



Owango & 34 others v Marashi Holdings Limited (Environment & Land Case 665 of 2011 & 398 of 2012 (Consolidated)) [2023] KEELC 290 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KEELC 290 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 665 OF 2011 & 398 OF 2012 (CONSOLIDATED)
OA ANGOTE, J
JANUARY 26, 2023

BETWEEN

NICK OMONDI OWANGO & 34 OTHERS PLAINTIFF

AND

MARASHI HOLDINGS LIMITED DEFENDANT

JUDGMENT

Background

1. This Judgment is in respect of two suits being Nairobi ELC No 665 of 2011 and Nairobi ELC 389 of 2012. In ELC No 665 of 2011, the Plaintiffs are laying claim to the property known as L.R No 9042/130, I.R No 49086(the suit property) by way of adverse possession. On the other hand, the Defendant herein is seeking vide ELC 398 of 2012 to asserts its proprietorship of the suit property and restrain the Plaintiffs from any dealings with the same.
2. On 20th February, 2014, the Court ordered that the suits be consolidated, with ELC No 665 of 2011 being the lead file.
3. The Plaintiffs herein filed an Originating Summons dated 17th of November, 2011 brought pursuant to Orders 37 and 38 of the *Limitation of Actions Act* and Order 37 Rule 7 of the Civil Procedure Rules, seeking the following Orders;
 - a. A declaration that the Plaintiffs are entitled to be registered forthwith as owners of L.R No 9042/130 which the Plaintiffs have been in adverse possession since 1990 to date for more than 12 years(twelve) years immediately preceding the presentation of this suit and, on which they have lived openly and continuously as of right and in adverse possession and without any interruption from the Defendant or its predecessors in the above title and that the Defendants title to parcel L.R No 9042/130 has been



extinguished in favour of the Plaintiff under Section 37 and 38 of the [Limitation of Actions Act](#), Laws of Kenya.

- b. That an order do issue vesting L.R No 9042/130 in the Plaintiffs.
 - c. An order of permanent injunction be issued restraining the Defendant, its employees, servants, agents, or any person claiming through them from evicting the Plaintiffs' from the parcel of land known as L.R No 9042/130(suit land) of from fencing the suit land or interfering with the Plaintiffs possession of the same or alienating, transferring, disposing and/or dealing with the suit land in any manner whatsoever.
 - d. An order for costs and interests thereon of this suit.
4. The Originating Summons is supported by the Supporting Affidavit of Martha Munini Nthunga, one of the Plaintiffs ,on her own behalf and on behalf of her co-Plaintiffs. The Plaintiffs deponed that they occupied the suit property in the year 1989 and put up structures thereon and that at the time of occupation, they assumed the property belonged to the County Government or City Council.
 5. According to the Plaintiffs, by the end of 1992, the suit property had been fully occupied; that sometime in 1993, an Asian man came onto the property and demanded that they cease constructions but he left when they asked him to show his ownership documents.
 6. It was the deposition of Ms Nthunga, that on or about 18th November, 2011, the Defendant's representatives came onto the suit land, claimed ownership thereof and asked them to vacate the suit property and that they sought legal advice from their Counsel who informed them that they have acquired prescriptive rights by way of adverse possession having been in occupation of the suit property for over 12 years.
 7. In this matter, the Plaintiff (who is the Defendant in the Originating Summons) vide the Plaint dated 5th July, 2012 is seeking for the following reliefs;
 - a. That this Honourable Court be pleased to issue a permanent injunction against the Defendants prohibiting them from encroaching on the suit property;
 - b. That this Honourable Court be pleased to order that the Defendants be evicted from the suit property and that they restore it to its previous state removing all tools, implements and materials used in the illegal construction work carried out;
 - c. That this Honourable Court be pleased to direct the O.C.S Embakassi Police Station enforce these orders;
 - d. Costs of this suit;
 - e. Any other and further relief this Honourable Court may deem just and expedient to grant.
 8. The Plaintiff's case as set out in the Plaint is that it is a limited liability company duly registered pursuant to the provisions of the [Companies Act](#); that it is the registered proprietor of the property known as L.R No 9042/130, I.R No 49086 (the suit property) vide an allotment by the Government of Kenya on 10th February, 1998 and that the suit property was initially known as Uns. Plot No 36-Embakassi Industrial Area-Nairobi.
 9. The Plaintiff averred that it has faithfully paid rent as and when they fall due; that it intended to carry out certain aspect of its business on the property but its agent upon a visit thereon



discovered that the Defendants had taken up occupation and set up slum dwellings and that the Defendants have no claim on the suit property and have, despite several requests, refused to vacate the same.

10. The Defendants filed a Defence on 30th October, 2012 wherein they denied the assertions by the Plaintiff averring that they have been in occupation of the suit property for a period exceeding 12 years and have subsequently acquired prescriptive rights by way of adverse possession.
11. Both matters proceeded by way of Affidavit evidence which I have highlighted above.

