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Date Delivered:	28 Mar 2022
Case Class:	Civil
Court:	Environment and Land Court at Malindi
Case Action:	Judgment
Judge:	Mugo David Mwangi
Citation:	David Oloo Miruka & 2 others v Embalands Investments Ltd [2022] eKLR
Advocates:	Mr. Nyamu for the Plaintiffs Mr. Gichigi for the Defendant
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Kilifi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Plaint dismissed
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI**

**ELC CASE NO. 2146 OF 2007**

**DAVID OLOO MIRUKA.....1<sup>ST</sup> PLAINTIFF**

**VULUKU NEBERT.....2<sup>ND</sup> PLAINTIFF**

**PHILIP MUTUKU MUTUSE.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**EMBALANDS INVESTMENTS LTD.....DEFENDANT**

**JUDGEMENT**

**Background.**

1. This is a judgement in respect of the counter-claim by the 3 Plaintiffs against the Defendant. The Defendant, Embalands Investment Ltd, had filed a case against the Plaintiffs but the same was on 29<sup>th</sup> November 2021 dismissed by the Court. The Plaintiffs were therefore allowed to proceed with their counter-claim.

2. The 3 claimants who were originally the Defendants in this case refer to themselves as “the Plaintiffs” in their amended counter-claim (amended on 2<sup>nd</sup> December 2019). In this judgement, and in order to avoid confusion, I will refer to them as such. So, whenever I mention the 1<sup>st</sup>, 2<sup>nd</sup> & or 3<sup>rd</sup> Plaintiffs, I will be referring to David Oloo Miruka, Vuluku Nebert and Philip Mutuku Mutuse respectively. The Defendant for purposes of this judgement will be Embalands Investment Ltd.

3. The Plaintiffs’ claim against the Defendant is as stated in the amended counter-claim of 2.12.2019. The Plaintiffs pray against the Defendant for orders:

*i. That the Defendants title to that parcel of land known as L.R No. 13416 situated at Embakasi in Nairobi measuring 0.400 hectares (hereinafter referred to as the suit property) be deemed to have extinguished through adverse possession by the Plaintiffs herein jointly and severally.*

*ii. That the Plaintiffs herein jointly and severally be declared and registered as the proprietors of the lease known as L.R No. 13416 and the defendant herein be ordered to transfer the title to the said 0.400 hectares of land to the plaintiffs.*

*iii. That in the alternative the title of L.R No. 13416 be held in trust for the Plaintiffs herein against the defendant.*

*iv. General damages*

*v. Costs and interests of the suit on the counter claim*

4. The Plaintiffs’ claim is that they have jointly and severally been in continuous, peaceful and uninterrupted occupation of the suit property – L.R No. 13416, each occupying a portion measuring 33x66 feet, from February 1992 until the date of filing the suit. They therefore aver that they have acquired title to the suit property by way of adverse possession against the registered owner.

5. The Plaintiffs further in their amended counter claim state that they have the physical control of the suit property. It is their case

that the previous owner of the suit property, Shreeji Enterprises Ltd knew of their occupation of the suit property but allowed them to continue in occupation without any disturbance and or interference.

6. The Defendant filed its statement of defence to the counter claim dated 10<sup>th</sup> November 2021. The Defendant denies the plaintiffs' claim. The defendant avers that at the time it purchased the suit property, the same was vacant.

7. The Defendant states that the only structures they found were on the road reserve next to the suit property which had slightly encroached onto the suit property on about a sixteenth of the suit property. The said structures were thereafter burnt down and the Defendant took full possession of the land.

8. The Defendant states that it subdivided the land into several portions, surrendered the mother title and new titles were issued in respect of the new parcels created. The new parcels were all sold and transferred to new owners. The Defendant therefore has no further interest in the suit property. In fact, the said title is non-existent in any event.

