



**Mkullu v Hassan & another (Environment & Land Case 89 of 2015)
[2023] KEELC 18306 (KLR) (26 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18306 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 89 OF 2015

SM KIBUNJA, J

JUNE 26, 2023

[FORMERLY MOMBASA HCCC NO 111 OF 2007]

**IN THE MATTER OF THE REGISTERED LAND ACT (CHAPTER 300) OF
THE LAWS OF KENYA AND A PARCL OF LAND KNOWN AS LAND
REFERENCE NUMBER MOMBASA/BLOCK/1083;**

AND

**IN THE MATTER OF THE LIMITATION OF ACTIONS ACT (CHAPTER 21)
LAWS OF KENYA;**

AND

**IN THE MATTER OF THE CIVIL PROCEDURE ACT (CHAPTER 21) LAWS
OF KENYA AND THE RULES ENACTED THEREUNDER**

BETWEEN

MOHAMED ABUSHIRI MKULLU PLAINTIFF

AND

SULEIMAN ABDALLA HASSAN 1ST DEFENDANT

THE ESTATE OF SAID SWELLAM GETHAN SAANUN 2ND DEFENDANT

JUDGMENT

1. The plaintiff commenced this proceeding against the defendants through the originating summons dated the May 8, 2007 seeking for orders that the plaintiff be registered as the absolute proprietor of Mombasa/Block/1083, the suit property, in place of the defendant and another by reason of adverse



possession. The originating summons is supported by the affidavit of Abubakar Abushiri Ahmed, the agent and grantee of power of attorney of the plaintiff, sworn on the May 8, 2007, in which he inter alia deposed that the defendants holds half share each over the suit property under a letter of allotment; that the suit property was hived out of Mombasa/BlockXV11/112, mother property, that belonged to the Goan Community in Mombasa; that the defendants have declined to transfer the suit property to him though he and his family have been living on the said property openly and exclusively, without paying rent for over twenty nine (29) years; that he declined to comply with the only attempt made by the defendants demanding ground rent, through their advocates letter dated July 24, 1986; that the defendants have lost interest over the suit property and it should be registered with him.

2. The pursuant to the 2nd defendant's application dated the April 12, 2010, the plaintiff's suit against the estate of Said Swellam Gethan Saanun, the 2nd defendant, was struck out with no order as to costs through the ruling delivered on the July 17, 2012. This suit was subsequently set down for *viva voce* hearing though the 1st defendant did not enter appearance and or file a reply or defence despite being served with the summons and affidavits of service being filed.
3. The plaintiff testified as PW1 virtually from London on the April 19, 2023. He told the court that he developed a four-bedroom house, three stores and latrine on the suit property in 1963, that is occupied by his tenants. That he had been told the land was in the name of the Goan Community, but a search conducted on the August 1, 2006 confirmed it was registered in the names of the defendants in 1986, each owning a half share. That on the July 24, 1986, the 2nd defendant wrote through his advocate to him to start paying rent for the plot but he declined to pay, and continued occupying the said plot. That he has connected water and electricity to the suit property.
4. The issues for determinations by the court are as follows;
 - a. Whether the plaintiff has established that he has been an adverse possessor of the suit property or a defined portion thereof, for over twelve (12) years.
 - b. Whether the title of the registered owners of the suit property or part thereof, has been extinguished through the plaintiff's adverse possession.
 - c. Whether the plaintiff should be declared the adverse possessor of the suit property or a part thereof, and be registered as the proprietor.
 - d. Who pays the costs in the suit.
5. The court has carefully considered the plaintiff's pleadings, oral, affidavit and documentary evidence and come to the following determinations;
 - a. That from the copy of the certificate of official search issued on the August 1, 2006, that is attached to the affidavit filed with the originating summons, land parcel MSA/Block/xv11/1083, the suit property, measuring 0.0362 hectares was on June 4, 1985 registered in the names of Suleiman Abdalla Hassan and Said Swellem Gethan Saano, each holding half share. The copy of the green card obtained on March 1, 2022, that was produced by the plaintiff as exhibit over the same land confirms the information on the certificate of official search and further shows that the parcel was first registered on the December 11, 1976 in the name of Said Swellem Gethan Saanun before the changes of June 4, 1985 detailed above was made. According to the plaintiff, he had been on the suit land long before the suit property was hived out of the mother title. He had developed a house on it in 1963 and his occupation was never affected or interrupted by the changes on the legal title.



- b. From the available evidence, the plaintiff has been occupying the suit land as of right as evidenced by his refusal to pay the rent demanded by the 2nd defendant vide the letter dated the July 24, 1986. The plaintiff's evidence that he had established the house on the suit property in 1963 has not been disputed. That by the time the 1st defendant became the registered owner of half share of the suit property on the June 4, 1985, the plaintiff was already on the said land and continued being in possession. The court takes note that the 1st defendant did not enter appearance or file a defence to contest the plaintiff's claim, and his title to his half share became extinguished at the expiry of twelve (12) years of the plaintiff's adverse occupation, on or about June 4, 1997. Accordingly, the court finds that the plaintiff has established his claim against the half share portion of the suit property registered in the name of the 1st defendant.
 - c. Further to (b) above, the court finds that the plaintiff is entitled to be registered as the proprietor of the half share of the suit property in place of the 1st defendant. The ownership of the other half share of the suit property should remain as it is as the plaintiff's suit against the 2nd defendant was struck out on the July 17, 2012.
 - d. That as the 1st defendant did not enter appearance, file reply/defence or defend the suit in any way, the court direct that the plaintiff bear his own costs the provisions of section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya notwithstanding.
6. Flowing from above, the court enters judgement for the plaintiff against the 1st defendant and orders as follows;
- a. That a declaration is hereby issued that the title of the 1st defendant to half share of Mombasa/Block xv11/1083, suit property, was extinguished on or about June 4, 1997 by the plaintiff's adverse possession.
 - b. That a declaration is hereby issued that the plaintiff became entitled to be registered as the proprietor of the half share of the suit property in place of the 1st defendant on or about June 4, 1997.
 - c. That an order be and is hereby issued that the plaintiff be registered as proprietor of half share of the suit property in place of the 1st defendant.
 - d. That as between the plaintiff and 1st defendant, no order as to costs is made.
- 7 It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 26TH DAY OF JUNE 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of;

Plaintiff: Absent

Defendant: Absent

Counsel : Mr. Ngumbo for Plaintiff.

Wilson – Court Assistant.

S. M. Kibunja, J.

