



**Karisa & Family v Mwachadzi (Environment & Land Case 183 of 2015)
[2022] KEELC 14547 (KLR) (1 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14547 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 183 OF 2015
MAO ODENY, J
NOVEMBER 1, 2022**

BETWEEN

KARISA KAHINDI KARISA & FAMILY PLAINTIFF

AND

MWALIMU HAMISI MWAHADZI DEFENDANT

JUDGMENT

1. By a Plaint dated September 28, 2015 the Plaintiffs herein sued the Defendant seeking the following orders that judgment be entered against the Defendants for:-
 - a. A Declaration that the part of the suit property known as Plot number 1665/III/MN CR No 22460 measuring approximately 1.344 Ha.
 - b. The Plaintiff to be allowed to utilize his land which he was illegally evicted by the Defendant
 - c. General damages for demolition of the Plaintiff's houses on the suit property.
 - d. Costs of the suit from the date of filing.

Plaintiff's Case

2. PW1 Karisa Kahindi Karisa adopted his written statement dated April 12, 2021 as evidence in chief and testified that he got into the suit property in 1978. That he was working for his mother who in turn was working for one Ali Mkoma, who was the original owner of the suit property.
3. PW1 stated that he entered into an agreement with the said Ali Mkoma who gave him a portion of the suit property for a consideration of Ksh 5,000/- and 3 goats. That upon Ali's demise, the Defendant demolished his house without any notice to vacate the suit property.



4. On cross examination, the Plaintiff stated that he did not know the title number of the land he lived on but he was certain it was the suit property and reiterated that the Defendant found him residing on the suit property.
5. PW2 Antony Charo Fondo equally adopted his written statement dated April 12, 2021 and testified that as a village elder, he knew all his neighbors, the Plaintiff being one of them and whom he had known since the 1970s while he was staying on the suit property.
6. On cross examination, the witness testified that he started living in the area in 1972 and that was the same year the Plaintiff moved into the suit property. PW2 added that he knew the said Ali Mkoma and that he entered into an agreement for sale of a portion of the suit property with the Plaintiff.
7. Similarly, PW3 Karisa Kombe the Plaintiff's neighbor adopted his written statement dated April 12, 2021 as evidence in chief and told the court on cross-examination that the suit property belonged to the said Ali Mkoma and that he moved to his plot located around the suit property area in 1980.
8. PW 4 Mtengo Kalama Nguwa, a resident of Majengo Kanamai and the Plaintiff's neighbor told the court that he witnessed the demolition of the Plaintiff's house and according to him the suit property belonged to one Ali Mkoma but he was not aware of the relationship between Ali and the Defendant.

Defendant's Case

9. DW1 Mwalimu Hamis Mwhadzi also adopted his written statement dated April 25, 2016, and produced documents as Dex No 1 to 18 and testified that the suit property belonged to his mother and grandmother. It was his testimony that upon their demise, the suit property was transferred to him and his siblings being the only surviving beneficiaries. DW1 also stated that he did not know the Plaintiff but knew his brother who had requested for a temporary place to stay.
10. It was DW1's evidence that he was at one point charged in court in relation to the suit property but the case was dismissed. He further stated that the Office of the Director of Criminal Investigation wrote a letter to the DCI Kilifi to investigate the matter which was concluded in favour in his favour. DW1 admitted that the Plaintiff was in occupation and that he would wish to go back to the suit property.
11. On cross examination, the Defendant testified that the said Ali was his uncle and that he inherited the suit property together with his mother. He added that the Plaintiff's wife was allowed to be on the suit property by his grandmother but he (the Defendant) confirmed that he was not present when that agreement was made. That his efforts to settle the matter amicably have been frustrated by the Plaintiff.
12. DW1 further stated that the suit had been instituted against the Defendant herein and two others who were eventually struck out of this suit by this Court on June 25, 2020 and therefore the suit proceeded as against the present Defendant only.
13. It was DW1's testimony that the suit property was subdivided into two Plot Nos 10468 CR 65550 and 10469; and the former registered in the names of the four siblings and the latter in the name of a purchaser, Steven Munga Mungae.
14. DW1 stated that prior to his mother and grandmother's demise, one Nzingo Karis had requested for a place to stay while she sourced for a place of her own and that shortly after the said Nzingo was conditionally permitted to construct a temporary house on the suit property, her husband, now the Plaintiff, joined her.
15. DW1 urged the court to dismiss the Plaintiff's suit and enter judgement as per his counterclaim with costs.