### **The Plaintiff's Case.**

9. This case proceeded to full hearing of the Plaintiffs' counter-claim. All the 3 Plaintiffs gave their testimonies before the court. The Defendant on his part did not call any witness.

10. The Plaintiffs adopted their respective witness statements as their evidence in chief.

11. PW1 David Oroo Miruka testified that they settled on the suit property in 1992 when they were working with Chief Mutuiri, then the chief of the area, as his youths (or youth wingers). The chief sub-divided the suit property and gave each of the Plaintiffs a plot measuring 33x66 feet.

12. Sometimes in 1999 or thereabout, a group known as Joy Women group took over the suit property alleging that they had been allocated the land by the late President Moi. The group sub-divided the suit property into plots for its members but fortunately included the plaintiffs herein and allocated each of them a plot but for a consideration.

13. Joy Women Group sold the plots to the Plaintiffs at Kshs. 40,000/= each. The Plaintiffs actually paid the consideration of Kshs.40,000/- and were, after making the said payment (of Kshs. 40,000/- for every plot) issued with certificates No. 458, 459 and 462 respectively, in the name of Joy women Group. The plot numbers issued to them were C91, C92 and C95 respectively, in mid-2003.

14. In December 2005, there was intrusion from some unknown people into the Plaintiffs' plots when the house of the 3<sup>rd</sup> Plaintiff, Philip Mutuku Mutuse was burnt down to ashes. The Plaintiffs reported the incident at Embakasi Police Station complaining against a suspect by the name of Omosa. The 3<sup>rd</sup> Plaintiff with the assistance of police tried to rebuild his house but it was pulled down and the suit property fenced off. The 3<sup>rd</sup> Plaintiff was arrested and charged with a criminal case; with the offence of malicious damage to property and other cases thereafter.

15. The evidence of the 1<sup>st</sup> Plaintiff was replicated by the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs.

### **Court's Directions**

16. Upon the close of the hearing, the court directed parties to file written submissions. The parties complied and filed their respective submissions. The court has had the opportunity to peruse the submissions.

### **Issues for Determination**

17. Having considered the pleadings filed by the parties in this case, the testimonies presented by the Plaintiffs and the submissions filed, this court is of the view that the issues for determination in this case are:-

*i. Whether the Plaintiffs have made a case of adverse possession of the suit property against the Defendant.*

ii. *What is the implication of the failure by the Plaintiffs to sue the current registered owner(s) of the suit property''*

iii. *Whether the plaintiffs are entitled to the orders sought.*

iv. *Whether the Plaintiffs are entitled to general damages for malicious prosecution and unlawful arrest.*

### **Analysis and Determination**

**A. Whether the Plaintiffs have proved a case of adverse possession of the suit property.**

18. The Defendants in their submissions cited the case of **Peter Okoth vs Amrose Ochido Andajo and Benedict Odhiambo Oketch (2021) eKLR** where the court in defining what amounts to adverse possession referred to the Court of Appeal decision in **Wilson Kazungu Katana & 101 others vs Abdalla Bakshwein & Another (2015) eKLR**.

19. The court stated that for a claim of adverse possession to succeed,

*i. The subject parcel of land must be registered in the name of a person other than the Applicant;*

*ii. The applicant must be in open and exclusive possession of that piece of land in an adverse manner to the title of the owner; and*

*iii. The Applicant must have been in occupation for a period in excess of twelve (12) years having dispossessed the owner or there having been discontinuance of possession by the owner.*

20. The Court of Appeal in the Wilson Kazungu Katana case (supra) went on to discuss other decided cases on the concept of adverse possession citing the case of **Kasuve Vs Mwaani Investments & Wanje Vs Saikwa**.

21. The court elaborated that a claimant must prove that he has been in exclusive possession of the land openly and as of right and without interruption for a 12 years either after dispossessing the owner or by discontinuance of possession by the owner on his own volition.

22. In the Wanje case, the court expressed the view that in order to acquire title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it.

