



**Katana v Athman (Environmental and Land Originating Summons
9 of 2021) [2024] KEELC 13961 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13961 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 9 OF 2021
FM NJOROGE, J
DECEMBER 18, 2024**

BETWEEN

DAVID ROBERT KATANA PLAINTIFF

AND

OMAR ATHMAN DEFENDANT

JUDGMENT

1. On 10/6/2021, the Plaintiff moved this court by way of Originating Summons dated 5/3/2019 seeking the following orders: -
 1. That the Plaintiff is entitled to be declared as the proprietor of land portion known as portion number 9219 (Orig. No. M4/260) Malindi which he has acquired by adverse possession having lived, occupied and worked on the same for a period more than 12 years peacefully, openly and without any interruption from the Defendant;
 2. That the Plaintiff is entitled to be registered as proprietor and issued with certificate of title over the suit property in place of the Defendant and/or her family;
 3. That the Plaintiff are entitled to costs of this suit.
2. The Originating Summons is anchored on the supporting affidavit sworn on 5/3/2019 by the Plaintiff and the accompanying documents being copies of photographs. The Plaintiff deposed that he entered the land portion number 9219 (Orig. No. M4/260) Malindi (the suit property) sometime in the year 2004, through a certain family identified as the Shutu family, which claims to be the owner of the suit property; he has since openly and peacefully occupied the suit property and constructed his home thereon; the suit property is registered in the name of the Defendant.



The Defence

3. In response, the Defendant filed a Replying Affidavit which he swore on 16/12/2021 stating that the application frivolous, vexatious, unmeritorious and incompetent. He deposed the suit property is not registered in his name but one Shumi Rick Edward who acquired the same at a valuable consideration from Ahmed Abdalla Bakshuwein. He annexed a copy of indenture dated 3/8/2005 to that effect. He added that he is however the beneficial owner together with one Nuru Ahmed Mohamed, having acquired the same on 6/12/2006 from the said Shumi. He equally exhibited a copy of that indenture.
4. The Defendant further deposed that before purchasing the suit property, he did a search at the lands registry where it was established that the suit property belonged to Shumi Rick Edward; he also conducted a ground visit in the year 2006 when the suit property was vacant. Upon purchase, he erected a barbed wire fence all round and planted some mango trees. He added that the Plaintiff trespassed on the suit property sometime in the year 2019, which prompted him to file a report to the Area Chief, Malindi town; the Plaintiff was then summoned vide summons dated 8/2/2019, 11/2/2019 and 13/2/2019 but failed to show up. He then filed a report under OB No. 26/1/10/2019 and a charge of forcible detainer preferred against the Plaintiff together with one Rogers Jenje Ndenge.
5. The Defendant averred that he will be greatly prejudiced if the application is allowed and his right to property would be infringed.

Evidence

6. The Plaintiff (PW1) adopted the averments in his supporting affidavit as part of his evidence-in-chief. He told the court that he has developed the suit property for over 12 years and even connected water supply thereon.
7. Upon cross-examination by Mr. Mburu, counsel for the Defendant, the Plaintiff stated that he had evidence to show when he entered the suit property allegedly with the agreement of the Shutu family. He added that he did not have any documents showing when the said buildings were erected on the suit property, or when the water was connected. He further told the court that he bought the suit property in 2004 and that the criminal case against him was eventually terminated.
8. The Plaintiff told the court in re-examination, that he constructed the house (a mabati house) in the year 2006 and that the said Rogers Jenje lived therein.
9. On his part, the Defendant (DW1) also adopted the contents of his affidavit as part of his evidence-in-chief. He testified that while they purchased the suit property in 2006, they are yet to effect transfer thereof. He reiterated that the suit property was all along vacant until the year 2019 when he learnt of the Plaintiff's invasion. He asserted that the criminal case against the Plaintiff was still pending and that the Plaintiff chased him when he visited the suit property.

Submissions

10. As at the timing of writing this opinion, only the Defendant had filed written submissions which are summarized as follows: for an applicant to succeed in a claim of adverse possession he or she ought to satisfy laid down principles and/or conditions restated in the case of *Mtana Lewa v Kahindi Ngala* (2015) eKLR and *Gabriel Mbuvi v Mukindia Maranya* [1993] eKLR, and found under Section 7, 13 and 38 of the *Limitation of Action Act* CAP 22 Laws of Kenya.
11. It was Counsel's submission that the suit is incompetent before this Honourable Court as it is not in compliance with the Provisions of Sections 7, 9, 13 37 and 38 of the *Limitations of Actions Act* CAP 22



Laws of Kenya having been brought against the Defendant who is not the registered owner of the suit property; that the Plaintiff has failed to prove possession and or occupation of the suit property and has failed to demonstrate having disposed the owner peacefully of the suit property; Counsel added that although the Plaintiff alleged to have entered on the suit property in the year 2004 he did not adduce any evidence to prove the same as he did not call any witnesses to corroborate his allegation.

12. In the ultimate, counsel beseeched the Court to dismiss the Plaintiff's claim with costs to the Defendant.

Determination

13. From the pleadings and the evidence adduced, this court frames the following questions as arising for determination: -

- i. Whether the Plaintiff has met the threshold for grant of orders of adverse possession;
- ii. Who shall bear the costs of the suit.

14. The doctrine of adverse possession in Kenya is founded under *Limitation of Actions Act*, CAP 22 Laws of Kenya as follows: -

7. Actions to recover land

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.

13. Right of action not to accrue or continue unless adverse possession

- 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 of this Act 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 a fresh 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.

38. Registration of title to land or easement acquired under Act

- (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.”



15. As rightly submitted for the Defendant, the doctrine of adverse possession was aptly defined in *Mtana Lewa v Kabindi Ngala Mwangandi* (*supra*) where the Court of Appeal held that: -

"Adverse possession is essentially a situation where a person takes possession of land and 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 is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force of stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner."

16. Further, the Court of Appeal in the case of *Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others* [2018] eKLR, held that: -

18. "Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non-permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, *nec vi nec clam nec precario*. See *Jandu v Kirplal & Another* (1975) EA 225. In other words, a party relying on the doctrine bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. See this Court's decision in *Wambugu v Njuguna* [1983] KLR 173."

17. In this case, it is undisputed that the Defendant is not the paper title holder of the suit property, thus the Plaintiff's claim against him can therefore not be sustained. The Plaintiff has equally failed to demonstrate that he is in actual possession of the suit property. Apart from lacking certification as required under Section 106B (4) the *Evidence Act*, the photographs annexed to his supporting affidavit do not convince me that the Plaintiff is in actual possession of the suit property. The Plaintiff even contradicts himself as to when he allegedly entered the suit property. At one point during his cross-examination, he stated that he bought the suit property in 2004. This raises concerns whether his claim is of adverse possession or purchaser's interest. Either way, I am not convinced that the Plaintiff has satisfied the requirements for granting the reliefs sought in his originating summons.

18. The outcome is that this suit is dismissed with costs to the Defendant.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 18TH DAY OF DECEMBER, 2024.

MWANGI NJOROGE

JUDGE, ELC MALINDI

