



**Gikandi & another ((Suing as the attorney and on behalf Sarah Wamuthenya)) v Katana
(Environment & Land Case 89 of 2019) [2023] KEELC 849 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 849 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 89 OF 2019
MAO ODENY, J
FEBRUARY 16, 2023**

BETWEEN

**VIOLET MUTHONI GIKANDI (SUING AS THE ATTORNEY AND ON
BEHALF SARAH WAMUTHENYA) 1ST PLAINTIFF
SARAH WAMUTHENYA 2ND PLAINTIFF
(SUING AS THE ATTORNEY AND ON BEHALF SARAH WAMUTHENYA)**

AND

LAWRENCE KAZUNGU KATANA DEFENDANT

JUDGMENT

1. By way of a Plaint dated 18th October 2018, the Plaintiff sought judgment be entered against the Defendant for: -
 - a. An eviction order compelling the defendant by himself/servants/agents to vacate from the suit property and/or in any other manner interfering with the indefeasible rights of ownership of the plaintiff over the suit property plot number Gede/Mijomboni/316.
 - b. Costs of this suit.
2. PW1 adopted her witness statement and stated that she was at all material times the registered owner of that parcel of land known as Gede/Mijomboni/316 and that she had employed the Defendant to work in the suit property in the year 1995 until on 18th October 2013 when she terminated the employment.
3. That the Defendant has since refused to vacate the suit property, instead he has continued to destroy the suit property by burning charcoal and destroying crops thereon which prompted the Plaintiff to institute criminal proceedings against the Defendant in Malindi Criminal Case No. 904 of 2018.



4. PW1 testified that her daughter Sarah Wamuthenya bought the suit property on 16th May 1993 from one Jane Wanjiru and produced a copy of transfer dated 26th May 1993 and title document.
5. PW2 told the court that he was the one who introduced the Defendant to work for the Plaintiff.
6. DW1 admitted that he stays on the suit property which belongs to the Plaintiff and that he has lived thereon for 38 years. On cross examination, he stated that he was the caretaker for the previous owner, Jane Wanjiru and further stated that the Plaintiff got into the suit property in 1995 and employed him as a caretaker as well.
7. DW1 filed a counterclaim and claimed that he has acquired the suit land vide adverse possession and urged the court to issue an order compelling the Land Registrar, Kilifi to cancel the name of the Plaintiff on the title and replace the same with his.
8. The Plaintiff submitted that she has established that she is the bonafide owner of the suit property and that by virtue of Section 24 and 26 of the Land Registration Act, she was entitled to the prayers sought. She added that the claim for adverse possession could not hold since the Defendant's occupation was not notorious but permitted. That in any case, time would only start to run after the Defendant's employment was terminated.

ANALYSIS AND DETERMINATION

9. The issues for determination are as to whether the Plaintiff is entitled to the prayer for eviction of the Defendant and whether the Defendant's claim for adverse possession is merited.
10. The Plaintiff produced proof as the registered owner of the suit land which was confirmed by the Defendant who laid a claim for adverse possession. A claimant of adverse possession must first acknowledge ownership of the suit land to which he or she claims to have been entitled to by the operation of the law. This is proof that the plaintiff is the owner of the suit land.
11. Section 24(a) of the Land Registration Act provides as follows:

Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.
12. Section 26 (1) of the Land Registration Act further provides as follows:

The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

 - a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
13. It is clear that the law is extremely protective of titles and the only instances that a title can be challenged is on grounds of fraud and where the title has been acquired illegally, unprocedurally or through a corrupt scheme. There was no evidence of fraud as the Defendant has faith that the titled was acquired legally to lay claim for adverse possession.



14. I find that the Plaintiff has proved her claim as an owner who is entitled to peace and quiet to enjoy the suit property.
15. On the issue whether the Defendant has proved that he has acquired the suit land by adverse possession, the doctrine of adverse possession is one of the ways of acquiring land. Section 7 of the Limitation of Actions Act provides:

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
16. In the case of *Mbira v Gachubi* (2002) IEALR 137 the court held that: -

“.....a person who seeks to acquire title to land by the method of Adverse Possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive and Adverse use by him or those under whom he claims for the statutory prescribed period without interruption....”
17. Similarly, in *Jandu v Kirplal & Another* (1975) EA 225, it was held:

“.....to prove title by Adverse Possession, it is not sufficient to show that some acts of Adverse Possession must be adequate in continuity, in publicity and in extent to show that it is Adverse to the owner. It must be actual, visible, exclusive, open and notorious.”
18. The Defendant must therefore show that he has been in continuous Possession of the land for 12 years or more without the authority of the owner; that such Possession has been open and notorious to the knowledge of the owner and that he has asserted a hostile title to the owner of the property.
19. In the present case, it is not disputed that the suit property is registered in the name of the Plaintiff. Indeed, the Defendant admitted as much. The Defendant also admitted at the hearing that he was employed as a caretaker by the previous owner and the Plaintiff when she bought the suit property in 1995. It is therefore clear to me that the Plaintiff had authorized the Defendant's stay on the suit property, well at least until 2013 when the employment contract was terminated. Time would therefore start to run in 2013. This suit having been filed in 2019, the claim for adverse possession cannot succeed. The upshot is that the Defendant's counterclaim is dismissed with costs.
20. The Defendant to give vacant possession within 30 days failure to which ejection notice to issue.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF FEBRUARY 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.

