



Khagali v Mutungati Farmers Cooperative Society (Environmental and Land Originating Summons E012 of 2023) [2024] KEELC 4532 (KLR) (6 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4532 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E012 OF 2023**

LA OMOLLO, J

JUNE 6, 2024

BETWEEN

SUSAN KHAGALI PLAINTIFF

AND

MUTUNGATI FARMERS COOPERATIVE SOCIETY DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff commenced this suit vide an Originating Summons dated 30th August, 2022.
2. The Plaintiff seeks the following orders:
 - a. A declaration that the title for the said Mutungati Farmers Cooperative Society in parcel of land referred to as Bahati/bahati Block 1(matukanio) share numbers 504,505,525 & 526 measuring approximately 8 acres has been extinguished by the Plaintiff's adverse possession thereof for a period of more than 12 years in terms of Sections 17 and 38 of the [Limitation of Actions Act](#);
 - b. A declaration that the Plaintiff has acquired the ownership interest in land parcel Bahati / Bahati Block 1(matukanio) share numbers 504,505,525 & 526 measuring approximately 8 acres by her adverse possession thereof for a period of more than 12 years.
 - c. An Order do issue requiring and directing the Land Registrar Nakuru to register the Plaintiff Susan Khagali as the owner of parcel of land Bahati/bahati Block 1(Matukanio) share numbers 504,505,525 & 526 measuring approximately 8 acres in place of Mutungati Farmers Cooperative Society and in place of any other person succeeding the Defendant.
 - d. That the Respondents, Mutungati Farmers Cooperative Society whether by themselves or through their employees, servant's agents or otherwise however be restrained by an order of permanent injunction from entering



upon, evicting, cultivating, grazing, occupying, transferring, alienating, disposing, tilling, leasing or in any way interfering with the Applicants' Plaintiffs' occupation and quiet possession of parcel Nos. Bahati/bahati Block 1 (matukanio) share numbers 504, 505, 525 & 526 measuring approximately 8 acres.

- e. That the costs of this Originating Summons be provided for.
3. The Originating summons is based on the following grounds:
- a. That the Applicant has been continuous and quiet occupation of the suit land since 2001 up to date.
 - b. That the Applicant has been in continuous occupation for a period of more than Twenty (20) years and has agriculturally improved the said suit land by tilling, planting, erecting permanent home thereon.
 - c. That the Plaintiff entered the said suit of land with the permission of the Defendant in 2001.
 - d. That the Plaintiff has been living on the suit land with his family without any interruption from the Defendants.
 - e. That the Plaintiff has been farming and livestock keeping in the said parcel of land.
 - f. That the Defendant has threatened to evict the Plaintiff from the parcel of land.
 - g. The Plaintiff's occupation of the property is adverse to the proprietary interest of the Respondents respectively.
 - h. The Applicant has become entitled by adverse possession to be registered as the proprietor to the property.
4. The Plaintiff avers that she is entitled to the suit property by virtue of adverse possession.

Respondents Response

5. The Defendant filed a Preliminary Objection dated 13th July, 2023 on the following grounds:
1. The Originating Summons does not satisfy the mandatory provisions of Order 37 Rule 7(2) and it should be struck out with costs.
 2. It is clearly admitted by the Applicant in her application that she has been in occupation of the Respondent's land with the Respondent's permission and so the occupation is not adverse.
 3. Having admitted that she has been occupying the property in her capacity as an employee to guard the same from trespassers, it is clear that the occupation is not adverse and thus the claim cannot arise.
 4. Having been dismissed as admitted in the year 2013, the mandatory period of 12 years has been reached as the cause of action, if any, accrued in 2013 and would be extinguished in the year 2025 and so the claim is misconceived.
6. He also filed a Replying Affidavit dated 26th July, 2023 sworn by one Peter Ngugi Wanyeki the Chairman of the Defendant.
7. He deposes that the Plaintiff has been in occupation of a small portion of the Defendant's land which occupation was allowed by the Defendant as her employer. He added that this was part of her benefits as an employee.



