



**Ali & 4 others v Centre & 3 others (Environment & Land Case
191 of 2021) [2023] KEELC 18131 (KLR) (20 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18131 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 191 OF 2021
NA MATHEKA, J
JUNE 20, 2023**

BETWEEN

**ALI MOHAMED ALI 1ST APPLICANT
JUMA RASHID MWAMBA 2ND APPLICANT
MOHAMED BAKARI AWADH 3RD APPLICANT
HAMISI MOHAMED OMARI 4TH APPLICANT
NANA HUSSEIN SALIM 5TH APPLICANT**

AND

**SHEIKH ZAYED CHILDREN WELFARE CENTRE 1ST DEFENDANT
NATIONAL LAND COMMISSION 2ND DEFENDANT
LIKONI POLICE STATION 3RD DEFENDANT
COUNTY GOVERNMENT OF MOMBASA 4TH DEFENDANT**

JUDGMENT

1. Plaintiffs/Applicants herein, claim to be the proprietors of Plot Number Mombasa/Block 1/1590, Mombasa by adverse possession for the determination of the following questions;
 - a. Are the Plaintiffs/Applicants entitled to be declared the proprietor of Plot Number Mombasa/Block 1/1590, Mombasa which they have acquired by adverse possession after staying and/or occupying and/or residing on the plot for over 50 years?
 - b. Are the Plaintiffs/Applicants entitled to be registered as the owner of Plot Number Mombasa/Block 1/1590, Mombasa and be issued with a Certificate of Title?
 - c. Are the Plaintiffs/Applicants entitled to costs of this suit?



2. It is based on the grounds that the Plaintiffs/Applicants have been residing in the suit property with their family for well over 50 years. The Defendant/Respondent will not suffer prejudice in anyway if the application is allowed.
3. That even if the 1st Defendant stated that the title deed of the suit premises was lost long ago and a report was made to the police station and an abstract was issued to that effect. (Annexed hereto is a copy of the abstract marked AHD 1). That the Defendant applied for advertisement of the lost title deed and on April 10, 2015, the advertisement was made on the Kenya Gazette vide Notice No 2339. That on October 7, 2015, the Land Registrar entered a record of the Gazette Notice No 2339 and issued the Defendant with Certificate of Lease of the suit property. That the Plaintiffs have not established the grounds for adverse possession because they have not occupied/ possessed the suit land for a period of more than 12 years, uninterrupted and against the will of the Defendants and therefore they cannot claim adverse possession of the suit premises. That on February 15, 2008, the Defendant undertook valuation of the suit premises through Valuation Officer of Mombasa, Mr Victor Olonde, and report prepared which stated that the parcel is currently undeveloped and dominated with natural shrubs. By way of Counter — claim the 1st Defendant claims against the Plaintiffs that the 1st Defendant is the Registered owner of the suit property. That the Title Deed of the suit property got lost and the 1st Defendant reported to police and an abstract was issued. That the 1st Defendant then advertised the loss in the Kenya Gazette Notice No 2339 of November 7, 2015 and a Certificate of lease was issued. The Plaintiffs are trespassers on the land who intend to acquire it by way of adverse possession. That the Plaintiffs have no right whatsoever over the suit property. That the Plaintiff should be ordered to vacate the suit premises and give vacant possession to the 1st Defendant. The 1st Defendant prays for judgment be entered against the Plaintiff for;
 - a. The Plaintiffs to vacate and give vacant possession of the suit property Plot No MSA/Block/1590.
 - b. Costs of the suit.
4. This court has considered the evidence and the submissions therein. What amounts to a claim of adverse possession is an instance where the suit property is registered in the name of a person other than the applicant, and the applicant who has been in open and exclusive possession of the suit property in an adverse manner to the title of the owner, for a period of more than twelve years. A claim for adverse possession is anchored on Sections 37 and 38 (1) of the *Limitation of Actions*, which contemplates two concepts dispossession and discontinuance of possession. The procedure for instituting the claim is provided for by order 37 rule 1 and 7 of the *Civil Procedure Rules*, where the applicant is required to file an originating summons that must be supported by an affidavit to which a certified extract of the title to the suit land has to be annexed.
5. The Applicants must establish that the title holder has lost his right to the land either by being disposed of it or having discontinued his possession of it. The Court of Appeal in *Wilson Kazungu Katana & 101 others vs Salim Abdalla Bakshwein & another* (2015) eKLR stated that:

“In order to acquire by statute of limitations a 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 and that what constitutes dispossession of a proprietor are acts done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use. A person who occupies another’s persons 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 the possession is not illegal. ...In other words his entry must be adverse to



the title of the owner of the land. ...Besides adversal entry into the land, the applicant must also demonstrate exclusive physical possession of the land and manifest unequivocally the intention to dispossess the owner. The occupation must be open, uninterrupted, adverse to the title of the owner, adequate, continuous and exclusive as already stated. The burden of proving all these is on the person asserting adverse possession.”

