



Karima (Suing as the Administrator of the Estate of Samson David Magambo - Deceased) v Kenya Airways Limited (Civil Cause 50 of 2016) [2023] KEELC 450 (KLR) (31 January 2023) (Judgment)

Neutral citation: [2023] KEELC 450 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
CIVIL CAUSE 50 OF 2016
MAO ODENY, J
JANUARY 31, 2023**

BETWEEN

BENDERA KARISA KARIMA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF SAMSON DAVID MAGAMBO - DECEASED) APPLICANT

AND

KENYA AIRWAYS LIMITED RESPONDENT

JUDGMENT

1. By an Originating Summons dated 8th March, 2016 the Applicant herein sued the Defendant seeking the following orders: -
 - a. That the Applicant be declared the legal representative of PLOT NO. 5786 MALINDI on behalf of the Estate of SAMSON DAVID MAGAMBO, deceased.
 - b. That Applicant applying on behalf of Estate of SAMSON DAVID MAGAMBO, deceased be registered as proprietor of PLOT NO. 5786 MALINDI.
 - c. That costs be in the cause.

APPLICANT'S CASE

2. PW1 adopted her supporting, further and supplementary affidavits and list of documents as her evidence and stated that the suit land was vacant when they moved in and that they have lived thereon peacefully without interruption from the Respondent.



3. PW1 further deponed that Plot Number L.R No. 5786 Kilifi is registered in the name of the Respondent and that she is entitled to be registered as the owner by virtue of adverse possession.
4. It was her evidence that the late husband SAMSON DAVID MAGAMBO had been in occupation of the suit land with his family since 1983 until his demise on 25th March, 2013. Further that she has known the suit land as home, depended on it for subsistence, built matrimonial home until sometime in August, 2006 when the Respondent claimed ownership.

RESPONDENT'S CASE

5. DW1 adopted his statement and list of documents dated 19th July 2019 as his evidence and stated that he was aware that the suit property was allocated to Kenya Airways Limited by the Commissioner of Lands vide a Letter of Allotment under Reference No. TP47/1/V111/11C dated 6th May, 1991 with a Deed plan attached to it.
6. DW1 further stated that the Respondent formally accepted the terms and conditions of the offer of the suit property and remitted the required sum as per the Letter of Allotment to the Commissioner of Lands and that the Respondent was issued with a Certificate of Title for LR. No. 5786 (IR No. 25915) on 4th July, 1994 attached to Deed Plan No. 162084.
7. It was DW1's testimony that at the time the Certificate of Title was issued, there were some squatters who were living on the suit property including the late Samson David Magambo who occupied a portion of the property on which there was a house erected by the Government of Kenya, the previous owner of the suit property until 4th July, 1994 when a Grant was registered in favour of the Respondent.
8. DW1 also stated that on 26th August, 2006, the Respondent wrote a letter to the late Samson David Magambo asking him to vacate the suit property and that on 18th October, 2006 after the demolition and eviction of all squatters on the suit property, the late Samson David Magambo wrote to the Respondent acknowledging that the house he was occupying had been demolished and thereafter requested the Respondent to give him 3 months to enable him find an alternative place.
9. DW1 similarly stated that the Respondent acceded to the request by the late Samson David Magambo who continued staying in the suit property with the permission and consent of the Respondent. He additionally told the court that the Respondent erected a perimeter fence around the property and employed guards to take care of the plot. Further that the Respondent has continued to pay all the land rent and rates over the suit property and as such, there is no basis for the adverse possession claim by the Petitioner.

APPLICANT'S SUBMISSIONS.

10. Counsel identified two issues for determination; whether the Applicant's claim for adverse possession is sustainable and or tenable and whether the allegation by the Respondent that the said land belonged to the Government of Kenya prior to the deceased "acquisition" hence the claim for adverse possession cannot lie.
11. Counsel relied on the case of WAMBUGU VS NJUGUNA CIVIL APPEAL NO. 10 OF 1980 and urged the court to grant the prayers as per the Originating Summons.