23. Dispossession constitutes of acts done which are inconsistent with the proprietor's enjoyment of the soil for the purpose for which he intended to use. Therefore, a person who occupies another's person's land with that person's consent, cannot be said to be in adverse possession as in reality he has not dispossessed the owner of the land and his possession is not illegal.

24. The Indian Supreme Court decision in the case of **Kamataka Board of Wakf vs Government of India & Others (2004) 10 SCC 779** emphasized the well settled principle that a party claiming adverse possession must prove that his possession is "*nec vi, nec clam, nec precario*" meaning, peaceful, open and continuous.

25. The Plaintiffs' submissions is that they started living on the suit property in 1992, when they were youths working for a chief by the name of Mutuiri. The chief allocated them each a plot measuring 33x66 feet on the suit property. They averred that they built temporary houses on the plots thus allocated.

26. The Plaintiffs submitted that in 1992, when they started living on the suit land, the owner of the land was Shreeji Enterprises Ltd. Their case is that the entry into the land was without the consent of Shreeji Enterprises Ltd.

27. The Plaintiffs claim that their possession of the suit property was exclusive, open and without interruptions from 1992 until sometime in 2005 when the 3<sup>rd</sup> Plaintiff's house was burnt down. They therefore assert that having occupied the suit property for the period of over 12 years uninterrupted from 1992, they became the adverse owners of the land in 2004.

28. The Plaintiffs affirm the legal position that a claimant's claim runs against the title and not necessarily against the current holders of the title. The change of ownership therefore, from Shreeji Enterprises Ltd to the Defendant in this case cannot defeat their claim. Their claim is recognized in law as an overriding interest. The Plaintiffs cited the case of Mweu vs Kiu Ranching & Farming Co-operative Society Ltd (1995) eKLR that was cited in the case of Chevron (K) Ltd vs Harrison Charo wa Shutu (2016) eKLR. The Court stated that:-

*“Adverse possession is a fact to be observed upon the land. It is not to be seen in the title even under Cap 300. A man who buys land without knowing who is in occupation of it risks his title just as he does if he fails to inspect his land for 12 years after he had acquired it.”*

29. The court notes that the Plaintiffs did not provide any material evidence, other than their oral testimonies, to confirm that they actually entered into the suit property in 1992. They too did not call an independent witness verify their claims. Amongst the exhibits they produced in support of their claim are two letters allegedly from the chief, Mukuru Kwa Njenga location, being PE1 and PE8 respectively.

30. PE1 is an undated letter written to confirm that David Oloo Miruka hails from the chief's area of jurisdiction. PE 8 is dated 12/01/2010 written by a chief by the name Joseph C Chepkwony to confirm that Nebert Vuluku Amugavo hails from his area of jurisdiction in Lucky Summer area near pipeline since 1992 on Block L.R No. 13416.

31. The Chief's letters are not addressed to any specific person. They are addressed “To whom it may concern”. The only logical inference is that the said letters were prepared for purposes of assisting the Plaintiffs in their case. They do not however explain the basis of the information therein. Nothing would have been easier than calling the chief as a witness in their case.

32. The Plaintiffs' had filed a further list of bundles of documents dated 2<sup>nd</sup> February 2015 where they had attached a number of documents including bundle of receipts for construction materials. In their testimonies however, none of the Plaintiffs referred to any of the documents in this further list and bundle of documents. The documents then are therefore of no evidential value.

33. The Practice directions on proceedings in the Environment and Land Courts and on proceedings relating to the environment and the use and occupation of, and title to land and proceedings on other courts, issued under gazette Notice No. 5178 of 25<sup>th</sup> July 2014 (commonly referred to as the Environment & Land Court practice directions), under rule 16 are categorical on the issue of witness statements and documents.

34. Rule 16 states that witness statements should contain sufficient details so that the witness will (at the hearing) adopt his/her statement as his/her evidence in chief. Thereafter only minimal highlighting may be required before the witness is cross-examined.

