



REPUBLIC OF KENYA



KENYA LAW
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**Mandano v Mkasa & another (Environment & Land Case 109 of 2017)
[2023] KEELC 16123 (KLR) (15 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16123 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 109 OF 2017
SM KIBUNJA, J
MARCH 15, 2023**

BETWEEN

NINGEMA BAKARI MANDANO APPLICANT

AND

SERAJ MZEE MOHAMED MKASA 1ST RESPONDENT

CHRISTINE MWENDE NGUI 2ND RESPONDENT

JUDGMENT

1. The applicant commenced the proceeding through the originating summons dated the January 7, 2017 seeking for the following orders;
 - “ 1. That Ningema Bakari Mandano become entitled by way of adverse possession to the title in all that parcel of land known as Mombasa/MS/Block 111/304 and Mombasa/MS/Block 111/305.
 2. That Ningema Bakari Mandano be registered as proprietor in common of Mombasa/MS/Block 111/304 and Mombasa/MS/Block 111/305 in place of Seraj Mzee Mohamed Mkasa and Christine Mwende Ngua.
 3. That the Ministry of Lands through the Mombasa District Registrar of Titles do register Ningema Bakari Mandano as proprietor of Mombasa/MS/Block 111/304 and Mombasa/MS/Block 111/305 in place of Seraj Mzee Mohamed Mkasa and Christine Mwende Ngua.
 4. That the costs of this suit be provided for.”

The originating summons is premised on the four (4) grounds on the face that though the respondents are the registered owners of Mombasa/MS/Block 111/304 and 305 each measuring 0.0213 acres, the



suit lands, the applicant has acquired title to the said lands by way of adverse possession following the over 19 years of continuous and uninterrupted occupation and possession of the same since 1997. That the respondents' titles to the said parcels stands extinguished by failing to interrupt the applicant's occupation and possession. The application is supported by the affidavit sworn by Ningema Bakari Mandano on the January 7, 2017 to which is attached inter alia copies of certificates of official searches for the two parcels issued on the November 8, 2016.

2. The respondents were served through substituted service but no appearances or replying affidavits were filed.
3. During the hearing, the applicant was the first to testify on the November 3, 2021. She adopted her filed statement in which she stated that she has lived on the two plots subject matter of this suit with her family for 19 years without any disturbances. That they have buried their relatives there and have never met the respondents who were registered with the said parcels. That in 2012 she had called the respondents through the chief so as to find out how they got registered with the plots but they never appeared. That her family and her are entitled to the plots as the rightful ancestral owners and possessors. The next witness was Batholomew Mwanyungu, a licensed surveyor, who produced his report dated the September 20, 2022 on the extents of the two plots, and the occupancy thereof.
4. The applicant was initially represented by MS M K Mulei & Company Advocates, before the firm of MS Nzamba Kitonga Advocates came on record through the Notice of Change of Advocate dated the July 21, 2022 and filed on the July 25, 2022. The record shows the counsel from the firm of MS. Nzamba Kitonga Advocates appeared or was represented in court on the July 25, 2022, September 27, 2022 and November 10, 2022. The counsel who filed the submissions dated the February 2, 2023, and appeared in court on the February 7, 2023 when judgement date was fixed is from the firm of MS. M. K. Mulei & Company Advocates, yet no notice of their coming back on record has been filed in accordance with Order 9 Rule 5 and 6 of the *Civil Procedure Rules*. The court on its own motion directed the matter to be mentioned on the February 20, 2023 and the two firms of advocates to be served with notice to attend. On that date only Mr. Ochieng for Kitonga advocate attended and clarified that he had filed another submission dated the February 13, 2023 to replace the one filed by MS MK Mulei & Company advocates. The court has noted that, filed with the said submission is a consent letter of the same dated, executed by the two firms of advocates withdrawing the submissions dated the February 2, 2023 and substituting it with that dated the February 13, 2023. The court has therefore considered the said submissions, despite having been filed late and without leave.
5. The issues for the court's determinations are as follows;
 - a. Whether the applicant has been in adverse possession of the whole or part of the two parcels of land for more than twelve (12) years.
 - b. Whether the applicant should be registered as a proprietor of the two parcels.
 - c. Who pays the costs of the originating summons.
6. The court has considered the grounds on the originating summons, evidence tendered, submissions by the learned counsel and come to the following determinations;
 - a. That in prayer 1 of the originating summons dated the January 7, 2017, what the applicant seeks is for a declaration that he is entitled by way of adverse possession to the suit properties. At prayer 2, the applicant seeks to be registered as "proprietor in common" with the suit properties. The rest of the pleadings and affidavit evidence leaves no doubt that what the applicant is seeking is for an order that he had become entitled to be registered as proprietor



of the said parcels by way of adverse possession, for having been in possession of the same for more than twelve years from 1997.

