



Mohamed v Alcon Engineering Company Limited (Environmental and Land Originating Summons E019 of 2023) [2025] KEELC 675 (KLR) (20 February 2025) (Judgment)

Neutral citation: [2025] KEELC 675 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E019 OF 2023
OA ANGOTE, J
FEBRUARY 20, 2025**

BETWEEN

ASHAFAQ AHMED MOHAMED APPLICANT

AND

ALCON ENGINEERING COMPANY LIMITED RESPONDENT

JUDGMENT

1. Vide an Originating Summons dated 3rd April, 2023, brought pursuant to the provisions of Article 40 of *the Constitution* of Kenya, 2010, Section 57(5) of the Registration of Titles Act, Section 28 and 73(1) of the *Land Registration Act*, Section 38 of the *Limitation of Actions Act*, Sections 1, 1A, 3, 3A and 63(e) of the *Civil Procedure Act* and Order 37 Rule 7 of the Civil Procedure Rules, the Applicant seeks the following reliefs:
 - a. That the Honourable Court be pleased to issue a declaration that the Applicant herein is the absolute legal owner of the suit property by virtue of adverse possession of over twelve (12) years since 2006 for ALL THAT property comprised in Title No L.R 209/10497/50 situated in Nairobi.
 - b. That the Land Registrar, Nairobi, registers the Applicant as the absolute legal owner of the suit property in place of the Respondent.
 - c. That the Honourable Court issues vesting orders upon the Applicant.
2. The Originating Summons is supported by the Affidavit of Ashafaq Ahmed Mohamed, the Applicant of an even date. He deponed that the Respondent is a limited liability company registered under the *Companies Act* under no C 14087 and is the registered proprietor of L.R No 209/10497/50 situate in Nairobi (hereinafter the suit property).



3. It was deposed that in the year 1992, the Respondent purchased the suit property from him on the conditions that the property will be transferred to his name when he attains the age of sixty-five; in the event of his death, the suit property will be transferred into the names of his children, Master Sahil Mugal and Master Sayam Mugal and that in the event of winding up of the company, the property will be transferred into his name or the family as aforesaid.
4. According to Mr. Mohamed, he thereafter entered into the suit property and has lived there to date; that on 22nd April, 2006, the Respondent, through its Director Mr. Alka Hanspal in the presence of Mr. Anwar A.B Ahmed, handed over the title deed of the suit property to him; that in addition, the water meter was transferred to his name and that he has continuously paid land rates and rent for the suit property as required by law.
5. It is the Applicant's case that he is currently seventy-two years old and is by dint of the letter dated 7th December, 1992 eligible to be made the absolute legal owner of the suit property; that the Respondent company has ceased to be operational and there is no trace of it; that efforts to trace the Directors of the Respondent company to effect transfer of the title to his name equally bore no fruits and that in addition to the foregoing, it has come to his knowledge that one of the company's Directors has passed on.
6. The Applicant deposed that as advised by Counsel, the law provides that once a person occupies a parcel of land for a period of more than twelve years, he becomes eligible to be made the legal owner of the said parcel of land.
7. The Originating summons was undefended.

Hearing and Evidence

8. The matter proceeded for hearing on 24th June, 2024. The Applicant, as PW1, placed reliance on the Originating summons and the Affidavit in support thereof as his evidence in chief and produced the annexures therein as PEXHB1. It was his oral evidence that he was given the land; that the land was purchased for him by the Directors of the Respondent; that one of the Directors of the Respondent died in 2006; that the land was purchased for him in 1992 and that he has a house on the land.