Submissions

12. The Plaintiffs, through counsel, filed submissions on 11th February, 2022. Counsel submitted that the Plaintiffs have been on the suit property since 1989, uninterrupted and without the authority of the Defendant who had 12 years till the year 2001 to recover possession of the land under Section 7 of the [Limitation of Actions Act](#).
13. Having failed to do so, it was submitted, the Defendant is barred from recovery of the suit property; that the verbal notice to the Plaintiffs to vacate the suit property given on 18th November, 2011 and Nairobi ELC 398 of 2012 lodged to recover possession could not resuscitate the Defendant's claim to the suit property and that the Defendant's proprietary interest in the suit property was extinguished under Section 17 of the [Limitation of Actions Act](#).
14. Counsel for the Plaintiffs submitted that the Defendant could only hold the suit property as a trustee to the Plaintiffs under Section 18 of the Limitations of Actions Act and that the Plaintiffs are entitled to the orders sought in their Originating Summons, and to the registration of their interests under Sections 37 and 38 of the Limitations of Actions Act.
15. The Defendant did not file submissions.

Analysis and Determination

16. Having considered the pleadings in both suits, the only issue that arise for determination is;

i. Whether the Plaintiffs have acquired the suit property by way of adverse possession?

17. Vide their respective suits, the parties herein claim proprietorship of the suit property and seek to protect their attendant rights thereto. The Plaintiffs in ELC 665 of 2011 (O.S) claim the suit property by way of adverse possession whereas the Plaintiff in ELC 398 of 2012 asserts that it is the registered proprietor and owner of the land.
18. It is a cardinal principle of law that he who alleges must prove. This position is succinctly captured in Sections 107, 109 and 112 of the [Evidence Act](#). The said Sections of the [Evidence Act](#) provides as follows:

“

- “(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”



And Sections 109 and 112 of the same Act states as follows:

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

“112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

19. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M’Nabea vs David M. Wachira* [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’airanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:

““Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

20. In the present case, the parties agreed to dispose of the matter by way of Affidavit evidence and as such no oral testimony was rendered. Whereas the Plaintiff in ELC 665 of 2011 did so, no affidavit was filed by the Defendant either to controvert the Plaintiffs’ case in ELC 665 of 2011 or in support of its case in ELC 398 of 2012. It has been said time without number that pleadings do not constitute evidence.

21. The Court in *CMC Aviation Ltd vs Cruise Air Ltd (1)* [1978] KLR 103, cited with approval by the Court of Appeal in *Charterhouse Bank Limited (Under Statutory Management) vs Frank N. Kamau* [2016] eKLR stated thus:

“Pleadings contain averments of the three concerned until they are proved or disproved, or there is admission of them or any of them by the Parties they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence...”

22. Indeed, Section 3 of the *Evidence Act* defines ‘evidence’ to mean:

“Evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigation is proved or disproved, and without prejudice to the foregoing generally includes statements by Accused persons, admission and observation by the Court in its Judicial Capacity.”



23. What are the consequences of a party failing to adduce evidence? In *Trust Bank Ltd vs Paramount Universal Bank Ltd & 2 Others* Nairobi HCC 1243/2001 it was held that:

“It is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings.”

24. In view of the foregoing, it follows that the Plaintiff in ELC 398 of 2012 not having adduced any evidence, either orally or by way of an affidavit, has failed to establish its case on a balance of probabilities and the same fails.

25. The Court will now proceed to consider the merits of ELC 665 of 2011 (OS) and in doing so will be guided by the fact that the Plaintiffs’ case is uncontroverted by the Defendant who did not file any reply to the Originating Summons.

26. As aforesaid, the Plaintiffs claim proprietorship of the suit property by way of adverse possession. To begin with, it is undisputed that the Defendant is the registered owner of the suit property. This ownership forms the foundation of the Plaintiffs’ claim, who have asserted that having occupied the Defendant’s property for more than 12 years, they have extinguished the Defendant’s rights thereto.

27. The doctrine of adverse possession is provided for under Section 7 of the *Limitation of Actions Act*, which states –

“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.”

28. The *Limitation of Actions Act* makes further provision for adverse possession at Section 13 that:

“(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 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.”

29. Section 17 of the Act further states;

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”



30. Finally, Section 38(1) and (2) provides as follows:

- “(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.
- (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”

31. The net effect of the aforesaid provisions of the law is to extinguish the title of a proprietor of land in favour of an adverse possessor at the expiry of 12 years.

32. In discussing the concept of adverse possession, the Court of Appeal in the case of *Richard Wefwafwa Songoi vs Ben Munyifwa Songoi* [2020] eKLR stated thus;

“Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It must start with a wrongful dispossession of the rightful owner.”

33. The doctrine was further discussed in the Court of Appeal in the case of *Mtana Lewa vs Kahindi Ngala Mwangandi* (2015) eKLR where the court stated as follows:

“Adverse possession is essentially a situation where a person takes possession of land, 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 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 or stealth or 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.”

