caution dated 8/12/1976. He testified that he has developed the suit land by planting trees, tea crop and building 3 houses. He produced photographs as exhibits to show the developments. That he has been on the land since the year 1950. On Cross-examination, he admitted that there was a suit No. Vihiga SPMCC No. 34 of 2010. He also admitted that he filed an objection in Hamisi SUCC C NO. 139 of 2019. He similarly admitted the existence of Vihiga SPM O.S No. E002 OF 2022. He stated that he filed an appeal against the ruling in the Hamisi court succession cause.
7. PW2 Jones Kageha Gavala, the applicant's wife, stated vide her witness statement filed in court on 7th February 2023 that she got married to the applicant in the year 1964 and found her husband staying on the land in dispute. That in the year 1976 her husband entered into a land sale agreement with Jezina a daughter of one Zachel Lizinga. That those present signed the agreement.
On cross examination she stated that the Defendant's mother and the plaintiff are siblings.
8. PW3 Stated that he was born on the suit land. He described the developments on the land. That he has never seen an eviction order for their removal from the land.
9. PW4 testified that the suit land belonged to Jezina Kazira who sold the whole of it to the plaintiff. And PW5 stated on Cross- examination that Jezina Kezira was a cousin to the Plaintiff.
10. The evidence of the defence comprised of the testimonies of DW1, DW2 and DW3 and the exhibits they produced. The Defendant who testified as DW1 stated through his witness statement dated 28th



February 2023 that he is the son and only child to the late Jezina Khasila Khagali who was the immediate owner of the suit property before it was transferred to him. That the plaintiff is not the rightful owner of the suit land either through purchase or adverse possession. That the plaintiff forcefully moved into the suit property in the year 1989 after selling his property known as Kakamega/Mudete/561. That the plaintiff moved onto the suit land because he held the view that the Defendant's mother (a woman) should not own the land.

11. That the applicant has not lived on the land peacefully because when he entered thereon forcefully in 1989 the Defendant's mother reported to the village elders who told the applicant to vacate but he refused. That thereafter the Defendant's mother commenced civil proceedings against the plaintiff in Vihiga SRM CC No. 34 of 1998. That later the Defendant filed succession cause namely Hamisi SUCC C. No. 139 of 2019 in which the plaintiff filed an objection. That the objection was dismissed and the plaintiff never appealed against the dismissal. That the Defendant also filed Vihiga ELC No. E002 of 2022 for removal of a caution and restriction. The Defendant prayed that the suit be dismissed with costs.
12. On Cross –examination the Defendant stated that he lives on a different land namely No. 339/ Kakamega/Mudete. That the Plaintiff and his family live on the suit land.
13. PW2 and PW3's evidence supported the Defendant's evidence.

Submissions

14. At the close of the evidence, parties filed written submissions on the case. Written submissions dated 26th October 2023 were filed on behalf of the applicant by the firm of Chitwah & Co. Advocates and written submissions dated 24th January 2024 filed on behalf of the Respondent by the firm of Lugano & Lugano Advocates.

Issues for Determination

15. From the pleadings filed, the evidence adduced and the submissions made, the sole issue that emerges for determination is whether or not the applicant has acquired title to the suit land by adverse possession.

Analysis and Determination

16. The plaintiff pleaded that he has been in occupation of the suit land since he bought it in the year 1976. That he has developed the land and had quiet, peaceful and continuous occupation hence acquired title to it by adverse possession. The evidence of the witnesses he called supported his evidence.
17. It was submitted on behalf of the plaintiff that it is trite law that adverse possession is essentially a situation where a person takes possession of land and asserts a right over it and the person having title to it neglects to take action against such person on assertion of his/her title for a certain period. That the doctrine of adverse possession is one way of land acquisition in Kenya.

Counsel relied on the provisions of Section 7, 13, 17 and 38 of the *Limitation of Actions Act* and submitted that for one to be entitled to land by way of adverse possession, he must prove that he has been in exclusive possession, openly and as of right without interruption for a period of 12 years after dispossessing the owner of possession. Counsel relied on the cases of Kasuve vs Mwaan Investment Ltd and 4 others 1984 (KLR), Kweyu vs Omuto and Wilson Kazungu Katana and 101 others Vs Salim Abdalla Bakhswain & Anor (2015) eKLR



