



**Kombo v Khatijabai d/o Mohamed Mawji (Environment & Land Case 247 of 2020) [2024] KEELC 3343 (KLR) (24 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3343 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 247 OF 2020**

**SM KIBUNJA, J  
APRIL 24, 2024**

**BETWEEN**

**FATUMA SUDI KOMBO ..... APPLICANT**

**AND**

**KHATIJABAI D/O MOHAMED MAWJI ..... RESPONDENT**

**JUDGMENT**

1. This suit was instituted vide an Originating Summons dated 13<sup>th</sup> December 2020 by Fatuma Sudi Kombo, the applicant, claiming to have been in adverse possession of LR No. 437/V/MN, the suit property, which is registered in the name of Khatijabai D/0 Mohamed Mawji. Filed in support of the originating summons, is the affidavit of Fatuma Sudi Kombo, the applicant, sworn on the 13<sup>th</sup> December 2020, in which she deposed inter alia, that she is one of the Administrators of the estate of Sudi Kombo Heri, whose family has been in occupation of the suit property for the last 20 years; that she and her extended family have been residing and cultivating on the suit property without interruption for over 20 years, and that she is entitled to be registered as a proprietor by way of adverse possession.
2. The suit came up for mention for directions on 21<sup>st</sup> June 2022, when Mr. Kenzi advocate for the applicant made an oral application for leave to serve the respondent by way of substituted service. The court directed an application for substituted service to be filed as well as the filing of a ground report that would indicate the actual occupation of the suit property, alongside an extract of the title. When the matter came up for further mention on 27<sup>th</sup> September 2022, the applicant had not complied with the directions the court had given on 21<sup>st</sup> June 2022. The court proceeded to warn the parties that the matter stands the risk of being struck out for non-compliance with Order 37 Rule 7 (2) and Order 5 of the Civil Procedure Rules. The applicant later filed the ground report by the surveyor on 22<sup>nd</sup> March 2023 and the certified copy and search of the suit property on 10<sup>th</sup> February 2023. The applicant also filed an affidavit of service sworn by Benedict Wambua Kenzi advocate on the 19<sup>th</sup> June 2023,



deposing that the respondent was served through an advertisement in the Daily Nation Newspaper of 30<sup>th</sup> May 2023. Then on the 20<sup>th</sup> November 2023, the learned counsel for the applicant indicated to the court that the applicant will rely on the affidavits and reports filed. The counsel consequently filed the submissions dated the 30<sup>th</sup> January 2024, that the court has considered.

3. The main issue before the court for determination is whether the applicant has proved, on a balance of probability, that she is entitled to be registered as the owner of the suit property by adverse possession.
4. The court has considered the originating summons, affidavit evidence, submissions by the learned counsel, superior courts decisions cited thereon, the record and come to the following determinations:
  - a. The record confirms that on the 21<sup>st</sup> June 2022, the learned counsel for the applicant made an oral application for leave to serve the respondent through substituted service. The court directed inter alia that “an application for substituted service will need to be filed.” Order 5 Rule 17 of the Civil Procedure Rules provides for substituted service where the court is satisfied that the summons cannot be served personally unto the respondent. In the instance case, the applicant made an oral application to the court on 21<sup>st</sup> June 2022 for leave to serve the respondent by way of advertisement. The court did not expressly grant leave to the applicant, but rather stated that an application for substituted service ought to be filed. I have perused the record and confirmed that no such application for leave was filed, and no leave for substituted service was granted. Nevertheless, the applicant proceeded to place an advert in the Daily Nation of 30<sup>th</sup> May 2023 and filed a return of service on 19<sup>th</sup> June 2023. The applicant ought to have made a formal application for leave to serve by way of substituted service. It is through such application that the applicant would have provided the court with evidence of the attempts made to trace and serve respondent personally. The court, if satisfied that the whereabouts of the respondent’s was unknown and that personal service could not have been effected, would have considered whether to allow substituted service. The applicant did not detail to the court any efforts that she had made to trace the respondent, if at all. In the case of *Bernard Mbole Kavoo & 2 others v Lukenya Ranching and Farming Co-operative Society Limited & 3 others* [2021] eKLR, the court held that;

“Before the court grants leave to a party to serve court process by way of substituted service, it must be satisfied by way of Affidavit evidence that the summons cannot be served in accordance with the provisions of Order 5 of the Civil Procedure Rules. I have gone through the records and I have not come across an Affidavit of Service (or an Affidavit of non-service) either by the Plaintiffs’ advocate or the process-server to show the efforts that were made to trace the Defendants for the purpose of serving them.”

Despite the applicant failing to file an application to seek leave from the court to serve the respondent by way of substituted service, the court will proceed to consider this suit on its merit.

