



**Kitsao & another v Githinji (Civil Suit 2 of 2021)
[2023] KEELC 305 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 305 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
CIVIL SUIT 2 OF 2021
MAO ODENY, J
JANUARY 26, 2023**

**N THE MATTER: OF THE REGISTERED LANDS ACT (CAP 300, LAWS OF KENYA) (NOW
REPEALED) AND THE LIMITATION OF ACTIONS ACT (CAP 22, LAWS OF KENYA)
AND
IN THE MATTER OF: THE CIVIL PROCEDURE ACT AND RULES ENACTED THERETO
AND
IN THE MATTER OF: TITLE NUMBER MALINDI/KAKUYUNI/MADUNGUNI/223**

BETWEEN

KITSAO KENGA KITSAO 1ST PLAINTIFF

ALEX KENGA KITSAO 2ND PLAINTIFF

AND

PERIS WANGUI GITHINJI DEFENDANT

JUDGMENT

1. By an Originating Summons dated the 29th November 2021 the Applicants Kitsao Kenga Kitsao and Alex Kenga Kitsao sought the following reliefs from this Honourable Court: -
 - a. A declaration that the title of the said Peris Wangui Githinji to the freehold interest in Title Number Malindi/Kakuyuni/Madunguni/223 has been extinguished by the Applicants' adverse possession thereof for a period of more than 12 years in terms of Sections 17 and 38 of the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya.
 - b. A declaration that the Applicants have acquired the freehold interest in Title Number Malindi/Kakuyuni/Madunguni/223 by their adverse possession thereof for a period of more than 12 years i.e., from at least 2007 to-date.



- c. An Order do issue requiring and directing the Chief Land Registration Officer, Kilifi to register the Applicants Kitsao Kenga Kitsao and Alex Kenga Kitsao as the proprietors of Title Number Malindi/Kakuyuni/Madunguni/223 in place of Peris Wangui Githinji and in place of any other person succeeding the Respondent.
 - d. Costs of the suit.
2. The Respondent was served by way of substituted service by advertisement but neither entered appearance nor filed a response therefore the summons proceeded undefended.

Applicants' Submissions

3. The Originating Summons is premised on the sworn affidavit of Kitsao Kenga Kitsao with the authority of Alex Kenga Kitsao who deponed that the Defendant was registered as proprietor of the suit land on 17th August 2007 which measures approximately 5.4 hectares.
4. He stated that together with the 2nd Plaintiff they have been in occupation of the suit property since 2007 and that Defendant or any other party has never claimed interest on the same despite their continued occupation uninterrupted.
5. It was the Applicant's case that the Defendant's proprietary interest in the suit property has been extinguished by virtue of the Applicants occupying the suit land for more than 12 years.
6. Counsel submitted extensively on the meaning and essentials of adverse possession and relied on Order 7, 9, 13, 37 and 39 of the *Limitation of Actions Act* and the case of *Said Karama Salim v Kokas M. Nakolo* [2017] eKLR.
7. Counsel identified five issues for determination as follows: -
 - a. Who is the registered proprietor of the suit property?
 - b. Whether or not the Applicants have made physical entry on the suit property and are in actual possession or occupancy of the suit property for the statutory period.
 - c. Whether the occupation of the suit property is permissive
 - d. Whether or not the Applicant's possession of the suit property has been continuous, uninterrupted and unbroken for the required statutory period
 - e. What reliefs if at all are available to the applicants.
8. On the first issue on whether the Respondent is the registered owner of the suit land, counsel submitted that according to the official search dated 29th October 2021 and the title, the Respondent was issued with a title on 17th August 2007.
9. Counsel relied on the cases of *Katana & 29 others v Nathoo* (Environment & Land Case 208 of 2017) [2022] KEELC 2232 (KLR) (29 June 2022) (Judgment), *Ann Itumbi Kiseli v James Muriuki Muriithi* [2013] eKLR and submitted that the Respondent is the indefeasible owner of the suit property.
10. On the second issue whether the Applicants have made physical entry on the suit property and are in actual possession, counsel submitted that Applicants have demonstrated that they have been on the suit land for over 12 years uninterrupted and that the Respondent has not tendered any evidence to demonstrate otherwise. Further, that the Plaintiffs are not licensees and their occupation is adverse, hostile and not sanctioned by the Respondent thus deserving of the orders sought.