35. In cases where documents are sought to be produced and relied on, the bundle of documents are required to be chronologically arranged and sequentially paginated. The litigants are reminded that all copies of documents in the bundle of documents must be clearly legible.

36. Finally, and in as much as possible, witness statements shall make sequential reference to the documents by their pages to make it easy for the court and other parties to follow and understand their cases.

37. In this case, the witness statements by the Plaintiffs do not make reference to the documents at all.

38. The Plaintiffs in their submissions have correctly expounded on the law on adverse possession. The case of Wilson Kazungu Katana (Supra) enumerated the essential elements that a claimant under adverse possession must prove to successfully establish such a claim.

39. At paragraph 14 of the submissions the Plaintiff's identified the three elements that they needed to prove, namely: -

*a) That they entered the land without the consent of the owner, or even though they entered the land with the consent of the*

*owner, they continued to occupy the land after the consent had been terminated. The occupation must be for a continuous period of 12 years.*

*b) They have to demonstrate that they had physical possession of the land and they manifested unequivocal intention to dispossess the owner.*

*c) They must prove that their occupation was open, uninterrupted, adverse to the title of the owner and peaceful.*

40. I have keenly followed the Plaintiffs' submissions in respect of the 3 identified elements. Curiously the Plaintiffs have not submitted on the 1999 incident and its legal implications on their claim for adverse possession.

41. According to the testimonies of the 3 Plaintiffs contained in their statements which were adopted as their evidence in chief, in 1999, a group known as Joy Women Group grabbed or took over the suit property and subdivided it into plots for its members. They, fortunately, included the 3 Plaintiffs but required them to pay Kshs.40,000/= in order to get certificates, in the name of the group. The Plaintiffs complied and were accordingly issued with the certificates in the name of Joy Women Group as well as plot numbers in the year 2003. The Plaintiffs exhibited the certificate of David Oloo, (PE1) the 1<sup>st</sup> Plaintiff dated 29<sup>th</sup> June 2003.

42. In the case of Peter Okoth Vs Ambrose Ochido Andajo & Benedict Odhiambo Oketch (2021) eKLR cited by the Plaintiffs in their submissions, the court referred to the court of appeal case of Wilson Kazungu Katana (supra). The Court of appeal went into great details to elaborate the meaning of the phrases "exclusive Physical Possession of the land." The court stated that,

*"Besides adverse entry into the land, the applicants must also demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner. The occupation must be open, uninterrupted, and adverse to the title of the owner, adequate, continuous and exclusive as already stated".*

43. For avoidance of any doubt, the court was categorical that, *'the burden of proving all these is on the person asserting adverse possession.'*

44. In the case of Gabriel Mbui Vs Mukindia Muranya (1993) eKLR Kuloba J (as he then was) methodically outlined the elements to be proved as follows:-

*a) The intruder claiming right by adverse possession must make physical entry and be in actual possession or occupancy of the land for the statutory period (12 years). He explained that adverse possession rests on de facto use and occupation by an entrant.*

*b) The entry and occupation must be with or maintained under, some claim of colour of right or title made in good faith by the stranger seeking to invoke the doctrine of adverse possession as against everyone else. Kuloba J's explanation was that, in other words, the intruder must have some apparent title, the appearance or semblance of title but not the reality of it, for the expression 'colour of right' in law means that which is title in appearance not in reality.*

*c) The occupation of land by the intruder who pleads adverse possession must be non-permissive use i.e. without permission from the true owner of the land occupied. Permissive occupation is inconsistent with adverse possession.*

*d) The non-permissive actual possession hostile to the current owner must be unequivocally exclusive, and with an evinced unmistakable 'animus possidendi', that is to say occupation with the clear intention of excluding the owner as well as other people. Exclusive possession means that the exercise of dominion over the land must not be shared with the disseized owner, the land being in actual possession with intent to hold solely for the possessor to the exclusion of others. It must be shown that the owner has ceased to be in occupation of the land by reason of dispossession or discontinuance of possession.*

