



Tsibulevskaya v Mwai (Environment & Land Case E098 of 2021 & Originating Summons 5 of 2022 (Consolidated)) [2024] KEELC 7049 (KLR) (24 October 2024) (Judgment)

Neutral citation: [2024] KEELC 7049 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E098 OF 2021 &
ORIGINATING SUMMONS 5 OF 2022 (CONSOLIDATED)**

JG KEMEI, J

OCTOBER 24, 2024

BETWEEN

GALINA TSIBULEVSKAYA PLAINTIFF

AND

COOLIN MUTURI MWAI DEFENDANT

JUDGMENT

1. Vide a Complaint dated the 7/7/2021 and filed on 21/9/2021 the Plaintiff avers that she is the registered owner of the suit land namely LR No 14870/74. Her claim is that the Defendant has trespassed onto the suit land without any colour of right, constructed a high perimeter wall blocking her access to the property despite demand to cease the trespass and demolish the perimeter in 2020 which demand has been ignored by the Defendant. She sought the following orders;
 - a. A mandatory injunction compelling the Defendant to demolish the perimeter wall erected on the suit land.
 - b. A permanent injunction restraining the Defendant, his agents' servants' employees or anyone authorized by him or acting on his own behalf from trespassing on occupying or in any other manner interfering with or dealing with the suit land.
 - c. General damages as to costs.
 - d. Costs of the suit
2. The Defendant on the other hand moved the Court by way of Originating Summons dated the 2/3/22 against the Plaintiff herein and urged the Court to determine the following questions;



- a. A declaration that the title of the Respondent Dr Tsibulevskaya Galina to the suit land has been extinguished by the applicant's adverse possession thereof of more than 12 years in terms of the Limitations of Actions Act
 - b. A declaration that the applicants has become entitled to adverse possession to the suit land situate in Kiambu County and registered in the name of the Respondent.
 - c. That the Registrar of titles, Central registry do register the applicant as the lessee from the Government of the Republic of Kenya of the suit land.
 - d. That the Registrar of Titles, Central Registry be directed that the order herein shall be an instrument of transfer of ownership of the whole suit land from the Respondent to the applicant.
3. The Defendant averred that he has been in continuous possession of the suit land registered in the name of the Plaintiff since 1996. He conceded that he has not been able to trace the owner of the land since 1996; that to ward off land grabbers he constructed the perimeter wall; the Defendant has used the suit land as a garage and a storage yard for the last 26 years unhindered.
 4. On the 22/5/23 the parties by consent elected to consolidate the two files with the current file being the lead file.

The evidence of the Plaintiff

5. The Plaintiff introduced herself as Dr Galina Tsibulevskaya, a medical doctor currently working in the United Kingdom (UK). She adopted her witness statement dated the 21/9/21 in evidence in chief and produced documents in support of her claim marked PEX No 1-11.
6. The witness stated that she is a Kenyan citizen by naturalization having lived in Kenya from 1984-1998, married a Mr Okello and worked at The Kenyatta National Hospital in various departments. She earned a Master's Degree in 1995 at the University of Nairobi specializing in Ear Nose and Throat (ENT). She was attached to the ENT department where she rose to the position of a consultant in the same hospital. That thereafter she left for the United Kingdom for further studies where she currently works and lives.
7. She stated that she purchased the suit land (then plot No 95 Membley) vide an agreement of sale from Daykio Plantations Limited, whose offices were at Family Finance Building on 20/1/1994 and paid in full the purchase price in the sum of Kshs. 150,000/- and was issued with a title on 12/8/1994. The land was charged to Barclays Bank Limited on 27/1/1995 to secure the sum of Kshs 200,000/-. That on full repayment of the loan it was discharged on 19/8/1996. See certificate of discharge dated the 13/8/96.
8. The witness stated that she held dual citizenship and the passport number on the agreement of sale being PP No 0381708 is her Russian Passport which she could not trace upon expiry. She stated that she is married in UK and holds a UK passport as well. That she renounced the name Okello upon separation with her husband in 1993 vide a deed poll in 1994 and adopted the names Dr Galina Vladimorovna Tsibulevskaya. That her father's name is Vladimorovna and her maiden name is Tsibulevskaya. That she purchased the suit land under the names Dr Tsibulevskaya Galina after the separation with her husband, Mr Okello.
9. That in 2019 she sent a surveyor to check on the status of the land but the Defendant who is her neighbor denied him access on the basis that the land belonged to male owner. That despite demand the Defendant has refused access nor ceased trespassing on the land.



