



Parodi v Malfati & another (As the Administrator of the Estate of Leonardo Malfati - Deceased) (Environmental and Land Originating Summons E008 of 2023) [2024] KEELC 3422 (KLR) (24 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3422 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E008 OF 2023
EK MAKORI, J
APRIL 24, 2024**

BETWEEN

GIORGIO PARODI APPLICANT

AND

EMILIA MALFATI 1ST RESPONDENT

ELISA MALFATI 2ND RESPONDENT

AS THE ADMINISTRATOR OF THE ESTATE OF LEONARDO MALFATI - DECEASED

JUDGMENT

1. The Originating Summons dated 1st March 2023 together with the Supporting Affidavit sworn on the even date as well as annexures produced as Plaintiff exhibit 1-7 seeks the determination from this Court, and issuance of the following:
 - a. A declaration that the Applicant is entitled by way of adverse possession having occupied the suit property Land Reference Portion Number 12197 (Original Number 12196/1 Kilifi within Malindi for a period exceeding 12 years.
 - b. An order be issued to the Registrar of Lands, Mombasa for the cancellation of the title held by Leonardo Malfati, and the same be issued to the Applicant.
 - c. An order directing the Deputy Registrar to execute all the documents concerning the transfer of the property Land Reference Portion Number 12197 (Original Number 12196/1) Kilifi within Malindi to the Applicant.
 - d. Costs of the suit.



2. The Applicant's case is that he has occupied the property known as Portion Number 12197 (Original Number 12196/1) Kilifi within Malindi Town since 2009. He produced the survey report which showed the extension of his occupation of the property and he has never been evicted from the property to date.
3. The Respondents herein are the beneficiaries of the estate of Leonardo Malfati who approached him to purchase the property however, upon realization that they had no legal capacity to transact, he retracted the same.
4. The 1st Respondent has now refused to take out succession proceedings for the estate of the deceased but continuously insisted on the payments and when the Applicant resisted she demanded that he vacate the property at which point he declined as he had extensively renovated the property.
5. The applicant even went out of his way and on 21st October 2011 he instructed him to prepare an agreement hoping that the 1st Respondent would react to the same but when it was sent to the 1st Respondent's email she refused to sign it.
6. The Respondent received a letter from a firm in Italy which the Respondent replied to vide his advocate's letters dated 15th February 2012, and the that dated 14th June 2012 but all fell on deaf ears.
7. The property has been in the Applicant's possession since the year 2010 and he has used it without force or secrecy with the knowledge of the Respondents and the refusal to transfer the property since, and lack of communication has necessitated the claim the instant claim of adverse possession.
8. The Applicant produced the following documents to prove his case:
 - a. Copy of the Title deed in favour of Leonardo Malfati;
 - b. Copies of the DTB Bank transfer;
 - c. Copies of letters dated 15th February, 2012;
 - d. Letter dated 14th June, 2012;
 - e. Draft sale agreement;
 - f. A copy of the survey report dated 10th January 2023;
 - g. Receipt of survey report dated 13th February 2023
9. The Respondent did not file any response despite being served with the claim as evidenced in an affidavit of service sworn on 18th April 2023.
10. From the record the issues for determination of this Court are;
 - i. Whether the Applicant has acquired the suit land through adverse possession.
 - ii. Whether an order for cancellation of the title held by the registered proprietor should be issued and the suit property be registered in favour of the Applicant.
11. The applicant submits that the applicant has proved that he has acquired the suit land under the doctrine of adverse possession as enunciated in *Mtana Lewa v Kahindi Ngala Mwangandi* [2005] eKLR, *Anzwan M. Salim & Others v Ahmed Ali Said & 2 Others* [2017] eKLR and *Mbira v Gachuhi* [2002]1 EALR 137.



12. In *Maina Kinya v Gerald Kwendaka* [2018] eKLR for adverse possession to accrue it has to be shown:

“The law in respect to adverse possession is now settled. For one to succeed in a claim of adverse possession he must satisfy the following criteria stated in the case of *Maweu vs. Liu Ranching and Farming Cooperative Society* 1985 KLR 430 where the Court held;

“Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity, and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”.