34. In discussing the essential elements in a claim for adverse possession, the Court of Appeal in the case of *Richard Wefwafwa Songoi* (supra) stated thus;

“A person who claims adverse possession must inter alia show:

- (a) on what date he came into possession;
- (b) what was the nature of his possession;
- (c) whether the fact of his possession was known to the other party;
- (d) for how long his possession has continued; and
- (e) that the possession was open and undisturbed for the requisite 12 years.”

35. This position was further enunciated by the Court of Appeal in *Wines & Spirits Kenya Limited & another vs George Mwachiru Mwangi* [2018] eKLR wherein court observed as follows;

“...It therefore follows that the onus is on the person or persons claiming adverse possession to prove that they have used this land which they claim as of right. This is the Latin maxim of *nec vi, nec clam, nec precario* (which means that the occupation of the land must have no



force, no secrecy, no evasion). Accordingly, the respondent herein was beholden to not only show his uninterrupted possession, but also that the 1st appellant had knowledge (or the means of knowing) actual or constructive of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration.”

36. The duty of the court in determining a claim for adverse possession was discussed by the Court of Appeal in the case of Solomon Muathe Mitau & 787 others vs Nguni Group Ranch [2017] eKLR which cited with approval the case Kweyu vs Omuto, Court of Appeal, Civil Appeal No. 8 of 1990 wherein the court stated;

“In deciding the issue of adverse possession, the primary function of a court is to draw inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of facts, the question of whether that possession is adverse or not is a matter of legal conclusion to be drawn from the findings of facts.”

37. The Court will be so guided. The first point of determination is when the Plaintiffs dispossessed the Defendant the suit property. Vide the Affidavit of 17th November, 2011 in support of the Originating Summons, Ms Martha Munini averred that she and her co-Plaintiffs entered the land in 1989. This disposition, given on oath, was neither challenged nor controverted.

38. The Defendant has not rendered an alternative explanation as to how the Plaintiffs came into possession of the suit land. For the aforesaid reasons, this court is left with no alternative but to believe the evidence adduced by the Plaintiffs and make a finding that they took possession of the suit property in 1989.

39. It is trite that by virtue of Sections 7 and 38 of the *Limitation of Actions Act*, a claim for adverse possession can only lie once an individual has been on the property for the statutory period of 12 years.

40. The next issue to be addressed by the court is when did time begin to run for purposes of the Plaintiffs’ claim of possession? In addressing this issue, the Court of Appeal in the case of Solomon Muathe Mitau & 787 Others vs Nguni Group Ranch [2017] eKLR stated;

“As regards the period of possession, time begins to run when there is some person in adverse possession of the land and not by virtue of the fact that the land is vacant. In respect of registered land, adverse possession dates from the granting of the certificate of title, for that is when the title holder is prima facie entitled to possession and therefore entitled to take action against any intruder to the land.”

41. The Plaintiff produced the official search for the suit property. The search indicates that the Defendant was registered as the owner of the suit property on 1st July, 1988. The Plaintiffs took possession of the land almost immediately thereof for. That being the case, the Defendant’s right to the suit property was extinguished in the year 2001. By the time the Defendant issued a vacation notice and instituted ELC 398 of 2012, the Plaintiffs had been on the suit property for more than 20 years.

42. As to whether the Plaintiff’s possession of the suit property was “nec vi, nec clam, nec precario,” that is, peaceful, open and continuous and with the necessary animus possidendi, or desire to acquire the land as their own, there can be no doubt about that. The deponent adduced photographs showing the extensive developments by the Plaintiffs, which must have been undertaken over time and openly and which any diligent owner ought to have been aware of.



43. In the end, the Court finds that the Plaintiffs have brought themselves within the confines of the law under the doctrine of adverse possession and are therefore entitled to the orders sought. Having found in favour of the Plaintiffs' claim for adverse possession, it follows that the Defendant's rights to the suit property have been extinguished.
44. For those reasons, the court makes the following orders;
- a. The Plaintiff's suit being ELC 398 OF 2012 is hereby dismissed with no order as to costs.
 - b. The Originating Summons dated 17th November, 2011 in ELC No.665 of 2011 (O.S) be and is hereby allowed in the following terms;
 - i. A declaration be and is hereby issued that the Plaintiffs are entitled to be registered forthwith as owners of L.R No 9042/130 having acquired the same by virtue of adverse possession.
 - ii. An order be and is hereby issued vesting L.R No 9042/130 in the Plaintiffs.
 - iii. An order of permanent injunction is hereby issued restraining the Defendant, its employees, servants, agents, or any person claiming through them from evicting the Plaintiffs from the parcel of land known as L.R No 9042/130 or from fencing the suit land or interfering with the Plaintiffs' possession of the same or alienating, transferring, disposing and/or dealing with the suit land in any manner whatsoever.
 - iv. Each party shall bear his/its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 26TH DAY OF JANUARY, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Ms Kiprop for Ndede for Defendant

Mr. Otieno for Ombwayo for Plaintiff

Court Assistant - Valentine

