



**Marenya v Mududa (Environment & Land Case E26 of 2022)
[2024] KEELC 3569 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3569 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE E26 OF 2022
AY KOROSS, J
APRIL 11, 2024**

BETWEEN

JENIPHER AWANDU MARENYA PLAINTIFF

AND

LUCIA AKELO MUDUDA DEFENDANT

JUDGMENT

Plaintiff's Case And Submissions

1. This suit is instituted by an originating summons (OS) dated 28/11/2022 in which the plaintiff sought to be deemed an adverse possessor of land parcel no. East Gem Nyandiwa/1055 (suit property) which measures 3.26 Ha. It is registered in the name of the defendant who is the plaintiff's step mother.
2. The OS is supported by the affidavit of the plaintiff Jenipher Awandu Marenya which she deposed on even date. Despite service, the defendant did not file any documents to refute the plaintiff's claim and therefore, the plaintiff's claim is undefended.
3. It is the plaintiff's case that she had allegedly acquired the suit property by adverse possession and seeks the following reliefs from this court: -
 - a. A declaration be made that she had acquired the suit property by adverse possession.
 - b. An order that a rectification of the suit property's register be made by deleting the defendant's name as proprietor and substituting it with her name and a title deed be issued to her.
 - c. An order be made vesting the suit property's title in her name as absolute proprietor and the deputy register do sign the necessary documents.
 - d. Costs of the suit.



4. The suit proceeded by viva voce evidence and being the only witness, the plaintiff testified as PW1. Her evidence is composed of her affidavit which she adopted as her evidence in chief and documents she produced in support of her case which included the suit property's certificate of official search and greencards of the suit property and that of land parcel no. East Gem/Nyandiwa 821 (821) from which the suit property is derived from.
4. It is her evidence she was born on the suit property in 1947 and had lived on it since then. It is her statement the suit property and East Gem Nyandiwa/1053 and 1054 were derived from 821.
4. Further, it is her evidence that upon subdivision of 821, the defendant settled on East Gem Nyandiwa/1054 which she has since subdivided and sold to 3rd parties. It is her position in 2008 and upon notice of the subdivisions, she informed the defendant of her occupancy of the suit property and the defendant was not troubled by this.
4. In addition, it is her case her occupancy was open, continuous, notorious, uninterrupted and exclusive in a manner that is averse to that of the defendant who is the registered owner.
4. After hearing the plaintiff and closing the parties' cases, this court directed the plaintiff's counsel on record M/s Omondi Abande & Co. Advocates to file written submissions. The plaintiff's counsel complied by filing written submissions dated 29/01/2024. The defendant did not file any submissions.
4. Relying on Section 7 and 38 (1) of the Limitation of Actions Act, counsel submits the claim is competently before this court and submits elements of adverse possession had been met by the plaintiff and relies on the case of Mathew Kiprop Tonui v Kimutai Arap Too & 4 others [2018] eKLR which cited with approval the Court of Appeal decision of Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & Another [2015] eKLR which defined the principles of adverse possession in the following terms: -

“From all these provisions, what amounts to adverse possession? First, the parcel of land must be registered in the name of a person other than the applicant, the applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner, lastly, he must have been in that occupation for a period in excess of twelve years having dispossessed the owner or there having been discontinuance of possession by the owner.

This concept of adverse possession has been the subject of many discourses and decisions of this Court. Suffice to mention but two, Kasuve v Mwaani Investments Limited & 4 others [2004] 1KLR 184 and Wanje v Saikwa (2) (supra). In the first decision, the court was emphatic that 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 twelve years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition.

In the Wanje case, the Court went further and took the view that in order to acquire by Statute of Limitations a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it and that what constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.

Further, the court opined that a person who occupies another's person's land with that person's consent, cannot be said to be in adverse possession as in reality he has not dispossessed the owner of the land and the possession is not illegal.



What these authorities are emphasizing is that for one to stake a claim on a parcel of land on the basis of adverse possession, he must show that he entered the parcel of land more or less as a trespasser as opposed to by consent of the owner. In other words, his entry must be adverse to the title of the owner of the land. It is also possible to enter the land with the consent of the owner, but if the owner at some point terminates the consent and the applicant does not leave but continues to occupy the land and the owner takes no steps to effectuate the termination of the consent for a period of twelve years after then, such applicant would be perfectly entitled to sue on account of adverse possession.