Submissions

9. The Applicant's counsel filed submissions on 16th September, 2024. Counsel submitted that it is a long standing principle of law that parties to a contract are bound by the terms and conditions thereof and courts cannot rewrite a contract for parties as expressed in *National Bank of Kenya Limited vs Pipe Plastic Samkolit(K)limited* [2002]E.A 503[2002]2 E.A 503[2011]eKLR.
10. Counsel submitted that as per the adduced agreement, the suit property was purchased for the Applicant by the Respondent and was to be transferred to the Applicant's name upon his attaining the age of 65 and in the event of his demise, the same to be transferred to his children and that in the event of winding up of the company, the property was to be transferred to the Applicant or his children as aforesaid.
11. It was submitted that as discussed in *Munyaka Kuna Company Limited vs Bernado Vicezo De Masi*(The Administrator of the Estate of Domenico De Masi(Deceased))[2018]eKLR, and *Mtana Lewa vs Kahindi Ngala Mwangandi*[2015]eKLR the law of adverse possession demands that a person alleging a right over title must show clear, unequivocal evidence that his possession was open, with the knowledge of the true owner and excluded the owner from enjoyment of the property.



12. Reliance in this respect was also placed on the cases of Gabriel Mbui vs Mukindia Maranya[1993]eKLR and Samuel Kihamba vs Mary Mbaisi[2015]eKLR.
13. It was submitted by counsel that the Applicant has established having been in open, continuous possession and occupation of the suit property for a period of 18 years as evinced by the payments of land rates and land rents; that the Applicant's possession and occupation of the suit property was evident despite the fact that he had not yet attained the age of 65 as was agreed in the letter of 7th December, 1992.
14. Counsel urged that by virtue of the agreement dated 7th December, 1992, it is clear that the Applicant is the absolute legal proprietor of the suit property and his rights to property as established in Article 40 of *the Constitution* should be protected and that in the alternative, it is clear that the Respondent's rights to the suit property became extinguished upon the lapse of the statutory limitation period.

Analysis and Determination

15. Having considered the Originating Summons, the Affidavit in support thereof and submissions, the sole issue that falls for consideration is whether the Applicant is entitled to L.R. 209/10497/50 by way of adverse possession.
16. Vide the present Originating Summons, the Applicant seeks to be declared the owner of the property by way of adverse possession. It is his case that he has been in open and continuous possession of the suit property for 18 years and by reason thereof has extinguished the Respondent's proprietary rights.
17. The Applicant adduced into evidence a copy of the Respondent's certificate of incorporation; title to the suit property in the Respondent's name; correspondence dated 7th December, 1992; agreement dated 22nd April, 2006; letter mandating transfer of water meter to the Plaintiff and receipts for land rates and rents and identity card.
18. The Respondent herein neither entered appearance nor filed any response and the Summons proceeded as undefended. Subsequently, the Applicant's allegations remain uncontroverted. This does not however lessen the burden of proof placed on the Applicant.
19. Indeed, the elementary principle of law that he who alleges must prove remains steadfast. The same is set out under Section 107(1)(2) of the *Evidence Act* which provides as follows:
 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."
20. The Applicant lays claim to the suit property by way of adverse possession. The law on adverse possession is provided for under the *Limitation of Actions Act*. Section 7 of the Act, provides as follows:

"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."
21. Further provisions are made under Section 13 which provides:
 1. A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred



to as adverse possession), and, where under sections 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

2. Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and afresh right of action does not accrue unless and until some person again takes adverse possession of the land.
 3. For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3), the land in reversion is taken to be adverse possession of the land.”
22. And Section 17 of the Act which states:
- “Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”
23. Finally, Section 38(1) and (2) state as follows:
1. Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.
 2. An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”
24. The net effect of the foregoing sections is to extinguish the title of the proprietor of land in favour of a party who has been in possession thereof for a minimum period of 12 years.
25. Discussing the concept of adverse possession, the Court of Appeal in *Mtana Lewa vs Kahindi Ngala Mwangandi* [2015]eKLR stated thus:
- “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.”
26. As to the elements, the Court of Appeal in the case of *Richard Wefwafwa Songoi vs Ben Muniyifwa Songoi* [2020] eKLR stated as follows:
- “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.”



