



REPUBLIC OF KENYA



KENYA LAW
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**Alanyi v Leposo & another (Environment & Land Case 50 of 2019)
[2024] KEELC 6966 (KLR) (23 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6966 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 50 OF 2019
MN GICHERU, J
OCTOBER 23, 2024**

BETWEEN

EKWINY MOSES ALANYI PLAINTIFF

AND

SHABAN EDI LEPOSO 1ST DEFENDANT

HASSAN IDDI MALAMBU 2ND DEFENDANT

JUDGMENT

1. The plaintiffs seek the following reliefs against the defendants.
 - a. That the plaintiff has become entitled by adverse possession to all that parcels of land comprised in Plot No Ngong/Ngong/44327 excised from Plot No Ngong/Ngong/27038.
 - b. That the applicant be declared and registered as the proprietor of the suit land.
 - c. That the District Land Registrar Ngong do enter in the register the said substitution.
 - d. That the costs of this suit be provided for.

This is as per the originating summons dated 6/6/2019.

2. The plaintiff's case is as follows. Firstly, he has been in quiet continuous possession and occupation of the suit land in excess of 12 years in adverse of the defendant and any other person claiming any right to the same. Secondly, he had lived and cultivated within the suit land for more than 27 years until 29/5/2019 when the defendants and their agents denied him entry and threatened him with dire consequences if he was to return. Thirdly, the suit land has a two –bedroomed house built for him by the late Iddi Hassan Malambu who was a paramount chief. Fourthly, the defendants who are the administrators of the estate of the late Iddi Hassan Malambu are opposed of the plaintiff's occupation of the suit land making the filing of this suit necessary.



3. In support of his case, the plaintiff filed the following evidence.
 - i. Supporting affidavit dated 6/6/2019 and a further affidavit dated 1/3/2021.
 - ii. Witness statement dated 24/2/2020.
 - iii. Copy of letter by the assistant chief of Kerarapon Sub location.
 - iv. Copy of title deed for LR Ngong/Ngong/27038.
 - v. Copy of certificate of confirmation of grant dated 1/11/2018 in Succession Case No 64/2016 at Kajiado.
 - vi. Copy of letter from the defendants' counsel asking for plaintiff to give vacant possession.
 - vii. Copies of photographs showing the suit land.
4. The 1st defendant in a replying affidavit dated 9/3/2020 has responded as follows. Firstly, the plaintiff's suit has no merit. Secondly, the suit property only came into existence on 4/11/2011 because before then it was part of the larger LR No 27038. Thirdly, the plaintiff came to the suit land at the invitation of the 1st defendant's father, the late Iddi Malambu Hassan who employed the plaintiff as a driver and a farm hand. He therefore lives on the land by virtue of his employment. Fourthly, after the death of the late Malambu, the family had a long drawn suit which was concluded in the year 2018. As the dispute ranged, the then administrators of the estate of the deceased filed a suit against the plaintiff, which was Machakos ELC No 39 of 2012 in which an order of eviction was issued against the plaintiff. This suit is therefore res judicata. Fifthly, the applicant has not demonstrated that he dispossessed the late Iddi Malambu Hassan of the suit land for a continuous period of twelve years, so as to entitle him title thereto by adverse possession.

Sixthly, the land has now a new beneficiary, and the plaintiff is no longer in possession. Finally, it was never the intention of the late Iddi Malambu Hassan to give the suit land to the plaintiff otherwise he would have transferred it in his lifetime or executed a will in favour of the plaintiff.
5. In support of their case, the defendants filed the following evidence.
 - i. Copy of judgment in Machakos ELC 389 of 2012 dated 28/11/2014.
 - ii. Copy of title deed for LR No 44327.
6. At the trial, the plaintiff testified as per his supporting affidavits and documents. He was then cross-examined by the defendants' counsel at length. This was on 16/10/2023. The first defendant when testifying on 30/5/2024 adopted his replying affidavit and annexures thereto as his evidence. He was then cross examined by the plaintiff's counsel.
7. Counsel for the parties were expected to file and serve written submissions by 15/7/2024 in the case of the defendants and 31/8/2024 in the case of the plaintiffs. By the time of writing this judgment in Mid-September no submissions had been filed. No submissions were therefore considered in the drafting of this judgment.
8. I have carefully considered all the evidence adduced by the parties including the supporting affidavits, the witness statement, the documents, the replying affidavits and the defendants' documents. I have also considered the submissions by learned counsel for the parties, the issues raised therein as well as the law cited. I find that the following issues arise in the suit.
 - i. Whether the plaintiff entered the suit land with the permission of the owner.



- ii. Whether this suit is res judicata because of Machakos ELC No 39 of 2012.
- iii. Whether the plaintiff should have joined Succession Cause No 64 of 2016 at Kajiado as a dependant of the deceased.

On the first issue, I find that the plaintiff admits that he entered the land with the permission of the owner. This defeats his claim for ownership through adverse possession. It is trite law that for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force and without licence or permission of the Kland owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. See *Mate Gitabi v Jane Kabubu Muga* Nyeri Civil Appeal No 43 of 2015. Having entered the suit land with the permission of the owner, the plaintiff cannot succeed in his claim for adverse possession.

9. On the second issue, I find that this suit is res judicata under Section 7 of the *Civil Procedure Act* because the plaintiff was a party in Machakos ELC 389/2012 where an order for his eviction from LR Ngong/ Ngong/44327 was made. Since the suit land was carved out of LR No 4432 the order made in the Machakos Case applies to the suit land. The plaintiff had two options. The first one was to seek to set aside the eviction order in the Machakos suit and participate in that suit or appeal against that decision. It was not open to him to file a fresh suit over a dispute that had been determined by a court of competent jurisdiction.
10. On the third and final issue, I find that the plaintiff should have joined the Kajiado High Court Succession Cause No 64 of 2016 if he was claiming the suit land as a dependant of the deceased Iddi Malambu Hassan. He should have adduced evidence in that court that he was a dependant of the deceased and that he was therefore entitled to a share of the estate.

For the above stated reasons, I find no merit in the plaintiff's suit and I dismiss it with costs. It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 23RD DAY OF OCTOBER 2024.

M.N. GICHERU

JUDGE

JUDGMENT