8. He further deposes that her services were terminated on 2nd September, 2013 and she filed a case to challenge the same vide ELRC 138 of 2016.
9. He deposes that judgment was delivered on 27th October, 2022 where the Plaintiff was granted Kshs. 4,500 salary in lieu of notice and Kshs. 17,000 unpaid salaries and costs of the suit.
10. The Defendant also deposes that from the judgment it was clear that the Plaintiff's occupation of the suit land was not adverse but with its permission in her capacity as an employee.
11. He further deposes that the Defendant's cause of action against the Plaintiff's occupation became adverse as from 2nd September, 2013. He adds that if that was not the position it was from March, 2014 when she was served with a notice to vacate.
12. He deposes that since the said time, the mandatory period of 12 years as required by section 17 and 38 of the *Limitation of Actions Act* has not lapsed.
13. The Defendant further deposes that the Plaintiff has misled the court that she has been in occupation of the whole land to the exclusion of the Defendant. He adds that he has been growing coffee on the suit land.
14. He also deposes that the Defendant is made up of over 300 members and that they have been farming on the suit land since acquiring the same in the 1980's.
15. He deposes that the Plaintiff only occupies one room in the suit land where she was allowed to cultivate vegetables on the open spaces next to her house for her own upkeep.
16. The Defendant deposes that the farm is currently under extensive expansion and renovation with the assistance of the Nakuru County Government.
17. He deposes that the Plaintiff is bitter having lost the substantive claim in ELRC 138 of 2016 and is using this court to hit back against the Defendant. He adds that the Plaintiff now wants to be allowed to remain in the Defendant's premises unlawfully and sabotage its developments.
18. In conclusion it is its deposition that the Plaintiff failed to disclose material facts of the position of having lost ELRC 138 of 2016 case thus misleading the court. He adds that she does not deserve the prayers as sought.

Factual Background.

19. Subsequent to the filing of this suit, no steps had been taken to prosecute it until 4th October, 2023. On the said date, the matter came up for hearing where the court directed that the Originating Summons and the Respondent's Preliminary Objection be disposed off by way of written submissions.

Issues for Determination.

20. On 14th November, 2023, the Plaintiff filed her written submission dated 30th August, 2022. She submits that she has been in occupation of the suit land for more than 12 years and that the Defendant confirms the same.
21. She further submits that the Defendant confirms that the Plaintiff has been in occupation of part of the subject parcel with the Defendant's permission.
22. She relies on Sections 7, 13 and 38 (1) and (2) of the *Limitation of Actions Act* and the Court of Appeal judicial decision in Benjamin Kamau Murma & Others V Gladys Njeri



23. The Plaintiff submits that the right to adverse possession does not automatically accrue unless the person in who's favour this right has accrued takes action.
24. The Plaintiff further relies on the judicial decision of *Mtana Lewa V Kahindi Ngaia Mwangandi* [2015] eKLR and urges the court to allow her claim as sought.

Analysis and Determination

25. This court shall first determine the Preliminary Objection.
26. In the judicial case of *Mukisa Biscuits Manufacturing Ltd –vs- West End Distributors* (1969) EA 696 the court defined a preliminary objection as follows:

“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration”.

In the same case Sir Charles Newbold, P. stated:

“ a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop”.

27. Looking at the Preliminary Objection, it is this court's view that the issues raised are factual in nature and would necessitate adducing of evidence in court.
28. The Supreme Court in the judicial case of *Hassan Ali Joho & another -Vs- Suleiman Said Shabal & 2 Others* SCK Petition No. 10 of 2013 [2014] eKLR held thus:

“ a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”.

29. In view of the above, this court finds that the Preliminary Objection dated 13th July, 2023 lacks merit and is hereby dismissed with costs to the Plaintiff.
30. On the originating summons, it is the Plaintiff's case that she has been in continuous and quiet occupation of the suit land for more than 20 years.
31. The Defendant on the other hand argues that Plaintiff's occupation was not adverse but with its permission in her capacity as an employee.
32. I have perused the judgment delivered on 27th October, 2022 as annexed in the Defendant's Replying Affidavit. It is not in dispute that the Plaintiff was an employee with the Defendant.
33. I have deduced from the said judgment that the Plaintiff had been employed as a casual employee in December, 2001 which is the same period she alleges that she took occupation of the suit land.



34. I have also looked at the claimant's statement in the ELRC Case 138 of 2016 dated 30th March, 2016. She admits that she had been occupying the Defendant's house before being asked to vacate.
35. The Court of Appeal in *Wilson Kazungu Katana & 101 others v. Salim Abdalla Bakshwein & another* [2015] eKLR sought to define what constitutes adverse possession. The court stated as follows: -

“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.

Further, the court opined that a person who occupies another's persons 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. (Emphasis mine)

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. (Emphasis mine)

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....”

36. The Plaintiff's occupation of the suit property was as an employee of the Defendant and with the Defendant's permission.
37. In the case of *Wilson Kazungu Katana* (Supra) the Court of Appeal also made reference to its decision in *Samuel Miki Waweru v Jane Njeri Richu*, Civil Appeal No. 122 of 2001, (UR), where it held as follows:

“...it is trite law that 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...”

38. Further, Order 37 of the Civil Procedure Rules provides that a party seeking to be declared entitled to a relief of adverse possession must attach to the supporting affidavit a copy of a title or extract of the registered land in issue. In this suit, no such title or extract has been attached.

DISPOSITION

39. In the result, this court finds that the Plaintiff’s Originating summons dated 30th August, 2022 lacks merit and it is hereby dismissed with costs to the Defendant.

40. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 6TH DAY OF JUNE, 2024.

L. A. OMOLLO

JUDGE

In the presence of:-

Parties; Absent

Court Assistant; Mr. Joseph Makori.