6. The first issue to consider is how the applicants came into possession of the suit property, in order to determine whether their possession was adverse to the respondent’s title. Time for the purpose of adverse possession started running in the applicants’ favour when they became trespassers and the 1st Defendant did not take any steps to assert their title to the suit property and stop time from running in favour of the Plaintiffs. From the evidence on record, each of the Plaintiffs claims to have come into possession differently, the 1st Defendant claimed to have moved in over 50 years, the 2nd Defendant was born there, while the 3rd and 4th Defendants moved in 2014 after buying a parcel of land from one Rashid Mwamba.
7. The 1st Defendant averred he entered into possession of the suit property over 50 years, while the 2nd Defendant claimed to have been born in the suit property. Even if the court were to assume that indeed the Plaintiffs’ possession commenced then, which the same has not been proved, there is not sufficient evidence that the 1st Plaintiff was in open, exclusive, continuous and uninterrupted possession of the suit property for 12 years or more. This is so because the 1st Defendant’s valuation report dated February 15, 2008 stated that the suit property was undeveloped and dominated by natural shrubs. The mere fact that for twelve years the Plaintiffs were in actual possession of the land is not enough to make the Limitation of Actions operative. There must be exclusive possession during the statutory period and the true owner was out of possession.
8. The entry of the 3rd and 4th Plaintiffs into the suit property cannot be said to be adverse to the 1st Defendant, since they both bought their parcels from one Rashid Mwamba as seen from the agreement of sale dated October 12, 2013 and the evidence of PW3. They took possession of the suit property as purchasers from the person whom they thought was the true owner of the suit land. The Plaintiffs therefore derive their occupation from a person whom they considered the true owner of the land, it follows that their occupation of the suit property was with permission. They have failed to establish how their possession ceased to be permissive and became adverse to the true owner. Moreover, their entry into the suit land was in 2014, they have not occupied the suit land continuously and uninterrupted for a period in excess of 12 years.
9. The Plaintiffs have attached a copy of the certificate of lease to Mombasa/Block/ I/1590 dated October 7, 2015 in the name of Sheikh Zayed Bin Sultan Ali Nahayyan. The mere replacement of a lost title deed, which was first issued on December 13, 1988 does not interrupt a person’s adverse possession, it is therefore in order for applicants to seek adverse possession over the suit property though the certificate of lease is dated October 7, 2015. Apart from the identification of the land, the Plaintiffs were required to specifically identify their specific portions they lay claim to. From the letter addressed to the Governor, Mombasa County dated August 4, 2014, the suit property is occupied by more persons other than the applicants. The Plaintiffs failed to prove the location of the distinct portion of the land they were individually claiming out of the 1.552ha acreage of the whole suit property. In *Wilson Kazungu Katana & 101 others v Salim Abdalla* (supra), the Court of Appeal stated:

“The identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession. This was so stated by this court in the case of *Githu v Ndele* (1984) KLR 776. The appellants did not discharge the burden of proving and specifically identifying or even describing the portions, sizes and locations



of those in their respective possession from the larger suit premises that they sought to have decreed to them.”

10. For possession to be adverse it must be actual, open, notorious, regular continuously uninterrupted, hostile, and exclusively occupied without any form of permission from the rightful owner for a statutory period of twelve years. The applicants have failed to prove dispossession or discontinued possession of the suit premises by the 1st Defendant throughout the period leading to filing this suit.
11. The court finds that the Plaintiffs have failed to demonstrate that they are entitled to the suit property by way of adverse possession. Accordingly, the Originating Summons dated September 16, 2021 lacks merit and is dismissed with costs to the Defendants. I find that the 1st Defendant has proved their counter claim on a balance of probabilities and I grant the following orders;
 - a. The Plaintiffs are hereby ordered to vacate Land Parcel Mombasa/Block 1/1590 and vacate the suit property within 60 days from the date of this judgement and in default eviction orders to issue.
 - b. Costs of this suit to the Defendants.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 20TH JUNE 2023.

N.A. MATHEKA

JUDGE

