



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**CIVIL SUIT NO. 206 OF 2017(O.S)**

**IN THE MATTER OF: PARCELS OF LAND KNOWN AS PLOT NUMBER**

**MUGUMO PASTA/MAZERAS/1064**

**IN THE MATTER OF: THE LIMITATION OF ACTIONS ACT 22 LAWS OF KENYA**

**BETWEEN**

**MUTUA KISALU ITUANGU.....APPLICANT**

**VERSUS**

**1. RASHID ABDULRAHIM**

**2. GULAM KADIR ABDULRAHIM**

**3. FATMA ABDULRAHIM**

**4. KHADIJA ISAK KHAMIS**

**5. SHAHNAZ KADMBAIISH PIRMOHAMED**

**6. KUMAT ABDULRAHIM PIRMOHAMED**

**7. SHAHIDA ABDURAHIM PIRMOHAMED**

**8. AYESHEH ABDURAHIM CHAKERZEHI.....RESPONDENTS**

**JUDGMENT**

1. By an Originating Summons dated 28<sup>th</sup> September 2017 and filed herein on 18<sup>th</sup> October 2017, the Applicant-Mutua Kisalu Ituangu contends that he is entitled to all that parcel of land known as Plot No. Mugumo Pasta/Mazeras/1064 (the suit property) by virtue of adverse possession and asks the Court to determine the following questions:-

- i) Whether the Applicant is entitled to the ownership of the suit property by virtue of adverse possession;*
- ii) Whether as the occupant of the suit property, the Applicant is entitled to be registered as the proprietor thereof; and*
- iii) Whether the Applicant is entitled to the costs of the Originating Summons.*

2. The Application is supported by the Applicant's affidavit sworn on 28<sup>th</sup> September 2017 and is premised on the grounds:

- i) That the Applicant has been in occupation/possession of the suit property for more than 12 years;*
- ii) That the Applicant has duly developed the suit property by planting coconut trees, cassava crops, tilled the land and planted*

*maize and other crops for sustaining his family;*

*iii) That the Applicant has also constructed a two bedroom stone house wherein he lives with his family and caretaker who manages the farm on his behalf;*

*iv) That the Applicant's occupation of the suit property has been open and continuous for over 12 years and the said occupation has not been interrupted by the Respondents or anyone else; and*

*v) That the Applicant is thus duly and legally entitled to the suit property by virtue of adverse possession and should be so registered.*

3. The Applicant was however unable to trace the 8-named Respondents herein for purposes of service. Consequently, by an application dated 30<sup>th</sup> October 2017, the Applicant sought leave to effect service upon the Respondents by way of substituted service through an advertisement in one of the local newspapers. That application was allowed by this Court on 4<sup>th</sup> December 2017.

4. Subsequently, as per an Affidavit of Service filed herein on 7<sup>th</sup> May 2018, the Applicant caused the Originating Summons to be served upon all the Respondents by an advertisement carried out in the Standard Newspaper of 22<sup>nd</sup> March 2018. As per the Court Order allowing the Substituted Service, the Respondents were required to enter appearance within 21 days. They did not however do so and this matter proceeded by way of formal proof.

5. At the trial herein, the Applicant adopted the contents of his affidavit sworn on 28<sup>th</sup> September 2018 in support of the summons. In the said Affidavit, he avers that in the year 1967, he secured employment as a shamba boy and caretaker of the suit property which was then owned by the family of one Katiwa Muli.

6. The Applicant avers that after the death of the said Katiwa Muli, his son Richard Katiwa Muli who married the Applicant's daughter gave the Applicant the suit property to till and plant crops for purposes of sustaining his family. The Applicant then proceeded to construct a house on the land in which he stays with his family-to-date.

7. According to the Applicant, when later on he decided to register the land in his name, he visited the Kilifi Land Registry on 5<sup>th</sup> September 2017 upon which he conducted a search on the land and came to learn that it was registered in the Respondents' name. He avers that his occupation of the property has been open and uninterrupted for more than 12 years and prays that he be declared the lawful owner thereof under the doctrine of adverse possession.

8. I have considered the Originating Summons, the Applicants testimony and the evidence placed before me. I have equally considered the submissions and authorities to which I was referred by the Learned Advocates for the Applicant.

9. Section 38(1) of the Limitation of Actions Act, Cap 22 of the Laws of Kenya provides as follows:-

***“Where a person claims to have become entitled by adverse possession to land...he may apply to (this) Court for an order that he be registered as proprietor of the land or lease in place of the person then registered as proprietor of the land.”***

10. It is trite that for a party to succeed in an application for adverse possession, it must be demonstrated that there was open, continuous, notorious and uninterrupted possession for a period of at least 12 years. As it were the Applicant herein testified that he has been in occupation of the suit property since 1967 when he was shown the same by his son in law one Richard Katiwa.

11. While it is not clear how the Respondents came to be registered as the owners of the suit property, no evidence was placed before me to controvert the Applicant's claim that he has lived on the suit property where he has built his home with his family for more than the statutorily provided 12 years. In support of his case the Applicant produced photos showing his homestead with old mud-walled and iron sheet houses constructed thereon as well as a compound fenced off with a barbed wire.

12. In my view those houses and other structures built on the land are evidence of an open and notorious occupation of the suit property and I am therefore satisfied, in the absence of any evidence to controvert the Applicant's testimony, that he has established his claim.

13. Arising from the foregoing and in light of the questions posed by the Applicant for determination in the Originating Summons, I hereby find and declare that:-

***i) The Applicant is entitled to the ownership of the parcel of land known as Plot No. Mugumo Pasta/Mazeras/1064 by virtue of adverse possession.***

***ii) The Applicant as the occupant of the said parcel of land namely Plot No. Mugumo Pasta/Mazeras/1064 is entitled to be duly registered as the proprietor of the said parcel of land.***

***iii) There shall be no order as to costs.***

**Dated, signed and delivered at Malindi this 28<sup>th</sup> day of March, 2019.**

**J.O. OLOLA**

JUDGE