27. In a claim for adverse possession, the burden of proof is upon the person setting up and seeking to prove title by adverse possession. The required element of proof is the usual standard of proof in civil cases, namely, on a balance of probability.
28. As aforesaid, the Applicant seeks the suit property by way of adverse possession. He contends that he has been in possession and occupation of the suit property since the same was handed over to him sometime in 2006 and has been duly paying land rent and rates and that the title deed of the property was handed over to him save that a transfer was not effected and efforts to trace the Company and have it transfer the property to him has bore no fruits.
29. It is apparent from the foregoing narration that the Applicant's entry into the suit property was not "hostile" as anticipated by the law on adverse possession. Rather, it was subject to an agreement between himself and the Respondent wherein the Respondent bought for him the property. Consequently, the question that lends itself is whether the Applicant's claim is tenable.
30. In Dr Ojienda's, Principles of Conveyancing Hand Book, Law Africa Vol II page 97 the learned author stated that:

"Where the claimant is in possession of the land with leave and licence of the true owner in pursuance of a valid agreement, the possession becomes adverse and time begins to run at the time the licence is determined. Prior to the determination of the licence, the occupation is not adverse but with permission the occupation can only be either with permission or adverse, the two concepts cannot co-exist."

31. Similarly, the Court of Appeal in the case of Wilson Kazungu Katana & 101 Others vs. Salim Abdalla Bakshwein & another [2015] e KLR, cited with approval its decision in the case of Samuel Miki Waweru vs. Jane Njeri Richu, Civil Appeal No. 122 of 2001(UR), where it had stated that:

"...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 or in (accordance with) provisions of an agreement of sale lease or otherwise. Further, as the High Court correctly held in Jandu vs. Kirpal [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted..."

32. It is apparent from the foregoing that whereas ordinarily a claim for adverse possession does not lie where the entry is with permission, in instances where the entry has been subject to an agreement and/or contract, a claim for adverse possession can lie in the right circumstances. Discussing this, the court in Cheromei vs Muigai (Environment & Land Case E005 of 2023) [2024] KEELC 5604 (KLR) (25 July 2024) (Judgment) persuasively held:

"Having been allowed possession under a sale, the Applicant can only claim that his occupation became adverse if he can prove that the license was determined... In Peter Mbiri Michuki vs Samuel Mugo Michuki (2014) eKLR, the Court of Appeal held that:"32. Our reading of the record shows that the plaintiff entered the suit property pursuant to a sale agreement in 1964 as a bona fide purchaser for value. The entry in 1964 was with permission of the appellant qua vendor. In the case of Public Trustee -v- Wanduru, (1984) KLR 314 at 319 Madan, J.A. stated that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser takes possession of the property because from this date, the true owner is dispossessed off



possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run.”

33. According to the Applicant, the Respondent bought for him the property and whereas he was granted possession and given title to the suit property, the same was to be transferred into his name upon his attaining 65 years. This is evinced in the letter dated the 7th December, 1992.
34. In the circumstances, as with a purchaser upon the final payment of the purchase price, time started running with respect to the Applicant’s claim once he attained the age of 65 years and the property was not transferred to him. This is when his continual occupation became adverse to that of the Respondent.
35. Guided by the Applicant’s identity card adduced into evidence, this would have been on 13th June, 2015. Twelve years from 13th June, 2015 will end on 13th June, 2027. This means that the institution of this suit has been brought approximately 4 years before the lapse of the 12 years anticipated.
36. The Court notes that the Applicant has vide his submissions set out an alternate case of ownership of the property on account of the agreement of 7th December, 1992. This is however despite the fact that no prayers are sought in this regard. It is a principle of law that parties are bound by the pleadings.
37. This was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others [2014] eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) v Nigeria Breweries PLC SC 91/2002 where Adereji, JSC. expressed himself thus on the importance and place of pleadings:

“... it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”
38. The Court rejects this alternative plea, as it raises matters not properly before the Court.
39. For those reasons, the Originating Summons dated 3rd July, 2024 is found to be unmerited and is hereby dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF FEBRUARY, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Malik holding brief for Mr. Khan for Plaintiff/Applicant

No appearance for Respondent

Court Assistant: Tracy