*e) Acts of user by the person invoking the statute of limitation to found his title are not enough to take the soil out of the owner or his predecessor in title and to vest it in the encroacher or squatter, unless the acts be done which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.*

*f) The possession by the person seeking to prove title by adverse possession must be visible, open and notorious giving reasonable notice to the owner and the community of the exercise of dominion over the land.*

**45. In my opinion, the actions by the Plaintiffs of paying Joy Women Group the sum of Kshs.40,000/- each in order to be issued with certificates in the name of the group and plot numbers demonstrate that the Plaintiffs acknowledged Joy Women Group as the “owners” of the suit property at that point in time. The Plaintiffs had not asserted their unambiguous claim or dominion over the suit property; otherwise, why would they be buying what they already apparently owned"**

**46. It is obvious that the Plaintiff’s occupation of the suit property was not unequivocally exclusive and with an evidence unmistakable animus possidendi. They had not exercised dominion over the suit property. That explains why the easily ceded authority over the suit property to Joy Women Group. That defeats their allegation of being in exclusive, uninterrupted and continuous possession.**

**47. Accordingly, this court finds that the Plaintiffs have not proved their claim for adverse possession of the suit property in accordance with the law.**

***B. What is the implication of the failure by the Plaintiffs to sue the current registered owner(s) of the suit property"***

48. As stated earlier, the Plaintiffs pray that the defendant’s title to the parcel of land L.R No. 13416 be deemed to have been extinguished and that the Plaintiffs be jointly declared and registered as the proprietors of the land jointly and severally.

49. The Plaintiffs in their submissions at paragraph 43 state that,

*“evidently from the title annexed to the (Defendant’s) bundle of documents at page 21, the (defendant) were registered as the owners of the land on 23<sup>rd</sup> August 2007. Subsequently, on 4<sup>th</sup> September 2012, the registered owner of all the parcel of land known as L.R No 13416 was transferred to one David Muthee as per page 28 of the (defendant’s) bundle of documents.”*

50. The averment by the plaintiffs is a clear indication that they were aware that the Defendant is not the registered owner of the land. They ought to have applied to join into the proceedings the then registered owner, upon discovery of the change of ownership of the land.

51. I too have perused the court proceedings of 29<sup>th</sup> November 2018. The Plaintiffs sought an adjournment on the said date to enable them file an appropriate Application to join the new owner(s) of the suit property into the suit. The court allowed the adjournment but also directed that the Application to join the new owner(s) of the suit property be filed within 30 days from that date failing which the counter-claim would stand dismissed with no orders as to costs. The Plaintiffs did not file the Application within the 30 days, or at all.

52. Despite being aware of the fact that the suit property was no longer in the name of the Defendant the plaintiffs did not take action to join the registered owner(s). The orders sought in this matter if granted would be detrimental to the interests of the current registered title holder(s). It is a well-established principle of law that no person should be condemned unheard.

53. In the case of **Msagha Vs Chief Justice and 7 others (2006) 2 KLR 555**, a 3 Judge Bench of the High Court made some pronouncements which I find worthy quoting herein verbatim. The Court stated that,

*“...the court observes first that the rules of natural justice “audi alteram partem” - hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonization of the globe during the heydays of the British Empire. An essential requirement for the performance of any judicial or quasi-judicial function is that the decision makers observe the principles of natural justice. A decision is unfair if the decision maker deprives himself of the views of the person affected. If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principle of justice. The decision must be declared to be no decision.”*

**54. Failure to join the current registered owner(s) of the suit property in my opinion is such a serious lapse that would invalidate the legality of these proceedings. It is a violation of the cardinal rule of natural justice, that no one should be condemned unheard.**

Justice Mutungi, on 29<sup>th</sup> November 2018 had already pronounced the consequences of the Plaintiffs' failure to join the current registered owner(s) of the suit property. Their suit stand dismissed.