- b. That paragraph 2 of the supporting affidavit by the applicant discloses the sizes [acreage] of the suit properties he was seeking as 0.0213 acres each. That is the same acreage indicated in the certificates of official searches in respect of the parcels dated the November 8, 2016 that are attached to the list of documents. That the applicant testified on the November 3, 2021 and adopted her filed statement as his evidence in chief and produced the documents in the list of documents as exhibits. Thereafter the court made an order for the applicant to get a licensed surveyor to prepare a ground report and the surveyor to be availed to testify.
- c. That thereafter, the ground report dated the January 11, 2022 by Mr Phillip Mulaa, a surveyor with Philomu Mapping Services, was filed with the further list of documents dated the January 19, 2022 by Ms MK Mulei & Company Advocates for the applicant. Another survey report dated the 20th September 2022 by BC Mwanyungu, a surveyor with Pimatech Land Surveyors and Consultants was subsequently filed with the applicant's further list of documents dated the September 27, 2022, through Ms. Nzamba Kitonga Advocates for the applicant. That while the report by Mr Phillip Mulaa does not show the acreages of the properties, that by Mr BC Mwanyungu indicated parcels MS/1/304 and 305 to be 0.9991 Ha [2.47 acres], and 0.9989 Ha [2.47 acres] respectively. The acreages stated in the said report is at variance with that contained in the certificates of official searches referred to earlier above. Mr Mwanyungu testified in court as PW2 on the November 10, 2022 and produced his report as exhibit. The court has noted that Mr Mulaa, the maker of the report dated the January 11, 2022 was not called as a witness and his report has not been produced as an exhibit.
- d. Though the applicant did not in his written statement and oral testimony in court specify the acreage or size of the suit properties that has been in his occupation and or possession for the required period of over twelve years, the fact that certificates of official searches dated the November 8, 2016 that were filed with the originating summons definitely in obedience to the dictates of Order 37 Rule 7(2) of the Civil Procedure Rules, can only be a confirmation of the registered acreages of the parcels of the properties he had sued over. That following the court's direction on the November 3, 2021 that a ground report from a licensed surveyor be obtained, filed and that the surveyor thereof be availed to testify, two reports dated the January 11, 2022 and September 20, 2022 were filed. Thereafter, Mr Mwanyungu testified as PW2, and produced the report dated the September 20, 2022, which is therefore the only report out of the two that the court will give due consideration.
- e. The report by PW2 and his testimony was to help the court confirm what parcel(s) of land and the acreages thereof, that has been under the Applicant's occupation or possession for the prescriptive period. The report does not have any certificates of titles attached to it but indicates under the paragraph headed "Method" that "The observations herein were pointed out by Mr Ningema Bakari (the applicant), her nephew Athumani Msengo and her neighbor Hassan Urema." The court is therefore left wondering whether the parcels of the land which the surveyor found to be about 2.47 acres each and which he prepared his report on, were the same ones whose acreages were indicated as 0.0213 acres on the filed certificates of official search. Neither the applicant nor PW2 tendered or attempted to offer any explanation on the great variance in the acreages of the suit lands on the surveyor's report and the certificates of official search. The applicant could be in occupation or possession of other parcels of land that he took PW2 to, and not the suit properties herein.



- f. That had the report by PW2 have been on the suit lands whose certificates of official searches had been filed with the originating summons, the acreages would have tallied with what was observed on the ground and contained in the report dated September 20, 2022. The court therefore finds and hold that the surveyor's report dated the September 20, 2022 on properties whose acreages were found to be 2.47 acres each has no relationship with the suit lands herein whose acreages is confirmed by the certificates of official searches filed as 0.0213 acres each. The applicant therefore failed to avail a ground report from a licensed surveyor over the suit properties herein, which according to the originating summons, supporting affidavit and certificates of official searches measures 0.0213 acres each.
- g. That even though the respondents herein did not enter appearance, file replying affidavit or participate in the proceeding herein, the applicant was throughout under obligation to prove his claim to the standard required of a balance of probabilities. That burden is set out in sections 107 to 109 of the Evidence Act chapter 80 of Laws of Kenya, and he has failed to discharge it.
- h. That as the respondent did not participate in any way in this proceeding, and the applicant has failed to prove his case, then pursuant to section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya, he will take care of his own costs.
7. That flowing from the above determinations, the court finds the applicant has failed to prove his claim on a balance of probabilities and orders as follows;
- a. The applicant's claim is hereby dismissed.
- b. The applicant will bear his own costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 15th DAY OF MARCH 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Applicant: Absent

Respondents : Absent

Counsel : Mr Ochieng For Kitonga For Applicant.

Wilson – Court Assistant.