Plaintiff's Submissions

16. Counsel submitted that an eviction process ought to be fair and as such, a notice of eviction ought to be issued in accordance with Section 152 E of the [Land \(Amendment\) Act, 2016](#) and relied on the case of [Benson Wekesa Milimo v National Land Commission & 2 others](#) [2021] eKLR; [Ali Abdi v Rhine Forwarders Limited & 2 others](#) [2020] eKLR.
17. Counsel further cited the cases of [Wambugu v Njuguna](#) [1983] KLR 173, [Mbira v Gachubu](#) [2002] 1EALR; and [Peter Okoth v Ambrose Ochido Andajo & another](#) [2021] eKLR, where the doctrine of adverse possession was explained.
18. Mr Komora submitted that the Plaintiff was entitled to the suit property having demonstrated that he has been in continuous occupation of the same for a period longer than 12 years.
19. Counsel for the Defendant identified two issues for determination namely, who is the is the rightful owner of plot No 1665/III/MN CR No 25460 and whether the plaintiffs have any right of possession under the doctrine of adverse possession.
20. Counsel submitted that in the absence of any contrary evidence challenging the Defendant's title, the Defendant's interest in the suit property was therefore protected under Section 24 (a) and 26 (1) of the [Land Registration Act, 2012](#). That the suit property no longer exists by virtue of the subdivision.
21. Mr Chebukaka submitted that the Plaintiff had not satisfied the conditions to be met in a claim for adverse possession and could not therefore have any right of possession under the doctrine of adverse possession.
22. Counsel relied on the cases of [Kweyu v Omutut](#) [1990] KLR 709 quoted in the case of [M'Mbaoni M'thaara v James Mbaka](#) [2017] eKLR; and [Richard Wefwafwa Songai v Ben Munyifwa Songai](#) [2020] eKLR.

Analysis and Determination

23. It is trite that a party claiming adverse possession ought to prove that the possession is without force, without secrecy and without the authority or permission of the owner of the said property for over 12 years.
24. Further it is also trite that in order to establish adverse possession, a party has to demonstrate exclusive possession, adverse rights of the title owner and the intention to possess it. Adverse possession is essentially a situation where a person takes possession of land and 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, is twelve (12) years.
25. This doctrine in Kenya is embodied in Section 7 of the [Limitation of Actions Act](#), which states that: -

“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.”
26. 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 afresh 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.”

27. Section 38(1) and (2) states; -

- “(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.

28. The issue for determination is whether the Plaintiff has acquired the suit land by way of adverse possession. The Court of Appeal in *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 no 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.”

29. The Plaintiff stated that he entered the suit land in 1978 and further entered into an agreement with the one Ali Mkoma who gave him a portion of the suit property for a consideration of Kshs 5,000/- and 3 goats. That upon Ali’s demise, the Defendant demolished his house without any notice to vacate the suit property.
30. The Plaintiff’s entry was with permission of the land owners and that the Plaintiff admitted that he was evicted which means that his occupation was interrupted and further that it was not continuous and peaceful and per the principles of adverse possession. The Plaintiff is bound by his pleadings.
31. I find that the Plaintiff has not proved that he has acquired the suit land by way of adverse possession and hence his case is dismissed and the Defendant’s counter claim is allowed with costs.



DATED, SIGNED AND DELIVERED AT MALINDI THIS 1ST DAY OF NOVEMBER, 2022.

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.

