



**Mwangi v Abongotum & another (Environment & Land Case
16 of 2021) [2023] KEELC 17835 (KLR) (30 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17835 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE 16 OF 2021

EK MAKORI, J

MAY 30, 2023

IN THE MATTER OF: PLOT NO. LAMU/HINDI MAGOGONI/699

AND

IN THE MATTER OF: LIMITATION OF ACTIONS ACT CAP 22, LAWS OF KENYA

AND

**IN THE MATTER OF: AN APPLICATION FOR DECLARATION THAT
THE PLAINTIFF HAS OBTAINED OWNERSHIP OF 15 ACRES OR 5.8
HECTERES OR THEREABOUT BY WAY OF ADVERSE POSSESSION**

BETWEEN

JOSEPHAT WANJOHI MWANGI PLAINTIFF

AND

KAMAMA ASMAN ABONGOTUM 1ST DEFENDANT

MESHAKI OMAR MANOTI 2ND DEFENDANT

JUDGMENT

1. Before this court is the plaintiff's originating summons dated August 12, 2021 supported with an affidavit of the plaintiff and filed under section 38 of the *Limitations of Actions Act* Cap 22 and under section 7 the *Land Act*; order 37 rule 7 of the *Civil Procedure Rules* seeking the following orders:
 - a. That the plaintiff is entitled to be declared as proprietor of 15 acres or 5.8 hectares of land, being Plot No Lamu/Hindi Magogoni/699 approximately measuring 5.8 hectares, Registry Map sheet No 1 situate at Hindi, Magogoni in Lamu County by way of adverse possession, after occupying thereon for over 12 years.



- b. That the Plaintiff is entitled to be registered proprietor of 15 acres or 5.8 hectares of land, being Plot No Lamu/Hindi Magogoni/699 and be issued with title document.
 - c. That cost of the suit be borne by the Defendants.
 2. The Defendants did not enter appearance nor place defence. The matter proceeded to full trial ex parte. The initial attempt on service on the Defendants was futile. The court ordered for substituted service by way of advertisement on local daily newspaper with wide circulation.
 3. The Plaintiff averred that he started occupying the suit land in the year 1996 even before the adjudication took place and after the adjudication the Plaintiff has continued staying and cultivating on the said suit land uninterrupted, openly and peaceful with the exclusion of the Defendants. He called his two neighbours to support his claim that he had been on the suit property since 1996.
 4. The Plaintiff contended that there is a time the 1st Respondent attempted to take him to court in Lamu Criminal Case No E276 of 2021 for forcible detainer and trespass he was acquitted after he pleaded the defence of adverse possession as his shield.
 5. The Plaintiff submitted that the elements of adverse possession are:
 - i. That he has been in the suit property for a period more than 12 years.
 - ii. That the said occupation must have been peaceful and continuous
 - iii. That the occupation must be open
 - iv. That the adverse possessor must have entered the suit property with an intention to dispossess the registered owner.
 6. The Plaintiff testified that he took possession of the suit land in the year 1996. From the said year to date, the Plaintiff has been and continues to be in the suit property a period of occupation of more than 12 years.
 7. The Plaintiff has a home fully established, a family with old children and that the property is fully occupied and utilized. His two witnesses asserted and told this court that the Plaintiff herein has been in occupation of the suit property since 1996 and that the said stay has been continuous and very peaceful for all this period.
 8. The Plaintiff relied on the case Wilson Njoroge Kamau v Nganga Muceru Kamu [2020] eKLR to support the position that he is an adverse possessor of the suit property.
 9. The issue for determination is whether the Plaintiff has acquired the suit property by way of adverse possession.
 10. As already stated, the defendants never entered appearance nor file any defence. Much of the Plaintiff's averment and testimony went unchallenged.
 11. As correctly stated in the submissions by counsel for the Plaintiff Mr Komora, and as held in the authorities he cited in support of the Plaintiff's claim for adverse possession, to succeed, it has to be shown that the Plaintiff has been in the suit land *nec vi, nec clam, nec precario*, meaning 'without



force, without secrecy, without permission.’ See also the holding in *Mtana Lewa v Kabindi Ngala Mwangandi* [2005] eKLR:

“ 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.”

12. In *Mbira v Gachubi* [2002] IEARL 137:-

“.....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....”

13. The Plaintiff has demonstrated that he has been in occupation of the suit property for a period straddling over 12 years since 1996. The evidence he tendered before this court has not been controverted. In my view, the evidence I have before me has achieved the threshold of what needs to be proved in order to succeed in a claim of adverse possession. The upshot is that the plaintiff’s claim succeeds in this manner:

- a. That the Plaintiff be and is hereby declared as proprietor of 15 acres or 5.8 hectares of land, being Plot No Lamu/Hindi Magogoni/699 approximately measuring 5.8 hectares, Registry Map Sheet No 1 situate at Hindi, Magogoni in Lamu County by way of adverse possession, after occupation thereon for over 12 years.
- b. That the plaintiff to be registered proprietor of 15 acres or 5.8 hectares of land, being Plot No Lamu/Hindi Magogoni/699 Registry Map Sheet No 1 situate at Hindi, Magogoni in Lamu County and title document be issued to him by the relevant Land Registry.
- c. That since the claim was undefended; there will be no order as to costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 30TH DAY OF MAY 2023.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Komora for the Plaintiff

Court Clerk: Happy

In the Absence of:

Defendants

