



**Alfani v Karani (Environment & Land Case 373 of 2017)
[2024] KEELC 4340 (KLR) (29 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4340 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 373 OF 2017**

SM KIBUNJA, J

MAY 29, 2024

BETWEEN

ALFAN MZEE ALFANI ALFANI APPLICANT

AND

LEVI KARANI RESPONDENT

JUDGMENT

1. The plaintiff filed the originating summons dated 13th October 2017 seeking for orders inter alia that the respondent's title to parcel C.R 7172/294, subdivision No. 699/111/MN, suit property, measuring 0.7800 Ha has been extinguished and that the Registrar of Titles Mombasa, be ordered to register the land in his name. The applicant averred that he has been in uninterrupted exclusive, peaceful and physical occupation of the suit property for a continuous period of over 12 years and its only fair that he be registered as the proprietor.
2. The respondent opposed the originating summons, through the replying affidavit sworn by himself on the 4th July 2023 inter alia deposing that the applicant has not been having exclusive and uninterrupted possession of the suit land for over twelve years indicating that he has been in possession; that he had bought the land from one Momo Bint Abubakar but later lost the title document which loss was gazetted on 30th May 2014; that the land is undeveloped except a temporary structure that is in one corner of the property; that the originating summons was fraudulently filed with the object of dispossessing him of his land, and should be dismissed with costs.
3. Both the applicant and respondent testified as PW1 and DW1 respectively, on the 5th December 2023. PW1 admitted that he had been chased out of the suit property, but that he later went back to the land. He also admitted that his deposition in the supporting affidavit dated 13th October 2017 did not reveal when the period of 12 years started. He added that he had erected a traditional semi-permanent house on the land, but had no crops there. It was his evidence that he is claiming for plot No. 1990 that had belonged to his great grandfather, even though he did not have title deeds. DW 1 testified that



he had never seen the plaintiff on the suit property on the several times he visited the land. He stated that he was employed as the provincial planner from 1974 to 1981 and thereafter, he was transferred to Nyanza and emphasized that he visited the suit property from time to time. That he had bought the suit land in 1979 but he was registered as owner in 1989 when he was in Kisumu. He narrated that after being transferred to Kisumu in 1981 he left a relative to live on the land. That, some people had come to mine on a portion of the suit land but his relative chased them away and they never came back. DW 1 referred to a photo of a house annexed as LK 3 in the afore said replying affidavit and admitted that he did not know its owner and that it is the reason he came to court, although he also admitted to never have reported to the police about it. He vehemently denied that the plaintiff has lived on the suit land since 1981 when he was transferred to Kisumu. He emphasized that he visited the suit property at least once every year. On further cross-examination, he admitted that he discovered the existence of the building sometime in July 2020.

4. The learned counsel for the applicant and respondent filed their submissions dated the 24th January 2024 and 1st February 2024 respectively, which the court has considered.
5. The issues for the court's determinations are as follows:
 - a. Whether the applicant has established a claim of adverse possession over the suit property.
 - b. Who pays the costs in the suit?
6. The court has after considering the grounds on the originating summons, affidavit and oral evidence by the parties, submissions by counsel come to the following determinations:
 - a. The doctrine of adverse possession is creation under the Laws of Kenya which can be traced back to its origins around 2000 B.C in the Code of Hammurabi which explained that if a man left his house, garden, or field and another person possessed and used it for three years, the newcomer retained the land. Here in Kenya, we borrowed the doctrine from the English Laws and has been entrenched under *section 7* of the Limitation of Actions chapter 22 of Laws of Kenya which provides that:

An action may not be brought by any person to recover land after the end of 12 years from the date which the right of action accrued to him or if it first accrued to some person through whom he claims to that person."

7. In the case of Jandu vs. Kirpal & Another [1975] EA 225 the court, while relying on the case of Bejoy Chundra v Kally Posonno [1878] 4 Cal 327 at p 329, held that:

By adverse possession I understand to be meant possession by a person holding the land on his own behalf, [or on behalf] of some person other than the true owner, the true owner having immediate possession. If by this adverse possession the statute is set running, and it continues to run for twelve years, then the title of the owner is extinguished and the person in possession becomes the owner."

The Court in Mtana Lewa vs. Kahindi Ngala Mwamgandi (2005) eKLR explained that:

Adverse Possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12 years."



In Alfred Welimo vs. Mulaa Sumba Barasa, CA No 186 of 2011, the Court of Appeal expressed itself thus:

It is trite that adverse possession is not established merely because the owner has abandoned possession of his land and ceased to use it; for as Robert Megarry aptly observed in his Megarry's manual of the Law of Property, 5th ed. page 490, the owner may have little present use for the land and that land may be used by others, without the users demonstrating a possession inconsistent with the title of the owner. So, the mere fact that the appellant abandoned possession of the suit property and went to live at Ndalu scheme by and of itself does not establish adverse possession. The abandonment of possession must be coupled with the respondent taking possession of the land with animus possidendi (the intention to possess) and asserting thereon rights that are inconsistent with those of the appellant as the owner of the land...."