18. The Defendant's case on the other hand is that the plaintiff has not had peaceful and uninterrupted occupation of the suit land.
19. It was submitted on behalf of the Defendant that the matter is res judicata and an abuse of the court process. That the basic minimum conditions which a party claiming land by way of adverse possession must prove are; exclusive, open, peaceful, continuous and uninterrupted possession of the suit property. Counsel relied on the case of Kimani Ruchire vs Swift Rutherford & Co Ltd (1980) KLR 10 cited by the Court of Appeal in Loise Nduta Itotia Vs Aziza Said Hamisi (2020) eKLR where it was held that

“The Plaintiffs have to prove that they claim as of right, nec vi, nec clam, nec precario (no force no secrecy, no persuasion). So, the plaintiff 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 any endeavors to interrupt it by way of recurrent consideration.”
20. Counsel further relied on the case of Gabriel Mbui - Vs - Mukindia Maranya (1993) eKLR where it was held that adverse possession is interrupted
 - a. by the physical entry upon the land by any person claiming the land in opposition to the person in actual possession with the intention of causing interruption.
 - b. by the institution of legal proceedings by the rightful owner to assert his right to the land.
 - c. by acknowledgement made by the person in possession to any person claiming to be the rightful proprietor, that such claim is admitted or otherwise recognized.
21. Counsel submitted that with the facts of the case a claim of adverse possession ought not to see the light of day. Relying on the case of Gabriel Mbui- Vs Mukindia Maranya (Supra) Counsel submitted that the elements of adverse possession are: (a) actual possession or occupancy of the land, (b) hostile to the current owner with a right to immediate possession (c) which is visible, open notorious and exclusive (d) exercised continuously and uninterrupted for a statutorily defined number of years (e) maintained under some color of right against everyone else (f) with an evinced unmistakable animus possidendi (g) held in good faith, without fraud. That the adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years.
22. Counsel submitted that the present suit is an abuse of the court process as it was lodged after the plaintiff lost in the various suits filed earlier. That the claim for adverse possession could have been raised in those other suits and not after they were concluded.
23. On entry of the Plaintiff onto the suit land, the plaintiff's position is that he came into the suit land in 1950 where he stayed having been brought there by the husband of Jezina Kazira. That in 1976, he bought the land from Jezina Kasira. Jezina Kazira (the Defendant's mother) was the registered owner. That thereafter he remained on the land to date. To support his position, the applicant produced a land sale agreement dated 8/7/1976 in vernacular and whose translation indicates that the land was being sold at Kshs 8,500/=.
24. The Defendant's position is that the plaintiff entered the land forcefully in the year 1989 and immediately Jezina Kazira Rizinga, the registered owner, reported him to the village elders, a baraza was called whereby he was told to vacate the suit land but he refused. The Defendant's response to the agreement produced by the plaintiff was that the same was not signed.



25. In whichever way the plaintiff entered the suit land; either by purchasing the suit land in 1976 and being allowed by the seller to enter as proprietor or by force in the year 1989 as contended by the Defendant, the registered owner of the suit land had the right to assert her title and terminate the occupation.
26. The Respondent claims that the registered owner (Jezina) reported the applicant to the village elders who asked the applicant to vacate. There is no evidence to this effect. There is also no evidence that Jezina filed suit or took any legal proceedings against the applicant with a view to remove him from the land. Although the Defendant stated in paragraph 10 of his defence and testified in his evidence that the registered owner of the land, Jezina, commenced civil proceedings against the plaintiff in Vihiga SRMCC No. 34 of 1998, there is no evidence of existence of case No Vihiga SRMCC No.34 OF 1998. The plaint produced by the Defendant as exhibit shows that the plaint dated 28th July 2010 was filed in court on 30th July 2010 was in respect of case No. 34 of 2010 and not 34 of 1998 as stated by the Defendant. It shows further that the plaintiff was the Defendant herein and the Defendant the plaintiff herein. Paragraph 3 of the said plaint indicated that suit had been brought by the Respondent herein as the legal representative of the estate of Jezina Kazira Rizinga, deceased having obtained a Limited Grant in Misc Application No. 125 of 2009. The Limited Grant dated 8th October 2009 produced as exhibit herein shows that the registered owner of the suit land, Jezinah Khakali Kazila, died on 10th April, 2009. There is no evidence therefore that the registered owner in her lifetime took any step to terminate the applicant's possession of the suit land or asserted her title over the suit land in any way. There is also no evidence by the Defendant on how the case No. 34 of 2010 ended. The plaintiff's position was that the Defendant later abandoned the suit.
27. The Defendant also contended that in addition to case No. 34 of 2010, there was the Succession cause in which the plaintiff's objection was declined and the grant confirmed in favour of the Defendant. The entire ruling of the court in the Succession cause was not availed to the court hence the grounds for dismissal of the objection have not been disclosed to the court.
28. Concerning occupation and possession, the Plaintiff deposed in paragraph 5 of the Supporting Affidavit that since 1976 he has established a home for his entire family on the suit land and lives thereon, he has developed it exclusively, uninterruptedly and with the knowledge of the Respondent to date. In his evidence, the applicant testified that he has planted tea leaves and trees on the suit land and built 3 houses. He produced photographs as exhibits to show the developments on the suit land.
29. The Defendant admitted on cross-examination that he doesn't live on the suit land. That the plaintiff and his family live on the suit land. That by the time of the death of Jezina Kasira, the registered owner, the plaintiff and his family were already settled on the suit land. He further admitted that there are about 3 houses on the suit land one of which is permanent and the others semi-permanent and that there is tea crop planted on the land.
30. The burden to controvert the plaintiff's evidence and prove that there had been interruption of the occupation was with the Defendant. He did not discharge the burden.
31. It is clear from the evidence that the plaintiff has had exclusive occupation of the suit land and has used it as of right. As at the time the deceased passed on, on 10/4/2009 the plaintiff had been in exclusive possession of the suit land for a period in excess of twelve (12) years. Even if the period was to be computed from the year 1989 which according to the Defendant, was the year the plaintiff entered the suit land, by the year 2009 when Jezina the registered owner died, 20 years had elapsed. Under S.



