



**Mwamwenda v Allui & another (Environmental and Land Originating
Summons 1 of 2023) [2024] KEELC 5814 (KLR) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5814 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 1 OF 2023**

AE DENA, J

JULY 30, 2024

BETWEEN

JUMA MWAMWENDA APPLICANT

AND

AHMED MOHAMED ALLUI 1ST RESPONDENT

JOSEPH KABATENDE 2ND RESPONDENT

JUDGMENT

1. By an Originating Summons dated 10/2/2022 and filed before court on 16/2/2022, the Applicant herein, who claims to be entitled to be registered as the absolute proprietor by adverse possession to land parcel no Kwale/Diani Complex/186 seeks for the following verbatim orders; -
 1. A declaration that the title deed in the names of Ahmed Mohammed Allui on all that parcel of land registered as Kwale/Diani Complex/186 has been extinguished by the Applicants adverse possession thereof for a period of more than 12 years.
 2. That the applicant herein be declared as entitled by way of adverse possession of over 12 years of land comprised in land parcel no Kwale/Diani Complex/186 situate in Diani within Kwale County.
 3. An order do issue directing the Land Registrar kwale land registry to register the applicant as the absolute proprietor of all that land parcel registered as Kwale/Diani Complex/186
 4. That costs of this application be in cause
2. The originating summons is premised upon the supporting affidavit of the applicant Juma Mwamwenda. It is averred that the 1st Respondent is the legal owner of all that parcel of land known as Kwale/Diani Complex/186 while the 2nd Respondent is the donee of Power of Attorney on the subject property by the 1st Respondent. He avers that he has been living on the suit property with his



family continuously for over 30 years without any interruptions from the Respondents. The Applicant further states that he has been cultivating the land and has even buried some of his deceased relatives on the same. The Applicants case is that ever since he took occupation of the land, no one including the Respondents has laid any claim thereon. The Applicant seeks to be registered as the owner of the property Kwale/Diani Complex/186 by the suit being allowed.

3. This suit is undefended despite service upon the defendants herein as evidenced by the proceedings of 26/7/2023 where Mr Mungai Advocate for the applicant intimated to court that he was unable to effect physical service upon the Respondents. The court ordered for an application for substituted service to be made before it for determination. Vide a Notice of Motion filed before court on 3/8/2023 the Applicant sought leave to effect service vide registered mail and advertisement in the local daily which application was allowed by the court.
4. The Respondent was served by way of substituted service by advertisement in Daily Nation of 28/9/2023 following leave granted on 27/9/23. The affidavit of service sworn on 2/11/2023 by George Mungai Kamau Advocate is on record.
5. The suit was set down for hearing on 5/3/2024. PW1 Juma Mwamwenda, the Plaintiff adopted his supporting affidavit sworn on 10/2/2022 and together with the documents attached as annexures JM1 and JM2 (PEX 1-2). These were Certified land register for the suit property and Photographs of structures on the land.
6. It was his testimony that from the green card the land is registered under Ahmed Mohamed AlluI the 1st Respondent. The said Ahmed gave a Power of Attorney to Joseph Kabetende Birori who is also sued as the 2nd Respondent. That he had seen the 1st Respondent 20 years ago when they had agreed that the Applicant would be in occupation of the suit property which he has been since the said time. It was the Applicants testimony that on the land he cultivates crops for cereals and has planted trees for wood. That he has further built two temporary structures. He stated that for the period he has been on the land no one has ever laid a claim upon the land. The Applicant stated that a surveyor had visited the land and conducted a survey. He prayed that he be given the title of the land for ownership.
7. With the above the Applicant's case was marked as closed.
8. The court directed counsel to file submissions which he complied. It is submitted that failure by the Respondents to respond to the suit renders the Applicants suit unopposed and the orders sought should be allowed. The court was referred to the case of Gateway Insurance Company Limited Versus Jamila Suleiman & Another [2018] eKLR.
9. The main issue for determination is identified as whether the Applicant has acquired a title by way of adverse possession against the registered owner. The court is referred to the provisions of Section 38[1] of the [Limitation of Actions Act](#) on the doctrine of adverse possession and Order 37 Rule 7 of the [Civil Procedure Act](#). It is submitted that the Applicant had satisfied the requirements of the law by producing in evidence the title deed confirming the suit property is registered in the names of the 1st Respondent and whose ownership the Applicant seeks to extinguish. Reliance was placed on the decided case of Abdi Rashid Adan Hassan V State Of WHE Edgley [2022] eKLR.
10. The Applicant avers that he has met the threshold set in Tabitha Waitherero Kimani V Joshua Kimani & Another [2017] eKLR as to open and notorious use of the property and continuous use thereof. Applicant prays the motion is allowed as prayed.



Determination

11. It is noteworthy that the Applicant's evidence is uncontroverted, however the Applicant is still tasked with discharging the burden and standard of proof in accordance with the law in order for his claim to succeed.

Section 107(1) of the *Evidence Act* provides that

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

Section 108 provides;

“The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.”

And section 109 provides;

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided for by law that the proof of that fact shall lie on any particular person.”