Besides adverse entry into the land, the applicant must also demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner. The occupation must be open, uninterrupted, adverse to the title of the owner, adequate, continuous and exclusive as already stated. The burden of proving all these is on the person asserting adverse possession. So that a claim of adverse possession would not succeed if the entry to the land was with the permission of the owner and remains that way throughout, or before the permission is terminated or if before the expiry of the period, the owner of the land takes steps to assert his title to the land. In the case of Samuel Miki Waweru v Jane Njeri Richu, Civil Appeal No. 122 of 2001, (UR), this court delivered the following dictum:

“...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...”

Issues for determination

4. I have considered the pleadings, adduced evidence and the plaintiff's submissions. Being guided by the well cited provisions of law and judicial precedents, I shall now proceed to consider the merits or otherwise of the plaintiff's claim and the issues for determination are: -
 - I. Whether the plaintiff proved her claim of adverse possession to the required standards.
 - II . What appropriate orders should be granted including an order as to costs.

Analysis and Determination

4. The issues which were earlier recognised as arising for determination shall be addressed herein in a sequential manner: -
 - I. Whether the plaintiff proved her claim of adverse possession to the required standards.
12. The common law doctrine of adverse possession is statutorily underpinned in our *Limitation of Actions Act* and it is one of the ways of acquiring land in Kenya.
12. The relevant provisions are underpinned in Sections 7, 13 and 38 of this Act and from these provisions of law and settled case law, the onus is on the plaintiff who claims adverse possession to prove that she is an intruder, she has been in unlawful occupation for a period of over 12 years to the time of filing suit and the claim is against the registered owner.
12. In addition, the plaintiff must show clear and unequivocal evidence she has dispossessed the owner or the owner has discontinued possession in a manner that is without permission and that her occupation is, with the knowledge of the true owner, without secrecy, peaceful, without evasion and in continuous



occupation of a determinable portion of the suit property. On these principles, See Wilson Kazungu Katana (Supra) and Mtana Lewa v Kahindi Ngala (2015) eKLR.

12. When a claimant makes a claim of adverse possession, this court has to apply strict interpretation of the law on adverse possession. Further, in deciding such a claim, the claimant has to meet not one but all the elements of adverse possession.
12. Since it is settled law claims of adverse possession is a matter of fact to be observed on the land and even if the plaintiff's claim of adverse possession is uncontested, the onus was upon her to tender facts to prove her claim. [See Maweu v Liu Ranching & Farming Cooperative Society [1985] eKLR].
12. Having allegedly been in occupation of the suit property from 1947 which is a period of 75 years to the time of filing suit, it is expected the plaintiff had developed it either by putting up structures on it, planted trees or actively cultivated it but in adducing her evidence, she did not adduce evidence to prove her occupancy.
12. Apart from asserting that she had met the ingredients of adverse possession, she did not produce before this court any photographs to show she had either developed or cultivated the suit property, call a neighbour to corroborate her testimony or produce a surveyor's report to ascertain the nature and extent of her occupancy.
12. These missing factual evidences were very critical to the plaintiff's case and in their absence, I am not satisfied the plaintiff is in occupation of the suit property.
12. Another issue of concern is that of the parties' close relationship and whether by virtue of this relationship, the plaintiff could make claims of adverse possession. It was the plaintiff's testimony she had been born on the suit property and the defendant is her stepmother.
12. The greencard of 821 demonstrates this particular property is a subdivision of "plot no. 339" and I am uncertain if this parcel is a 1st registration or not. Having been in alleged occupation from 1947, the plaintiff did not lead evidence of intervening circumstances that led to her exclusion during 1st registration of the suit property or of her relationship with the 1st registered owner who obviously was not the defendant. It could only be by virtue of such evidence that her claim of adverse possession by customary trust could arise.
12. As evident from the greencard of 821, its registered proprietors were Ogoma Miduda (Ogoma) and Martin Miduda (Martin) who were so registered on 30/9/1994. Thereafter, it was transferred to the defendant by transmission on 23/9/2005.
12. In the absence of a confirmation of grant, I am unable to establish the relationship between the defendant, Ogoma and Martin but from the greencard, it appears probate proceedings were conducted on their estates in the defendant's favour.
12. A claim of adverse possession by customary trust is expounded by the Court of Appeal's findings in the case of Eunice Karimi Kibunja v Mwirigi M'ringera Kibunja [2013] eKLR which held thus: -