10. In cross examination, the witness stated that her names are Dr Galina Vladimorovna Tsibulevskaya. That the title is registered under Dr Tsibulevskaya Galina of passport No 0381708. That she holds Kenyan Passport No A340544. That the names in the agreement of sale, payment receipts, charge, discharge of charge bears the names Dr Tsibulevskaya Galina.
11. With respect to the letter dated the 16/7/2020, the witness informed the Court that she did not present herself to the local authority to be given the land because she held a title to the same and did not see the necessity of presenting herself to parties that had no interest in the suit land. She stated that the suit land is located next to a Church and is adjacent to the Defendants plot No 76. She stated that she fenced the property with a chicken wire and poles fence in 1997 and paid rates. That though she does not know the owners of the neighbouring plots, she knows the location of her plot. She stated that she saw the Defendant for the first time in Court. That the Defendant erected a perimeter wall without her permission. That she visited the land last in February 2023.

The evidence of the Defendant

12. Colin Muturi Mwai led evidence and relied on his witness statement dated the 22/10/21 and produced documents in support marked as DEX No 1-11. He also relied on his Originating Summons dated the 2/3/22 and the attendant Supporting Affidavit.
13. He introduced himself as an Insurance claims settling Agent and that he is the owner of LR No 14870/76 adjacent to the suit land. That he is aware that the suit land is registered in the name of his friend namely Dr Tsibulevskaya Galina since 1994. That he met his friend, a male adult in 1994 when they were purchasing the land from Daykio Plantations Limited. That he worked for Family Insurance Brokers as a Principal Officer between 1991-1995. That Family Finance Building Society and Daykio Plantations Limited were owned by one owner and housed at the current Family Bank Building at the Central business district in Nairobi. That he occupied the same office with John, the marketing manager of Daykio Plantations Limited who was in charge of land/property sales.
14. That in 1995 he opened a timber yard on the suit land and that of the Church. That Dr Tsibulevskaya asked him to keep watch over his land which he has done to date. That though he has not presented details of the 7 fake claimants, he stated that several people have claimed the land and the current Plaintiff is the 8th one. That he coined a litmus test and tricked them that the land belonged to a lady so as to catch the fake claimants and secondly with no protest, he erected a stone perimeter wall at the front and rear of the property to keep it safe from grabbers and thirdly asked them to identify themselves before the local administration and the elders and if they are the right owners he would hand over the land to them. That in the same breath, he invited the Plaintiff to identify herself and claim the land but she refused. That he has taken care of the land for over 26 years at the request of Dr Galina, the real owner of the suit land and that he is not a trespasser at all. That the Plaintiff is not the owner of the land as the owner is a male doctor and not female. That he is ready to surrender the land to the real Dr Tsibulevskaya or his descendants.
15. That the real owner charged the land to Barclays Bank wherein the charge document made reference to "his" to confirm that the real owner was male and not female. That the Plaintiff is a version of his own creation and not the real owner of the land.
16. In cross, the witness informed the Court that he has not presented any evidence to support his averment that Dr Tsibulevskaya was male nor called witnesses to confirm their friendship. He stated that he was a friend for about two years and he communicated with him once or twice. The witness stated that though he has filed a claim under adverse possession against the current Plaintiff (who in his opinion is not the rightful owner of the suit land), he has no interest in taking the suit land save to hand it over



- to the real owner. That he filed the Originating Summons as a measure to keep the land safe for the real Dr Tsibulevskaya.
17. With respect to the letter dated the 16/7/2020, the witness stated that he did not raise any concern on the gender of the Plaintiff save to demand that the Plaintiff identify herself to the local authorities and claim the suit land but instead she filed suit.
 18. That he is the Chairman of Membley Association and having been the first to take possession of the land, he knows all the members.
 19. The witness further informed the Court that he is not an expert in Russian names. That though he looked for Dr Tsibulevskaya, he has not reported any missing person to the Police nor contacted his next of kin.