**C. Whether the Plaintiffs are entitled to the orders sought.**

**55. Going by the above finding, that the plaintiffs have not made a case for adverse possession; obviously then, they are not entitled to the orders sought.**

**56. However, there is another aspect of the plaintiffs' case that would have denied them the orders sought irrespective of any other finding.**

**57. The orders sought by the Plaintiffs are inconsistent with their pleadings and evidence adduced before the court.**

**58. In their amended counter-claim, amended on 2<sup>nd</sup> December 2019, the Plaintiffs' claim as stated in paragraph 6 thereof is that, the plaintiffs have been in continuous peaceful and uninterrupted occupation of the suit land L.R No. 13416 in equal portions measuring 33x66 feet each. This position was confirmed during the hearing.**

**59. The suit property L.R No.13416 measures 0.4000 hectares, equivalent of approximately 1 acre. During cross examination, the Plaintiffs confirmed that the whole land L.R 13416 if subdivided into 33x66 feet plots would have about 13-16 such plots. In essence, the total area claimed by the plaintiffs is merely about one fifth (1/5) of the whole land.**

**60. The Plaintiffs' however sought a declaration against the entire parcel of the land. Interestingly, even in their submissions, the plaintiffs insist on the entire parcel of land. The plaintiffs had the opportunity to amend their pleadings but did not exercise that right accordingly. This court's position is that parties are bound by their pleadings. As the plaintiffs' evidence is inconsistent with the orders sought, the court would not grant them the orders anyway.**

**D. Whether the Plaintiffs would be entitled to general damages for malicious prosecution and unlawful arrest.**

**61. Prayer D in the plaintiffs' counter claim was for general damages. The Plaintiffs, at paragraph 54 of their submissions explained that the Defendant through one of its Directors, Yuvinalis Nyabuto, on multiple occasions harassed and caused the Plaintiffs to be arrested and charged with criminal cases being criminal case No. 3224/06, 1138/06, 5785/06 & 2437/07, in an attempt to frustrate them. They seek damages of Kshs.300,000/- each.**

**62. The Plaintiffs allege that the said director caused them to be incarcerated for 1 week awaiting consideration of their bail/bond application.**

**63. I find 3 pronounced weakness in the claim by the Plaintiffs.**

**64. Firstly, a company is a separate legal entity distinct from its directors. Where a director commits a wrong in his own personal capacity, the company is not liable and the director must be held personally liable for such a wrong. The Plaintiffs did not offer any evidence to show that the alleged, Yuvinalis Nyabuto was a director of the defendant company and that he was acting in his capacity as an agent of the company. The Plaintiffs therefore ought to have sued him personally.**

**65. Secondly, in our criminal law regime, the decision whether to arrest or not and to prosecute are in the hands of the police service under the command of the Director of Criminal Investigation and or the Inspector General of Police and the Director of Public Prosecution, respectively. The Director of Public Prosecution and the Police would be necessary parties who must be joined in the proceedings where the Plaintiffs claim general damages for malicious prosecution and unlawful arrest.**

**66. The third weakness is that no evidence was adduced in respect of that claim for damages. The Plaintiffs' Advocate submitted in the written submissions that the Plaintiffs were incarcerated for 1 week as they waited for the bail/bond process in court. This is not supported by any material evidence or testimony of the party.**



67. Accordingly, the Plaintiffs' claim for damages is untenable for lack of evidence in support of it and for the reasons explained above.

68. The conclusion is that the Plaintiffs' counter-claim fails in its entirety. It is therefore dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF MARCH 2022.

M.D. MWANGI

JUDGE

IN THE VIRTUAL PRESENCE OF:-

MS. ESAMI H/B FOR MR. NYAMU FOR THE PLAINTIFFS

MR. GICHIGI FOR THE DEFENDANT

COURT ASSISTANT: HILDA

M.D. MWANGI

JUDGE



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