



**Gutu v Mirza (Environmental and Land Originating Summons
215 of 2017) [2024] KEELC 13657 (KLR) (9 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13657 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 215 OF 2017
FM NJOROGE, J
DECEMBER 9, 2024**

BETWEEN

EUNICE KAHINDI GUTU PLAINTIFF

AND

MOHAMED AJAZ MIRZA DEFENDANT

JUDGMENT

The Claim.

1. By way of an Originating Summons dated 24th October 2017 the respondent moved this court seeking the following orders:
 1. That the Applicant is entitled to be declared as proprietor of land parcel known as Kilifi/Mtondia/165 which she has acquired by adverse possession, having lived and worked thereon for over 24 years since 1992 well beyond the statutory 12 years, and used it peacefully and uninterrupted without any interference from the Respondent;
 2. That the Applicant is entitled to be registered and issued with certificate of title over the same in place of the Respondent.
2. The Originating Summons is founded on the Supporting Affidavit of Eunice Kahindi Gutu, the Applicant, who deposed that he has lived on the suit property for over 24 years. That sometime in 1992 she and her husband Kahindi Karu Biryia and their child travelled to Kilifi for employment in the farm of Joseph Naran which comprised of land reference number Kilifi/Mtondia/165. She stated that the said Joseph Naran visited the land once in 1992 and informed her husband and herself that Janet Wairimu Chokwe had also sold the land to another person known as Mohamed Ajaz Mirza and never showed up again; the applicant then went on with her occupation, and took full possession of the land.



3. It was averred that her first born son Shariff Kahindi Kalu grew up on the suit property where her residential home is situated. Further, that she has fully developed the land by planting several coconut trees, cashew nut trees, orange trees, cultivating and fencing the land. Lastly, it was averred that she has been in occupation of the suit property for over 24 years without interference from the registered proprietor.

The Response

4. In response, the Respondent filed a replying affidavit dated 13th July 2020. He deponed that he is registered as the absolute proprietor of the suit property. He stated that the Plaintiff's husband Kahindi Kaku Biryra filed ELC No. 95 of 2015 (OS) claiming that he is entitled to the suit property by way of adverse possession and that the said suit is yet to be heard and determined. Further, that the instant suit is an abuse of the court process in that although the Applicant in the earlier suit and the applicant in this suit are not the same, the applicants in both cases are husband and wife and both suits seek the same remedy. He stated that the correct name of "Joseph Naran" is "Naran Keshra Halai" who is his friend and who was looking after the suit property on his behalf and that it is not true that Naran visited the suit property in 1992 as alleged by the Applicant. In addition, Naran frequently visited the suit property until 5-6 years ago when he travelled to India and thereafter the respondent started visiting the suit property by himself regularly.
5. It was further averred that the Applicant stated that her husband had left the suit property but does not state when he left, and that her husband had filed a suit on 15th June 2015 claiming the suit land by way of adverse possession. It was also stated that since he acquired the suit property, the Applicant's husband has been his employee and he has been paying his salary regularly which the Applicant collected personally on behalf of her husband, regularly calling at the offices of Coast Bus to collect the same; further, the Applicant has collected money from him with a view to help pay for medical expenses and school fees. He added that his son Adil Mirza took video footage and recorded conversations between him and the Applicant collecting salary and admitting that the husband was indeed employed by the Respondent and also that she has been receiving salary and other financial assistance from him.
6. Mr. Mohamed Ajaz further stated in his affidavit that the said house on the suit property was constructed at his instance and expense to enable the Applicant's family to live thereon; that he has permitted the Applicant to live on the suit property for the sole purpose of enabling the Applicant's husband take care of the same since he acquired it in 1992. Further, the mango trees and coconut trees shown in the Applicant's photographs were on the suit property before he acquired it. Lastly, he stated that he had caused the whole suit property to be fenced at his expense but the fence is no longer in place for reasons known to the Applicant and her husband.

Evidence At Hearing

Applicant's Evidence.

7. PW1, Eunice Kahindi Gutu adopted her supporting affidavit dated 24/10/17 and her further witness statement dated 3/6/21 as her evidence. She also adopted her statement dated 11/11/22 and produced as P. Exh. 1 & 2 documents as per the list of documents dated 3/6/21. She told the court that she lives on the suit property and has planted cashew nuts, coconuts and vegetables; that also she has built a house on the suit land. She further testified that she does not communicate with the defendant. Further that she is divorced from her husband Kahindi and she does not know where he lives. She added that



- the husband was employed by Joseph Naran and she came to the suit property through her husband as an employee; further, that she received money for payment of school fees by one Christopher Karisa.
8. On cross-examination, she reiterated that her husband had been employed by Naran. She admitted that she came to the suit land by reason of the employment of her husband by Naran, but she has never been employed by the defendant. She stated that she was not aware that her husband was being paid; that her husband would come to the suit land but was not staying on it. She stated that she was not aware why Christopher Karisa used to pay her money. She also stated that she was aware that her husband had instituted a suit to have the suit land granted to him. She averred that she and her husband disagreed in 1999 and separated in the year 2000 and she had refunded him the dowry paid.
 9. PW2, Shariff Kahindi Binje, the Applicant's son, adopted his witness statement dated 24/10/17. He added that his father had been employed by Naran and he left the suit land in the year 2000. Further that he has been staying on the suit land.
 10. PW3, Patrick Yaa, told the court that he was an Assistant Chief and came from the same sub-location as the Applicant. He adopted as his evidence his affidavit dated 21/1/22.
 11. On cross-examination, he told the court that he knew Kahindi Biryia as the Plaintiff's husband; that there was a ceremony for the return of dowry vide an agreement by the elders. He also stated that Kahindi Biryia used to stay on the suit land with the Plaintiff.