- b. Adverse possession is a statutory process of acquiring title to land by extinguishing the title of the registered owner, by the actual occupation of the land in a manner that is visible, open, notorious, exclusive, continuous and uninterrupted for a statutory period of 12 years. Adverse possession is based on facts, which must be asserted, pleaded and proved. The applicant must show the date she took possession, the nature of her possession, how long the possession has been, and whether her possession was open and undisturbed.
- c. In the case of *Richard Wefwafwa Songoi v Ben Muniyifwa Songoi* [2020] eKLR the Court of Appeal held that,  
‘A person who claims adverse possession must inter alia show:



- (a) on what date he came into possession.
- (b) what was the nature of his possession?
- (c) whether the fact of his possession was known to the other party.
- (d) for how long his possession has continued, and
- (e) that the possession was open and undisturbed for the requisite 12 years.

In the instant matter, the applicant maintained that her late mother, Sudi Kombo Heri, herself and her family have been in occupation of the suit property for over 20 years. That they have been residing and cultivating the suit property without any interruption, until recently when the area chief, and other purported elders colluded to sell the suit property to unsuspecting buyers.

- d. The applicant did not give the court a specific time that she made a physical entry, and became in actual possession of the suit property for the purpose of confirming whether the statutory period required has lapsed. When did time begin to run? Since time does not begin to run merely because the land is vacant, the applicant must give a timeline in which she became in actual occupation of the suit land.
- e. The applicant must demonstrate that her possession was non-permissive and exclusive with the clear intention of ousting the true owner of the suit property. Exclusive possession means that the applicant physically dominates the whole land or the portion claimed thereof, to the exclusion of the true owner and any other person. The applicant ought to demonstrate that the respondent has ceased to be in occupation and that she has continuously been in occupation. The owner ceases to be in occupation by reason of dispossession or discontinuance of possession.
- f. In the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR the court held that;
 

“Dispossession is where a person comes in and drives another out of the land; discontinuance of possession is where the person in possession goes out and another person takes possession. The term “dispossession” imports ouster, ie a driving out of possession against the will of the person in actual possession.... Discontinuance consists in the owner giving up, ceasing to use, and abandonment, of the land, a cessation of occupation...If a man does not use his land, either by himself or by some person claiming through him, he does not thereby necessarily discontinue possession of it, nor does that fact bring about the elimination of his possession. In our law, the mere fact that for twelve years or more there has been no suit brought against the squatter, or the mere fact that for twelve years the squatter has been in actual possession of the land, is not enough to make the *Limitation of Actions Act* operative; possession for twelve years cannot per se make the Act come into operation against an owner of land. The Act is operative only where there has been exclusive possession for the statutory period by the person to be protected by the statute.”
- g. In the ground situation survey on LR No. MN/V/437, it was reported that there are different structures of different nature, that is permanent, Swahili houses and temporary buildings therein. The Google Maps replied upon show that over the years the structures have increased across the 10.171 acres of land. It was also reported that there are squatters and numerous structures with encroachment set at 90%. It is therefore clear to the court that the applicant is not in exclusive possession of the suit property, and that there are other occupants in occupation of the suit land, who were not joined in this suit. The applicant has therefore failed to adduce evidence to show that she was in exclusive possession of the suit land that she seeks



to adversely possess. The court can only conclude that the applicant did not have exclusive possession of the suit property for the statutory period required for the prescriptive relief to crystallize in her favour. She held the suit land in the same capacity as the other occupiers of the suit land, who have constructed and permanent and semi-permanent structures on the suit property.

- h. Given the affidavit evidence before this court, the applicant is not in exclusive possession of the suit property. She has also not particularized the specific portion of the suit property that she claims her family has been adversely possessed of. It is apparent to the court that the applicant has failed to prove that the respondent has lost the right to the suit property, either by being dispossessed or having discontinued possession, of the suit property for a continuous statutory period of 12 years, to entitle her to the title to the suit premises by way of adverse possession. The applicant's plea of adverse possession fails in totality, and the Originating Summons dated 13<sup>th</sup> December 2020 and filed on 22<sup>nd</sup> December 2020 is devoid of merit.
  - i. That in view of the fact that the respondent did not participate in this proceedings, the applicant will bear her own costs in terms of section 27 of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya.
    1. That flowing from the above determinations, the court finds and orders as follows:
      - a. That the applicant has failed to establish a claim of adverse possession over the suit property on a balance of probabilities.
      - b. That the applicant suit commenced through the originating summons dated the 13<sup>th</sup> December 2020, and filed on the 22<sup>nd</sup> December 2020 is therefore dismissed.
      - c. The applicant to meet her own costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED ON THIS 24<sup>TH</sup> DAY OF APRIL 2024.

S. M. Kibunja, J.

ELC MOMBASA.

IN THE PRESENCE OF:

APPLICANT : M/s Wambua for Kenzi

RESPONDENT : No appearance

WILSON – Court Assistant.

S. M. Kibunja, J.

ELC MOMBASA.

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