The Written Submissions

20. As to whether the Plaintiff is the registered owner of the land, the Plaintiff answered that in the positive since her title was not challenged by the Defendant on any of the grounds enumerated under Section 26 of the *Land Registration Act*.
21. Further that the Plaintiff demonstrated to the Court that her names are Galina Vladimirovna Tsibulevskaya as appears on all her documents and that she is a Russian by descent. That the Plaintiff demonstrated that both the names Tsibulevskaya Galina and Galina Vladimirovna Tsibulevskaya belong to her.
22. It was submitted that the Defendant's entry into the land and refusal to vacate when demanded by the Plaintiff constitutes trespass and the Court was urged to find so.
23. Is the Plaintiff entitled to damages? It was submitted that the Plaintiff has been denied access to her property for a period of 29 years by the Defendant who has erected a perimeter wall hence denying the Plaintiff access to the suit land and urged the Court to award the Plaintiff the sum of Kshs 150,000/- annually from 1995 until vacant possession is given.
24. It was further submitted that trespass having been admitted by the Plaintiff, a permanent injunction ought to be issued against the Defendant.
25. On the claim of adverse possession, it was submitted that the same fails because the Defendant vide the letter dated the 30/7/2020 admitted being in possession of the suit land with the authority of the registered owner. Further admission was that he was willing to hand over the land to the Plaintiff is testament of absence of intention to exclude the Plaintiff from the land.
26. The Defendant submitted that prima facie the suit land is registered in the name of Dr Tsibulevskaya Galina as can be seen in the certificate of title, sale agreement, charge, discharge and payment receipts. That the Plaintiff contains names such as Galina Tsibulevskaya and in other personal documents the names Galina Vladimirovna Tsibulevskaya take eminence. It was argued that the names of the Plaintiff in the Kenyan identity card are Galina Vladimirovna Tsibulevskaya which is different from Dr Tsibulevskaya Galina in the title. The Defendant also took issue with the differing passport numbers in the sale agreement and the passport. The word "his" in the charge document together with all the variances go along to corroborate the averment of the Defendant that the owner of the land was a male and not a female and least of all not the Plaintiff. In the end the Court was urged to determine that the Plaintiff is not the person named as the registered owner of the suit land.
27. As to whether the Plaintiff is the registered owner of the suit land, the Defendant submitted in the negative. He denied any trespass and instead contended that it is the registered owner who asked him



to keep watch over the property. That the Plaintiff declined to comply with his directive to identify herself with the local authorities before the land could be handed over to her and it is for that reason that the Defendant opinions that the Plaintiff has not come to the Court of equity with clean hands.

28. Further he submitted that he has been in possession of the suit land since 1996, utilizing it as a garage and storage and erected a fence 15 years ago without any hindrance and let from any quarter let alone the Plaintiff. He urged the Court to grant orders for adverse possession in his favour.