Respondent's Evidence

12. DW1, Mohamed Ajax Mirza, adopted his witness statement dated 24/9/21 as his evidence and produced as P. Exh 1-27 documents as per the list of documents of even date. On cross-examination he stated that he is the registered owner of the suit property and he employed Kahindi Biryia in the farm in 1992 and he is still his employee and lives on the farm. Further that payments were made to Kahindi through the Applicant by way of Mpesa and also his company Verobern; that the Plaintiff lived there with her husband as his employee.
13. DW2, Christopher Karisa, adopted his witness statement dated 8/10/21 as his evidence-in-chief. He identified the plaintiff in court, whom he stated is Kahindi's wife, and added that he and Kahindi were employed by the defendant. He added that the Plaintiff is not a squatter as she was paid on behalf of her husband up to March 2019.
14. On cross-examination he stated that he was in charge of all employees; that he was told to pay Kahindi which money he sent to him by M-pesa.
15. DW3 Adil Mirza adopted his witness statement dated 29/9/2021 as his evidence-in-chief. He told the court that his caretaker was called Kahindi and he came to the suit property with his family; that the plaintiff never stayed on the suit property as a caretaker but as the wife to the caretaker. He added that he gave the Plaintiff money as Kahindi was unwell and at no point did he complain that they paid the wrong person, of which money was paid up to 2019.
16. On cross-examination he stated that he had recorded the video clip. He stated that Teranora and Verobern have one director and Mohamed Ajax Mirza is not a director or a shareholder in the companies; further, that the companies paid the Plaintiff on his behalf while the other monies paid to Christopher were from the companies.



Determination

17. Both parties filed written submissions. I have read and considered the submissions by the parties as well as the authorities relied upon by the parties while preparing this judgment.
18. The issue for determination is whether the Applicant is entitled to the suit property by way of adverse possession.
19. The principle of adverse possession is well settled under *Limitation of Actions Act*. Section 7 of the said Act places a bar on actions to recover land after 12 years from the date on which the right accrued. Further Section 13 of the same Act, provides that adverse possession is the exception to this limitation:
 - (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) of this Act, the land in reversion is taken to be adverse possession of the land.”
20. Finally, 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.”
21. In the case of *Gabriel Mbui vs Mukindia Maranya* [1993] eKLR adverse possession was defined as;

“..the non-permissive physical control over land coupled with the intention of doing so, by a stranger having actual occupation solely on his own behalf or on behalf of some other person, in opposition to, and to the exclusion of all others including the true owner out of possession of that land, the true owner having a right to immediate possession and having clear knowledge of the assertion of exclusive ownership as of right by occupying stranger inconsistent with the true owner’s enjoyment of land for purposes for which the owner intended to use it.”
22. In the case of *Mtana Lewa –vs- Kahindi Ngala Mwangandi* [2015] eKLR the court of Appeal defined adverse possession as:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, twelve (12) years. The



process springs into action essentially by default or in action of the owner. The essential prerequisites being that possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

23. In sum therefore, for one to claim rights to land by way of adverse possession they must demonstrate that they there was open possession and occupation, uninterrupted occupation for not less than twelve years and that the said occupation was within the owner’s knowledge.
24. The Applicant’s case is that she has been on the suit property since the year 1992. She states that she came into the occupation of the land with her husband alongside her first born son; that she has made developments on the land and has lived thereon without any interruption; that the Respondent has never visited the land at any time.
25. On his part, the Respondent states that he allowed the Applicant lived on the land courtesy of her husband who was a caretaker to the land and made payments for his employment through the Applicant and there were no complaints. The Respondent produced mobile money statements as proof of payment and vouchers. These payments were made up to March 2019. I am not persuaded that the applicant is saying the truth when she stated that she was not aware why Christopher Karisa used to pay her money. The money was only paid in connection with her husband’s employment as a caretaker on the farm. I find this as sufficient evidence that the Applicant’s husband was a caretaker to the farm. In *Gatatha Farmers Co. Ltd v Otieno Okiro & 2 others* [2018] eKLR the court declined a claim for adverse possession by a son where he had come onto the suit land by virtue of his father’s employment with the title holder. The court held as follows:

“It appears that the true position with regard to the land occupied by the deceased’s father was that the deceased was entitled to a lifetime interest in the land. The interest in the land having been described as such could not survive his demise so as to pass on to his children by way of probate proceedings or otherwise on transmission.”
26. In the present case the person through whose employment the applicant entered the suit land is still alive. In fact, he appears to have commenced a case of his own whose fate has not been disclosed. Nevertheless, those who, like the applicant, came into occupation of the land through his employment only can not sustain a claim for adverse possession against the defendant.
27. In the above circumstances this court finds that the Applicant is not entitled to the suit land by way of adverse possession and her claim is hereby dismissed. There shall be no orders as to costs.

JUDGMENT DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 9TH DAY OF DECEMBER, 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