13. It was held further in *Murunga Kabangi & 2 Others v Hannah Gitau &* [2019] eKLR that:

“As stated earlier, the single issue involved in this appeal is whether the appellants had established that they were entitled to be registered as the owners, by adverse possession, of the disputed land thereby defeating the rights of the registered owners whose title must be cancelled to give way to the registration of the trespasser-turned-owner in the eyes of the law.

In the recent case of *David Munene Wamwati & 4 Others vs The Registered Trustees of the Anglican Church of Kenya & Another*, Civil Appeal No. 36 of 2015 (UR), this Court had this to say: -

“The conceptual and ethical dilemma presented by the law on adverse possession has long engaged judicial minds in this Court and we need not rehash it. This Court has on many occasions exposed the morality and justice of a law that permits a trespasser to morph, by mere advance of time, into the owner of land he entered into without permission of the owner and at absolutely no consideration thereby defeating an owner, a registered one at that, who in all likelihood invested funds in the purchase of the land. These concerns have been articulated with firmness and passion but have always borne the impotence of equity in the face of explicit provisions of law which must nonetheless be followed until a legislative intervention should effect much-needed change. See, for a thorough exposition of the controversies aroused by the law on adverse possession, the decision of our learned brothers *Makhandia, Ouko, and M’Inoti, JJ. A in Mtana Lewa Vs. Ngala Mwangandi* [2015] eKLR. For all of its problematic nature, however, the law on adverse possession is itself quite simple. This Court, differently constituted put it thus in *MATE GITABI vs. Jane Kabubu Muga & Others* (Nyeri Civil Appeal No. 43 of 2015 (unreported));

“For one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the landowner. These elements are contained in the Latin maxim *nec vi, nec clam, nec precario*. See also *Eliva Nyogesa Lusena & Another Vs. Nathan Wekesa Omacha – Kisumu Civil Appeal No. 134 Of 1993 And Kasuve Vs. Mwaani Investments Ltd & 4 Others* [2004] KLR 184 at page 188 where this Court stated as follows;

‘In order to be entitled to land by adverse possession, the claimant must prove that she has been in exclusive possession of land openly and as of right and without interruption for 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.’ See also *Wanje vs Saikwa* [1984] KLR 284.”

And so, the law is fairly well settled.”



14. The testimony offered shows that the applicant has been in occupation of the suit property since 2009 which is now cumulatively over 12 years. It has been open and uninterrupted without secret and to dispossess the registered owners. The registered landowner is said to have died. The beneficiaries have failed to take out letters of administration. They have abandoned the suit land and have never set foot on the suit land. An intention to purchase had earlier been expressed but was abandoned sometime in 2011. After several correspondences, it seems the issue of purchase was shelved. Meanwhile, the applicant has continued to occupy the suit property and done renovations thereon. I will think about the circumstances of this case the suit property stands abandoned and the applicant has acquired the same by operations of the doctrine of adverse possession.
15. The Originating Summons will succeed in the following manner:
- a. The applicant be and is hereby declared by the operations of the doctrine of adverse possession to have acquired a parcel of land described as Land Reference Portion Number 12197 (Original Number 12196/1) Kilifi within Malindi.
 - b. An order does and is hereby issued to the effect that the respondents' title over Land Reference Portion Number 12197 (Original Number 12196/1) Kilifi within Malindi has been extinguished.
 - c. An order does and is hereby issued directing the Land Register of Titles Kilifi to register Land Reference Portion Number 12197 (Original Number 12196/1) Kilifi within Malindi in the names of the applicant herein.
 - d. The applicant will also be entitled to the Costs of this suit.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 24TH DAY OF APRIL 2024.

E. K. MAKORI

JUDGE

In the Presence of:

M/s Mwangi for the Applicant

Court Clerk: Happy

In the Absence of:

Respondent