Analysis and determination

29. Having considered the pleadings of the parties, the evidence led at the trial, the rival written submissions and all the material placed before the Court the issues for determination are;
- a. Whether Galina Tsibulevskaya and Galina Vladimirovna Tsibulevskaya is the same person as Dr Tsibulevskaya Galina who is the registered owner of the suit land;
 - b. Whether the Defendant has proved a claim in adverse possession;
 - c. Whether trespass has been proven; and
 - d. Costs.
30. In the main, the claim of the Plaintiff is that she is the registered owner of the suit land having acquired it in 1994 from Daykio Plantations Limited. That upon acquisition she charged the land to Barclays Bank of Kenya in 1995 which facility was discharged in 1996. That she left for the UK in 1997 and in 2019 she instructed a surveyor to check the status of the land when the surveyor found that the Defendant trespassed onto the land.
31. The Defendant on the other hand denied trespass and stated that he occupied the land on authorization of Dr Galina, his friend who asked him to keep watch over the land. Interalia vide an Originating Summons the Defendant sought title by way of adverse possession on the grounds that he has occupied the land since 1996, a period of over 25 years.
32. It was the contention of the Defendant that the land belongs to a man called Dr Galina (not the Plaintiff) and that the Plaintiff is an imposter on the land. The Plaintiff led evidence that she came to Kenya in 1984 and got married to a Mr Okello. She presented her documents to wit Kenyan passport, ID, copy of employment card at Kenyatta National Hospital, letters from Nairobi University where she was undertaking a Master's Degree, deed poll upon separation with her husband Mr Okello when she adopted her three names, Galina Vladimirovna Tsibulevskaya and dropped that of Okello. She explained that the name "kaya" in Russian denotes female unlike "ki" which is for a male. She explained that Tsibulevskaya is her first name while Vladimirovna is her father's name.
33. The Court found that all the three names of the Plaintiff are interchangeably used in the sale agreement, the ID, passport, the employment card, charge, discharge, payment receipts for the land and the title. These documents date back to as far as 1993.
34. He who alleges must proof. The Defendant failed to present a separate title in the name of Dr Galina whom he claims to be the real owner of the land; failed to disproof that the Plaintiff is not whom she claims to be; failed to show that he reported the disappearance of Dr Galina at any police station as a missing person.
35. In the absence of any evidence to the contrary, the Court answers the first issue in the positive.



36. The Plaintiff has presented a title before Court which bears her two names. Going by the provisions of Section 26 of the [Land Registration Act](#) this Court is mandated to take the person whose name is in the title as prima facie owner of the land.
37. In the absence of any contrary evidence and guided by the provisions of Section 26 of [Land Registration Act](#), the Court finds that the Defendant has failed to profer any successful challenge to the title of the Plaintiff. The Plaintiff is therefore taken to be the absolute owner of the title presented before Court.
38. On the claim of adverse possession, the Defendant informed the Court that he was authorized by the owner of the land to take care of the land upon which he entered the land converted it into a garage and storage area and constructed the perimeter wall and occupied the land in excess of 26 years.
39. In the case of Little Dale versus Liver Pool College (1900) 19, 21 the Court stated as follows:-

“In order to acquire by the 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... Two things appear to be contemplated by that enactment; disposition and discontinuance of possession...if this is the correct way to approach the problem, the question becomes, has the claimant proved that the Title holder has been dispossessed or has discontinued his possession of the land in question for the statutory period” Rather than has the claimant proved that he (through himself or others on whose possession he can rely) been in possession for the requisite number of years”

The next question therefore is what constituted dispossession of the proprietor. It simply means that in order to defeat a title by dispossession the former owner there must be demonstration of existence of acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.”

40. Further in the case of Wambugu Vs. Njuguna (1983) KLR 172 Courts distilled the guiding principles as follows:-
 1. The general principle is that until the contrary is proved possession in law follows the right to possess.
 2. In order to acquire by the statute of limitation 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 for which he intended to use it
 3. The [limitation of Actions Act](#), in adverse possession contemplates two concepts, disposition and discontinuance of possession. 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 for the requisite number of years.
 4. Where the claimant is in exclusive possession of the land with leave and licence of the appellant in pursuance to a valid sale or agreement, the possession becomes adverse and time begin 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 ...