7 of the [Limitation of Actions Act](#) any claim by the deceased or her estate to recover the land had long become time –barred. Section 7 of the [Limitation of actions act](#) provides:

“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.”

Section 17 of the [Limitation of Actions act](#) provides

“Subject to section 18 of this act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action) the title of that person to the land is extinguished.”

32. The import of these provisions of the law in this case is that the title of Jezina Kazira, deceased, to the suit land was extinguished at expiration of twelve years from the date the right of action accrued to her. Whether the computation of time is done from the year 1976 which according to the plaintiff is the year the right of action accrued to the deceased or the year 1989 which according to the Respondent is the year the applicant forcefully entered the suit land, the result is the same.

33. Under section 28 of the [Land Registration Act](#), rights acquired through adverse possession are classified as overriding interest to which registered land is subject. It provides;

‘Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted in the register-

- a.
- b.
- c.
- d.
- e.
- f.
- g.
- h. Rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.”

34. In this case the applicant has demonstrated that he has had exclusive, continuous, uninterrupted and open occupation and possession of the suit land for a period in excess of 12 years. It follows that he has acquired and holds an overriding interest over the suit land in terms of section 28 (1) (h) of the [Land registration Act](#) to which the title of the registered owner is subject. This means that the title obtained by the Respondent upon succession was subject to the overriding interest under S. 28 (h) of the [Land Registration Act](#) in favour of the plaintiff. Since the plaintiff’s claim is for the entire of the suit land it means the Defendant holds the title in trust for the plaintiff.

35. This court has found that the plaintiff has acquired title to the suit land by adverse possession, that the title of the deceased registered owner was extinguished pursuant to the provisions of section 17 of the [Limitation of Actions Act](#) before her death, that the suit land is subject to an overriding interest in



terms of section 28 (h) of the [Land Registration Act](#) in favour of the plaintiff and that the Defendant holds the title to the suit land in trust for the applicant.

36. On costs, though the law is that costs follow the event, for the reason that the parties are close relatives, it is in the interest of justice not to burden any of them with costs.
37. On the basis of the foregoing findings, the court finds that the plaintiff has proved his case on a balance of probabilities and enters judgement in his favour for: -
- a. A declaration that the Plaintiff has acquired title to the suit land by adverse possession.
 - b. A declaration that the title of Jezina Kazira to land parcel No. Kakamega/Mudete/563 was extinguished in her lifetime by operation of the law.
 - c. An order for transfer of the suit land by the Defendant to the Plaintiff forthwith in default of which the Deputy Registrar of the Court shall execute all necessary documents to effect the transfer.
 - f. An order of permanent injunction restraining the Defendant whether acting by himself or through his agents, servants and /or his assigns from interfering with the Plaintiff's quiet possession and use of Land Parcel No. Kakamega/Mudete/563.
 - d. Each party to bear its own costs of the suit.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED THIS 14TH DAY OF MARCH, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

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E. ASATI,

JUDGE.

In the presence of:

Patricia: Court Assistant.

No appearance for the plaintiff.

Lugano Advocate for the Defendant.

