



Board of Management Ndemi Secondary School v Mwangi (Environment & Land Miscellaneous Case 8 of 2023) [2024] KEELC 4700 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEELC 4700 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT & LAND MISCELLANEOUS CASE 8 OF 2023
YM ANGIMA, J
MARCH 7, 2024
(FORMERLY NYAHURURU ELC MISC.NO.E020 OF 2022)

BETWEEN

THE BOARD OF MANAGEMENT NDEMI SECONDARY SCHOOL APPLICANT

AND

LAZARUS NG'ANG'A MWANGI RESPONDENT

JUDGMENT

A. Applicant's Claim

1. Vide an originating summons dated November 21, 2022 filed pursuant to Order 37 rule 7 & Section 38 of the *Limitation of Actions Act* (Cap.22); Article 40(1) of Kenya *Constitution* 2010, Sections 28(h), 106(3) and 107(1) of the *Land Registration Act*, 2012 and other enabling powers of the law the Applicant sought the following declarations and consequential orders:
 - a. That Ndemi Secondary School be declared to have acquired by adverse possession all that parcel of land measuring 5.0 Hectares known as Title No. Nyandarua/Ndemi/97 which parcel is clearly identifiable on the ground as it is demarcated and fully developed by the Applicant.
 - b. That the land register to land Title No. Nyandarua/Ndemi/97 be rectified in such a manner as will reflect the Applicant herein as the registered owners of the said parcel of land measuring 5.0 Hectares.
 - c. That this Honorable court be pleased to restrain the Respondent whether by himself, his servants, agents, assigns, personal representatives or any person claiming through him by an order of permanent injunction from entering, alienating, laying claim, disposing or in any other manner interfering with Applicant's exclusive possession, use and occupation of the parcel of land measuring 5.0 hectares known as Title No. Nyandarua/Ndemi/97.



- d. That such other questions as may be pertinent to the case be determined and appropriate directions and orders be given.
 - e. That the costs of these proceedings be borne by the Respondent.
2. The summons was based upon the grounds set out in the supporting affidavit sworn by Charles Ndiritu Wachira on November 21, 2022 and the annexures thereto. The Applicant contended that it had been in open, continuous and exclusive possession and occupation of the suit property for a period exceeding 12 years without any interruption from the Respondent or anyone claiming through him.
 3. The Applicant pleaded that it was established in 1984 as an expansion of Ndemi Primary School. It was pleaded that it had all along occupied and developed the suit property by constructing buildings, fencing the same and running school activities thereon without any interruption. The Applicant filed a further affidavit sworn by Charles Ndiritu Wachira on June 20, 2023 annexing a copy of a certificate of official search for the suit property which shows that the Respondent was registered as proprietor of the suit property on July 27, 1993.

B. Respondent's Response

4. The record shows that since the Respondent could not be traced for service of the originating summons the Applicant obtained leave of court to serve him through substituted service by advertising in a newspaper of national circulation. The record further shows that the relevant publication was duly published in the Daily Nation Newspaper on January 15, 2024 and an affidavit of service filed to that effect. It would appear from the record that the Respondent did not enter appearance and neither did he file an answer to the summons.

C. Hearing of the Originating Summons

5. When the suit was set down for hearing the Applicant called one witness and closed its case. The witness was Charles Wachira Ndiritu who testified that he was the principal of Ndemi Secondary School. He adopted the contents of his supporting affidavit of November 21, 2022 and further affidavit of 20.06.2023 as his evidence in-chief and produced the 13 annexures thereto as exhibits P1 – P13 respectively. He consequently urged the court to declare that the Applicant had acquired the suit property through the doctrine of adverse possession and to grant the consequential orders sought.

D. Directions on Submissions

6. Upon conclusion of the hearing, the Applicant was granted 21 days to file its written submissions. The record shows that those submissions were filed on or about February 2, 2024.

E. Issues for Determination

7. The court has considered the pleadings, evidence and submissions on record in this matter. The court is of the view that there are three main issues for determination herein, namely:
 - a. Whether the Applicant has proved its claim for adverse possession of the suit property.
 - b. Whether the Applicant is entitled to the reliefs sought in the suit.
 - c. Who shall bear costs of the suit.