5. The rule on permissive possession is that possession does not become adverse before the end of the period during which the possessor is permitted to occupy the land ...
 6. Adverse possession means that a person is in possession in whose favour time can run ...
 7. Where the claimant is a purchaser under a contract of sale of land, it would be unfair to allow time to run in favour of the purchaser pending completion when it is clear that he was only allowed to continue to stay because of the pending purchase because had it not been for the pending purchase the vendors would have evicted him. The possession can only become adverse once the contract is repudiated ...
 8. Where a claimant pleads the right to land under an agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is the claimant's possession as deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation of at least 12 years after such payment.”
41. In this case it was admitted by the Defendant that he was in possession with the permission of the registered owner. It is trite that permission destroys a claim in adverse possession. It is the evidence of the Defendant that he occupied the land with the permission of Dr Galina who asked him to keep watch of the land. The claim of adverse possession therefore fails.
42. The second reason why this claim is untenable is because in addition to permissive occupation of the suit land, the Defendant in the same breadth challenges the title of the Plaintiff. In either circumstances, no claim of adverse possession is tenable and the reason is because it is the very title that the Defendant wishes to be awarded to him by the Court. It is trite that the adverse possessor must acknowledge the title of the paper owner.
43. Thirdly it has been admitted severally by the Defendant that he has no interest in the suit land. In his own words had the Plaintiff presented herself before the local authorities he was ready and willing to surrender the land to her. For those reasons the Defendant's claim of title by way of adverse possession fails.
44. The next issue for examination is whether the Plaintiff has proven trespass on the suit land.
45. Section 3 (1) of the *Trespass Act*, Cap 294 provides that:
- “ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
46. Thus, trespass is an intrusion by a person into the land of another who is in possession and ownership. The Plaintiff led evidence that upon purchase she fenced her plot with chicken wire and left the country. This evidence is corroborated by the Defendants letter dated the 30/7/2020 where it is stated as follows;
- “ With authority from Dr. Tsibulevsakaya, the registered owner of the property land reference Number 14780/74, our client has for the last twenty-three years been in continuous possession of the subject property and has been using it for his business. Noteworthy, our client had with the property owner's permission and in a quest to protect the property from vandals and land grabbers, erected a barbed wire fence thereon.



However, the barbed wire fence was vandalized, which necessitated our client to erect a wall fence so as to further protect the property from unlawful and unauthorized access by persons acting without permission from the property's rightful owner.

Importantly, our client has not trespassed on the property as he has all these years been acting under the authority of the property's registered owner."

47. From the above it is clear that the Defendant admitted to the fencing of the land by the Plaintiff but contends that the barbed wire was vandalized and he proceeded to construct a stone wall round the property without the consent of the Plaintiff. It was admitted by both the Plaintiff and the Defendant that both met in Court for the first time. Hence they did not know each other.
48. The Court finds that the Plaintiff has proven trespass. It is trite that trespass is actionable *per se*. According to the Halsbury's laws damages are computed as follows;
 - a. If the Plaintiff proves the trespass he is entitled to recover nominal damages, even if he has not suffered any actual loss.
 - b. If the trespass has caused the Plaintiff actual damage, he is entitled to receive such amount as will compensate him for his loss.
 - c. Where the Defendant has made use of the Plaintiff's land, the Plaintiff is entitled to receive by way of damages such sum as would reasonably be paid for that use.
49. The Court finds that the Defendant has been in trespass from 2019 and despite demand to vacate the suit land he has continued in his trespass and for that reason I am inclined to condemn him to pay nominal damages of Kshs 100,000/- in this circumstances.
50. Costs follow the event and in this case I find no reason to deny the successful party costs.
51. Final orders for disposal
 - a. The claim of adverse possession by the Defendant fails
 - b. A mandatory injunction compelling the Defendant to vacate and demolish the perimeter wall erected on the suit land within the next sixty (60) days be and is hereby issued. In default he shall be evicted in accordance with the provisions of the law and the wall demolished at his own costs.
 - c. A permanent injunction restraining the Defendant, his agents' servants' employees or anyone authorized by him or acting on his own behalf from trespassing on occupying or in any other manner interfering with or dealing with the suit land forthwith be and is hereby issued.
 - d. General damages for trespass in the sum of Kshs. 100,000/- be and is hereby awarded to the Plaintiff.
 - e. Costs in favour of the Plaintiff.
52. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 24TH DAY OF OCTOBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE



Delivered online in the presence of;

Bhanji for the Plaintiff

Kimani for the Defendant

Court Assistant – Phyllis