11. Counsel cited the case of *Douglas Mwangi Muteru v Victoria Mere Dzilla* [2017] eKLR where the court stated that possession must be adequate in continuity, in publicity and in extent. Counsel further relied on the case of *Benjamin Kipsigei Arap Chumek V Reuben Cheruyiot Chepkwony* (2016) eKLR on the need to demonstrate exclusive possession for a period on 12 years openly uninterrupted.
12. It was counsel's submission that it is trite law that a person who presents a case for determination must prove *vide* evidence lest the case be dismissed for lack of evidence.
13. Counsel therefore urged the court to allow the summons as prayed as the Applicants have proved adverse possession.

Analysis and Determination

14. The issue for determination is a case 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 Dzengo 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.”

15. It is incumbent upon the Applicant to show under what circumstances he disposed the true owner of the suit land and that he had the requisite intention to possess (*animus possidendi*) together with fact of possession (*factum possidendi*). Did the applicant intend to control the suit property?
16. 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.”

17. As rightly submitted that a party who asserts must prove the proposition by evidence. The Applicants deponed that they have been in possession for a period of over 12 years since 2007. They did not tender any evidence to show how they came into possession of the suit land, were they squatters on the suit land, were they employees on the suit land, did they buy the suit land.
18. This information would have been very useful as it is trite that possession is a question of fact and the Applicants are duty bound to show that their possession or occupation was peaceful, continuous with the knowledge but without permission of the owner.



19. In the case of *Gabriel Mbui v Mukindia Maranya* [1993] eKLR, Kuloba J (as he then was) held: -
- “The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown”
20. The Applicants were under a duty to demonstrate facts showing a clear intention to hold the suit land adversely and also show the de facto use and occupation. The Applicants relied on the supporting affidavit whereby they claimed that they have been in occupation since 2007. The questions are, are Applicants staying on the suit land, if so are there any buildings or structures that they have either built or constructed by the owner that they reside in. Have they been cultivating the suit land, are there any trees planted or otherwise on the suit land? Are they in occupation of the whole 5.5 hectares or a portion of it.
21. The Applicants should have gone a step further to answer the above questions precisely or even annexed some photographic evidence of structures if any. The Applicants have not shown that they have been in actual possession of the suit land, that they have done acts which are inconsistent with the enjoyment by the true owner of the land for the purposes for which it was intended to use.
22. Similarly, occupation per se is not what creates rights of adverse possession, the occupation must be adverse to the rights of possession to the registered owner.
23. In the case of *Mbira v Gachuhi* [2002] 1 EA 137, the court held that the claimant must lead evidence to show that the owner has been dispossessed or that the owner had discontinued possession as follows: -
- “There must be evidence and facts found showing that the true owner’s titled has been expressly repudiated by the adverse possessor. There must be facts of possession asserted against a claim of ownership of all others, including the registered proprietor.... So, one must show the mode of repudiation; the knowledge by the true owner, of the assertion of the adverse claim; the date and mode in which the adverse claim was brought to the knowledge of the true owner...”
24. Further in the case of *Ernest Wesonga Kweyu versus Kweyu Omuto* CA Civ Appeal No. 8 of 1990 where Gicheru J.A. (as he then was) in deciding the issue of adverse possession said that ; -
- “the primary function of a Court is to draw legal inferences from prove facts which inferences are matters of law. Accordingly, while possession is a matter of fact, any proposition reached from the fact that the given possession is or is not an adverse one is a legal conclusion drawn from the findings on a given fact. The adverse character of the possession must be established as a fact. It cannot be assumed as a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and occupation must be shown.”
25. Even though the Applicants’ evidence is uncontroverted, it is trite that that a party is still under an obligation to prove his or her case. They ought to have even annexed photographs showing that indeed they are in occupation of the suit property or led further evidence to prove possession and occupation.



26. In the case of *Kenya Power & Lighting Company Limited V Nathan Karanja Gachoka & Another* [2016] eKLR, the Court stated:-

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”

27. The evidence by the Applicants is not sufficient to prove that they have acquired the suit land by way of adverse possession.

28. In the case of *David Odhiambo Ooko v Helida Akoth Oduor & another* [2020] eKLR this court held that: -

“Adverse possession is a doctrine that legally dispossesses the legal owner of a suit land by operation of the law. That is why the principles or the ingredients for proof of adverse possession are very stringent so as not to dispossess a rightful owner of the suit land. It was not enough for the Plaintiff to make mere averments in his pleadings that he had been in uninterrupted possession without tendering evidence to that effect.”

29. I have considered the pleadings, the submission by counsel and find that the Applicants have not proved that the true and/or registered owner of the suit parcel had relinquished possession or abandoned the suit parcel; or that had actual knowledge of their occupation and possession of the parcel.

30. The upshot is the case is dismissed with no orders as to costs as it was undefended.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 26TH 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.

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