F. Analysis and Determination

8. The court has considered the evidence and submissions on record on this issue. The elements of adverse possession were summarized in the case of *Kasuve v Mwaani Investments Ltd & 4 Others* [2004] 1KLR 184 as follows:

“....and in order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossession of the owner or by the discontinuation of possession by the owner on his own volition, *Wanja v Sakwa No.2* [1984] KLR 284. A title by adverse possession can be acquired under the *Limitation of Actions Act* for part of the land...”

9. Similarly, in the case of *Chevron (K) Limited v Harrison Charo Wa Shutu* [2016] eKLR it was held, inter alia, that:

“At the expiration of the twelve-year period the proprietor’s title will be extinguished by operation of the law and section 38 of the Act permits the adverse possessor to apply to the High Court for an order that he be registered as the proprietor of the land. Therefore the critical period for the determination whether possession was adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that his possession was without the true owner’s permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner’s enjoyment of the soil for the purpose for which he intended to use it. See *Littledale v Liverpool College* (1900)1 Ch.19, 21.”

10. The Applicant’s evidence was that it had been in open, continuous and exclusive possession of the suit property since 1984 without any interruption from the registered owner. Its further evidence was that it had constructed school buildings and operated educational activities thereon for decades and that the registered owner had never taken steps to evict the school from the suit property. The Applicant submitted that due to the foregoing it had acquired the suit property through the doctrine of adverse possession under the *Limitation of Actions Act* (Cap.22).
11. The court has noted that the Applicant’s evidence was neither challenged nor controverted at the trial since the Respondent did not participate in the hearing. The court, therefore, accepts the Applicant’s evidence as the true factual foundation of its claim. The court accepts that the Respondent has lost his right of recovery of the suit property and that the Applicant has acquired the same through the doctrine of adverse possession. The copy of the land register which was filed in court shows that the land register was opened on April 2, 1992 when the SFT was registered as proprietor. The Respondent was only registered as proprietor on July 7, 1993 hence the limitation period is to be reckoned from that date and not from 1984. A computation of the limitation period from July 7, 1993 indicates that the 12 year period expired on or about July 6, 2005.
12. The Applicant’s activities and developments on the suit property indicate that it had the requisite animus possidendi by utilizing the land as if it was the rightful owner. There is also no indication on record that the Applicant was utilizing and developing the suit property with the consent or permission of the Respondent. There was also no interruption of the Applicant’s possession since there was no evidence that the Respondent had either made an effective and peaceable entry into the suit property or instituted legal proceedings for its recovery within the limitation period. The court is thus of the



opinion that the Applicant has satisfied all the requirements of proving adverse possession on a balance of probabilities.

b. Whether the Applicant is entitled to the reliefs sought in the suit

13. The court has already found and held that the Applicant has proved its claim for adverse possession of the suit property. It would, therefore, follow that the Applicant is entitled to all the consequential reliefs which would vest the suit property in it. However, the court is not inclined to grant the prayer of permanent injunction against the Respondent since there was no evidence, let alone an allegation, that he intended to enter, alienate or dispose of the suit property or interfere with the Applicant's use or occupation thereof.

c. Who shall bear costs of the suit

14. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court is of the view that since the suit was not defended there would be no need of penalizing the Respondent in costs. The court shall consequently make an order that there shall be no order as to costs.

G. Conclusion and Disposal Order

15. The upshot of the foregoing is that the court finds and holds that the Applicant has proved its claim for adverse possession on a balance of probabilities. As a consequence, the court makes the following orders for disposal of the originating summons dated November 21, 2022:
- a. A declaration be and is hereby made that the Applicant, the Board of Management Ndemi Secondary School, has become entitled to be registered as proprietor of Title No. Nyandarua/Ndemi/97 on account of the doctrine of adverse possession.
 - b. The Land Registrar – Nyandarua County shall cause the Applicant to be registered as proprietor of Title No. Nyandarua/Ndemi/97 on account of adverse possession and shall for that purpose dispense with production of the original title deed and all documents in the possession, custody and control of the Respondent.
 - c. The Deputy Registrar of the court shall execute all necessary forms, documents and instruments on behalf of the Respondent to facilitate the transfer of the suit property to the Applicant.
 - d. There shall be no order as to costs.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 7TH DAY OF MARCH, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Kamau for the Applicant

N/A for the Respondent

C/A - Carol



.....
Y. M. ANGIMA
JUDGE