RESPONDENT'S SUBMISSIONS

12. Counsel for the Respondent identified two issues for determination namely: -
 - a. Whether the Applicant meets the threshold for Adverse possession.
 - b. Whether the Respondent has been dispossessed of its title in the suit property.
13. On the first issue as to whether the Applicant meets the threshold for adverse possession, counsel submitted that for a claim of adverse possession to be sustainable, the Applicant ought to demonstrate that he has dispossessed the Respondent of its title in the property for the statutory period of 12 years as expressed by Sections 7 and 13 of the *Limitation of Actions Act*.
14. Counsel relied on the case of Jacob Mwanto Wangora v Mary Waruga Wokabi & 3 Others (2018) eKLR where the court held that an Applicant must demonstrate that he/she has been in continuous and uninterrupted possession without the consent of the owner of the land, his/her interest has to be inconsistent to the interests of the true owner of the land, the possession has to be open and notorious to enable the owner to be on notice that there is a trespasser on his/her land, that the possession has to be actual and that the possession has to be exclusive to avoid confusion on who is entitled to obtain the title to the suit land once the limitation period lapses.
15. Counsel submitted that the Applicant's claim is that adverse possession has crystallized by dint of the fact that the deceased and subsequently herself, have resided on the suit property for a period of 33 years, and therefore asserted that the property was government land before 1994 when the Respondent obtained the title to the property and that it is trite law that there can be no adverse possession in respect to government land hence the Applicant cannot sustain any claim in respect to the suit property for the period leading to 1994.
16. Counsel relied on the case of Masek Ole Tinkoi & 3 others v Kenya Grain Growers Limited & 2 others (2018) eKLR where the court held that the provisions of Section 41(a) (i) of *Limitation of Actions Act* expressly exclude Government land or land otherwise enjoyed by the Government from being acquired through adverse possession.
17. It was counsel's further submission that the Applicant's stay on the suit property has not met the above standard since it is not in dispute that the Respondent entered the suit property, evicted the squatters and demolished the structures at the property. That the deceased's possession of the suit property was interrupted and that the deceased had requested for three months to vacate the suit premises to look for alternative land which was accepted by the Respondent.
18. Counsel cited the case of Nyaga Rungu v Stanley Nyaga Kuvuta (2020) eKLR where the court held that interruption of possession is significant in that it stops time for running under the Limitations of Actions Act.
19. Similarly counsel cited the case of Kipketer Togom vs Isaac Cipriano Shingore [2012] eKLR where the Court held that the Respondent must assert his entry to the title by physically entering onto the property and evicting or ejecting the trespasser from the suit property.
20. It was counsel's submission that the Respondent made effective entry into the premises by evicting the squatters, erecting the fence, and appointing guards to look after the suit property and time stopped running from 1994 to 2006.



ANALYSIS AND DETERMINATION.

21. The issue for determination is whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period as was held in the case of Haro Yonda Juaie v Sadaka Dzenge Mbauro & another [2014] eKLR, where the court held:

“The position, as was held in the above case, is therefore not whether or not the claimant has proved that he has been in possession for the requisite number of years but whether he had the animus possidendi to acquire the land by way of adverse possession. The Claimant can only prove that he had the requisite animus possidendi by showing the circumstances under which he dispossessed the true owner of the land or the circumstances under which the true owner discontinued his possession.”

22. The background of this case is that the deceased SAMSON DAVID MAGAMBO had been in peaceful and uninterrupted occupation of PLOT NO. 5786 MALINDI since the year 1983, a period spanning over thirty years, and that the Respondent was all aware of his occupation.
23. It is on record that the suit property was owned by the government prior to allocation to the Respondent who was issued with a Certificate of title on 4th July 1994. Further that the Respondent wrote a letter 26th August, 2006, to the late Samson David Magambo asking him to vacate the suit property and that on 18th October, 2006 after the demolition and eviction of all squatters on the suit property, the late Samson David Magambo wrote to the Respondent acknowledging that the house he was occupying had been demolished and thereafter requested the Respondent to give him 3 months to enable him find an alternative place which was granted.
24. In the Court of Appeal case of Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others [2018] eKLR elaborated on the required elements to prove adverse possession thus: -

“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 12years as espoused in the Latin maxim, nec vi nec clam nec precario. See Jandu vs. 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 vs. Njuguna [1983] KLR 173.”

25. The Applicant must prove that the possession was actual, open, non-permissive non-consensual, notorious and exclusive in order to be granted an order of adverse possession. The possession must also be uninterrupted for a period on 12 years.
26. It is not disputed that prior to allocation of the land to the Respondent, the land belonged to the government hence it was public land. It is trite law that a party cannot claim adverse possession on government land as per Section 41(a) (i) of *Limitation of Actions Act* expressly exclude Government land or land otherwise enjoyed by the Government from being acquired through adverse possession as was held in the case of Ravji Karsan Shanghani -vs- Peter Gakumu [2019] eKLR.
27. Similarly in the case of Benson Mukuwa Wachira –Vs- Assumption Sisters of Nairobi Registered Trustees [2016] eKLR the Court of Appeal held that the doctrine of adverse possession cannot apply



to land registered in favour of the Government of a County Government and that adverse possession can only attach when the government allocated the land to the Respondent.

28. It therefore follows that time did not run while the Applicant was occupying the land that belonged to the government. The Applicant could only start counting time after the Respondent had acquired the title but unfortunately the occupation and possession was interrupted by the entry of the Respondent and eviction of the squatters who were occupying the suit land including the Applicant's husband who acknowledged the Respondent's title by asking for 3 months to vacate. The entry, demolition of structures, fencing the suit property, putting guard to secure the property and eviction of the Applicant's husband and the relatives was proof that the Applicant's occupation was not peaceful and quiet as the Applicant would want the court to believe.
29. It should also be noted that the Applicant's occupation of the suit property was with the permission and consent of the Respondent from the correspondences requesting for permission to look for alternative land.
30. I have considered the summons, the response, the submissions by counsel and find that the Applicant has not proved her case and therefore is dismissed with costs to the Respondent

DATED, SIGNED AND DELIVERED AT MALINDI THIS 31ST DAY OF JANUARY, 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