12. The Court of Appeal in *Charter House Bank Limited (Under Statutory Management v Frank N. Kamau* [2016] eKLR, when discussing the burden of proof upon the Plaintiff in a situation where the Defendant failed to adduce evidence stated that:

“we would therefore venture to suggest that before the trial court can conclude that the Plaintiff's case is not controverted or is proved on a balance of probability by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence from the defendant.... The Plaintiff must adduce evidence, which in the absence of rebutted evidence by the Defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgement merely because the Defendant has not testified”

13. In the instant suit, it is imperative of the applicant to prove that he has met the required threshold for grant of the orders sought in the originating summons. The doctrine of adverse possession is embodied in the provisions of Section 7 of the *Limitation of Actions Act*, (Cap 22) 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 is first accrued to some person through whom he claims, to that person”.

14. Section 13 of the Act further states:

“(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession.”



15. Section 38 of the Act provides that:

“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.”

16. Additionally the Court of Appeal in the case of Benjamin Kamau Murma & Others vs Gladys Njeri, C A No. 213 of 1996 held as follows:

“The combined effect of the relevant provisions of sections 7, 13 and 17 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.”

17. The adverse possession doctrine was well articulated in *Wambugu v Njuguna* [1983] KLR 172, where the Court held that:

“In order to acquire by the statute of limitations 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. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it.”

And that:

“The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”

18. Arising from the above, it is clear that the main the elements of adverse possession that a claimant has to prove is actual, open, exclusive and hostile possession of the land claimed.

19. The court is also guided by the case of *Francis Gicharu Kariri - v- Peter Njoroge Mairu, Civil Appeal No. 293 of 2002* (Nairobi) where the Court of Appeal approved the decision of the High Court in the case of *Kimani Ruchire -v - Swift Rutherfords & Co. Ltd.* (1980) KLR 10 where Kneller J, held that:

“The plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion)”.

20. The court has considered the evidence on record, as well as the fact that the Respondents herein did not defend the case. I have also considered the applicable law on the doctrine of Adverse Possession and the guidance of precedents herein.

21. It is the Applicants case that sometime back he was in occupation of a land parcel adjacent to the suit property herein. That the owner of the said property asked him to vacate the same with the intention to develop it. PW1 then moved to the suit property with the permission of the 1st Respondent who was the owner. He alleges that from the time he moved into the suit property, the 1st Respondent has never turned up with any claim on the same or prevented him from making any developments. He also



states that the 2nd Respondent who was granted Power of Attorney with regard to the property has never laid any claim on the same.

22. I have considered the Applicant's exhibits and I find that indeed it is not in doubt that the suit property Kwale/Diani Complex/186 was registered to the 1st Respondent on the 22/9/1995 wherein he was issued with the title on the same day. It is also clear that the Applicant instituted this suit 16/2/2022 which is 27 years after registration of the suit property in the applicant's name. It is trite that for an adverse possession claim to succeed, a party claiming must have been in possession for over 12 years. The Applicant has produced photographs in support of the developments made therein which are supported by the findings in the surveyor's report which I will comment on shortly.
23. The court also engaged the witness on how he got to be found in possession of the suit property. PW1 stated that he used to live in a neighbouring plot as a squatter but he was asked to leave to allow for development of the land. That when the 1st Respondent came he engaged him on the issue. I probed further into the arrangements he agreed with the 1st Respondent and he clarified that he was to live there and look after the land and he would be sending the witness Kshs. 200/- but he had never seen the 1st Respondent since then. On further probe he stated it was a place for him to just stay. The court was satisfied with the explanation and noting that it was apparent the 1st Respondent never came back after the said arrangements.
24. The court had also directed that a surveyor's report was to be filed on the ground status including occupation. The report was filed and is dated 30/1/24 and on occupation it states that on the ground, the applicant enjoy physical habitation of the parcel and the physical features found were two habitable temporary structures but most of the land comprise large swatches of thick bushes. It would follow therefore that only a portion of the land is occupied adversely by the Applicant and this is the only portion I will be inclined to grant for purposes of adverse possession. I however note that its size and location is not given in the survey report.
25. In conclusion, I find that Applicant has, on balance of probabilities proven open possession and continuous adverse use of the suit land for more than 12 years. Consequently, the Court finds and holds that the Originating Summons dated 10/2/2022, is merited and the same is allowed in the following terms
1. A declaration that the Applicant has acquired a portion of the land occupied by the applicant in the title deed in the names of Ahmed Mohammed Allui registered as Kwale/Diani Complex/186 has been extinguished by the Applicants adverse possession thereof for a period of more than 12 years.
 2. That the applicant herein be declared as entitled by way of adverse possession of over 12 years of the acquired portion he is in occupation in land parcel Number Kwale/Diani Complex/186 situate in Diani within Kwale County.
 3. For purposes of orders 1) and 2) above the County Land Surveyor Kwale Mr. G. Mwangoma shall further to the report dated 30th January 2024 Ref.KWL/ACS/2VOL.XXXI/163 demarcate and identify the portion occupied by the Applicant and with a view to hive it off for execution of this judgement.
 4. The above exercise shall be conducted within 45 days of this judgement. The Applicant shall meet the costs of 3) above.



5. An order does issue directing the Land Registrar kwale land registry subject to the orders 1, 2, 3 above register the applicant as the absolute proprietor of the portion above occupied of the land parcel registered as Kwale/Diani Complex/186.
6. Costs shall be to the applicant.

It is so ordered.

JUDGEMENT DATED SIGNED AND DELIVERED THIS 30TH DAY OF JULY 2024.

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A.E DENA

JUDGE

Ms. Mkabane for the Applicant

No appearance for the Respondents

Mr. Daniel Disii Court Assistant