"First, that there was no dispute Eunice was in continuous, uninterrupted possession of the suit land as of right without permission of Mwirigi; secondly, the Law of Succession did not distinguish a male or female child or their marital status, lastly in the yester years, customary practices did not favour women for registration of ancestral land, thus it was necessary to examine the circumstances under which Eunice caused the title to land be



registered in Mwirigi's name. If those circumstances were considered, the trial Judge would have discerned the intention was for Mwirigi to hold the title in trust of Eunice."

12. Claims of adverse possession amongst close family relations have posed and continue to pose legal challenges in Kenya as can be seen in the cases of Mbui v Maranya [1993] KLR 726, Rodgers Mwamboje v Douglas Mwamboje [2014] eKLR, John Baraza Ojiambo v Veronica Auma Ojiambo & 3 others [2013] eKLR and Samuel Kihamba v Mary Mbaisi [2015] eKLR.
12. In the African set up, it is common for family members to accommodate other extended family members in their parcels of land out of good will and entertaining adverse possession in such scenarios would cause chaos, be unfair to the registered owners and abuse the African culture of oneness as was elucidated in the case of Mbui Vs Maranya (1993) KLR 726 where Kuloba J stated: -

"Now, in this country, go to the country side, where our largest population resides, and see for yourself how people are so caring and mindful of one another's welfare. In the countryside, a lot of people are living on other people's land, thanks to the African milk of generosity and kindness Our way of living has always been to depend on one another for mutual survival and progress. This is at every level.

To us, if you want any help, if you want a cow, if you want a piece of land for as long as the owner does not immediately require it, you are given these things, because the owner knows that it does not matter for how long you borrow this things; he can always recover whatever he has lent to you and whatever he has let you use. There are many people who, by a gentleman's agreement, all over the country, are actually living on the land of their friends, their clansmen, neighbours or even void land sale agreements. They do not ever think of claiming or losing title, by adverse possession..... I would be surprised if anyone pretended to be ignorant of these things. And ignorance on the part of a judge would be a calamity for the innocent.

12. When confronted with an appeal concerning a claim of adverse possession between a step son and mother, the Court of Appeal in the case of Samuel Kihamba (Supra) expressed itself as follows on claims of adverse possession between close family relations:

"Could the doctrine of adverse possession apply against the parties to the suit before the learned Judge who were related by being mother and step-son? We think not. We are persuaded by various dicta which we have quoted and relied upon in this judgement and must state that it would create havoc for families and the society of Kenya generally if the principle of adverse possession applied within families against close relatives."

12. The African culture of accommodating a relative emerged in the present case whereby the plaintiff testified that when she informed the defendant that she was in occupation of the suit property, the defendant never bothered her and minded her own business as if nothing major had transpired.
12. In my view, the plaintiff's claim could have been well suited under probate proceedings or customary trust subject to meeting the legal hurdles but not in the manner she has approached this court. In applying the dicta of these decisions, I am not satisfied the plaintiff has proved she was in adverse possession of the suit property.



II. What appropriate orders should be granted including an order as to costs

30. For the reasons stated above, it is my ultimate finding the plaintiff did not prove her claim of adverse possession to the required standards and I hereby dismiss her case. It is trite law costs follow the event and the plaintiff shall bear her own costs. In the end, I make the following final disposal orders;
- a. The plaintiff's suit against the defendant is hereby dismissed.
 - b. The plaintiff shall bear her own costs of this suit.

Orders accordingly.

DELIVERED AND DATED AT SIAYA THIS 11TH DAY OF APRIL 2024.

HON. A. Y. KOROSS

JUDGE

11/4/2024

JUDGMENT DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO

Conferencing Platform in the Presence of:

Miss Raburu h/b for Mr. MM Omondi for the plaintiff

N/A for the defendant

Court assistant: Ishmael Orwa