In Ndolo vs. Kitutu & 8 others (Civil Appeal 394 of 2018) [2022] KECA 1289 (KLR) (18 November 2022) (Judgment), the Court held that:

For a claim founded on adverse possession to succeed, the person in possession must have a peaceful and uninterrupted use of the land. The physical fact of exclusive possession and the animus possidendi to hold as owner to the exclusion to the actual owner are important factors in a claim for adverse possession. The principles stated in the above holding are also encapsulated in the local legislation referred to elsewhere in this judgment. The direct import of these two provisions is, firstly, that a person dispossessed of land cannot bring an action to recover land after the expiration of twelve years from the date on which the right of action accrued, which is the date of dispossession. Secondly, after the expiration of the said twelve years the title of the registered owner shall be extinguished. Thirdly, the person in adverse possession is entitled to a title by possession."

In Wambugu vs. Njuguna (1983) KLR 171, the Court of Appeal held that:

in a claim for adverse possession, it is not enough for the claimant to show possession of the suit land for the statutory period of 12 years or more, what must be proved is that the proprietor of the land was either dispossessed of the land or that he discontinued his possession of the land for the entire statutory period; that a registered owner of land is deemed to be in possession of his land until an intruder enters upon the land and commences activities inimical to his title since it is dispossession of the respondent that defeats his title to the land it is inconsistent with his enjoyment of the land, and the purpose for which he intended to use it; that the onus was on the appellants to prove that they occupied the suit land openly, that is, without secrecy, without force, and with the knowledge of, but without the permission of, the respondent, continuously and with the intention to have the land as their own; that the onus was on the appellants to prove by evidence that the respondent was aware of the invasion of his land for a period of 12 years or more; that, in the case of Titus Kigoro Munyi vs. Peter Mburu Kimani [2015] eKLR, the court held that actual or constructive knowledge of adverse possession by a third party on part of the registered owner must be proved, and that the statutory period starts to run when the registered owner becomes aware of the trespass."

- b. It is a fact there was a house on the suit property. The applicant position is that that he had built a traditional semi-permanent house on the suit land and had lived there with his wife and children for over 12 years. That he has been conducting business on the suit property for over 12 years and even obtained a loan facility to operate a quarrying mine on the land. In the case of Richard Wefwafwa Songoi v Ben Munyifwa 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.”
- c. It is abundantly clear that the applicant has not disclosed either through his originating summons, or his evidence when he entered onto the suit property, or when his adverse possession of the suit property commenced. Without that disclosure, it becomes difficult for the court to with certainty know or determine from what date, month or year to start counting the period to confirm whether or not 12 years had lapsed by the time the applicant moved the court to be registered as the adverse possessor of the suit property. The adverse possession commencement date becomes even more important because the applicant had also argued that the suit property belonged to his great grandfather, which could be taken to mean the basis of his claim to the land is as ancestral land.
- d. To succeed in an adverse possession claim, the applicant has to prove that the possession was ‘*nec vi, nec clam, nec precario*’ that is to say ‘without force, without secrecy, without permission’. The possession also has to be exclusive, meaning that the applicant possession dispossessed the respondent out of the suit property. 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.”

- e. The respondent testified that he had bought the suit property in 1979. That he left a relative to look after the land when he was transferred to Kisumu in 1981. The applicant talked about being chased out of the suit property at some time, but later returned, and coincidentally, the respondent told of his relative having chased some people who had wanted to conduct the quarrying business on a portion of the suit



property. However, neither the applicant nor the respondent tendered evidence in support of their conflicting positions. It is the word of the applicant against that of the respondent, and neither of the two was specific on when the incident took place.

- f. Though it is an uncontested fact that there is a structure on the suit property, it is impossible to confirm when it was erected from the testimonies of the parties herein. The applicant's case is devoid of specific timelines and is coupled with insufficient evidence of exclusive possession leaving the court with no choice but to find that the applicant has failed to establish his claim to the required level of balance of probabilities.
 - g. That having found no merit in the originating summons, it follows that under section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya, the applicant will pay the respondent's costs.
7. Flowing from the foregoing, the court finds and orders as follows:
- a. That the applicant's claim through originating summons dated the 13th October 2017 is without merit and is dismissed.
 - b. The applicant to pay the respondent's costs.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 29TH DAY OF MAY 2024.

S. M. Kibunja, J.

ELC MOMBASA.

IN THE PRESENCE OF:

APPLICANT : No appearance.

RESPONDENT : Mr Asige

LEAKEY – COURT ASSISTANT.

S. M. Kibunja, J.

ELC MOMBASA.

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