



**Miji & another v Neon Oaks Limited (Environment & Land Case
78 of 2022) [2023] KEELC 20969 (KLR) (26 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20969 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 78 OF 2022
NA MATHEKA, J
OCTOBER 26, 2023**

BETWEEN

ABOUBAKAR ABOUD MIJI 1ST PLAINTIFF

MAURICE MOMBA CHIKODZA 2ND PLAINTIFF

AND

NEON OAKS LIMITED RESPONDENT

JUDGMENT

1. This is the application of the plaintiffs/applicants who claims to be entitled to the parcel of the Land known as Title Number Mombasa/Mainland South/Block XXVI /161 valued at Kshs 25,000,000/= (Twenty five million) by virtue of adverse possession for determination of the following questions;
 1. That the respondent's interest in all that piece of land situated in Mombasa County containing by measuring one decimal five (1.5) acres or there about being Title Number Mombasa/ Block XXVI/161 has been extinguished. That the Registrar of Titles, Mombasa County do delete entries in favour of the respondents if any on the green card/Register and or register the appropriate discharge in respect thereof without gazettelement.
 2. That the Registrar of Titles, Mombasa County do reconstruct a Skeleton file in respect to Title Number Mombasa/ Block XXVI /161 thereof.
 3. That the applicants Abubakar About Miji and Maurice Monba Chikodza be registered as the proprietors of all that piece of land situated in Mombasa County containing by measurement one decimal five (1.5) acres or thereabout being Title Number Mombasa/ Block XXVI/161 in place of Neon Cars Limited by reason of the fact that the applicants have become entitled to the said land by adverse possession.



4. That the Lands Registrar -Mombasa without gazettelement do proceed and issue a Title Document/Provincial Certificate for parcel of land in Mombasa County containing by measurement One Decimal Five (1.5) acres or there about being Title Number Mombasa/ Block XXVI /161 in the names of the applicants Abubakaraboud Miji and Maurice Momba Chokodza.
 5. That the Orders referred to the paragraphs 1, 2, 3, 4 and 5 above be registered against the Title to property known as the parcel of land situated hi Mombasa County by measurement One Decimal Five (1.5) acres or thereabout being Title Number Mombasa/Block XXVI /161 in terms of Section 38(2) of The Limitation Actions Act, Chapter 22, Laws of Kenya.
 6. That the Land Registrar, Mombasa County do dispense with the production of the original title document and all other legal documents to be produced Abubakaraboud and Maurice Momba Chikodza.
2. The plaintiffs/applicants aver that they have been in uninterrupted exclusive physical Possession of all that piece of land situated in Mombasa County containing by measurement One Decimal Five (1.5) acres or thereabout being Title Number Mombasa/ Block XXVI /161 for a continuous period in excess of 12 years and thereon lies his home. That the respondent have shown no interest in the parcel of land and neither have they given any notice to vacate possession of the suit land to the plaintiff. That the respondent rights and/or interest in all that piece of land situated in Mombasa County containing by measurement One Decimal Five (1.5) acres or thereabout being Title Number Mombasa/Block XXVI/161 has been extinguished. That it is fair and just that the applicant be registered as owner of the all that piece of land situated in Mombasa County containing by measurement one Decimal five (1.5) acres or thereabout being Title Number Mombasa/ Block XXVI/161 so that they stop living in fear that they may wake up to an eviction one day with their families. That the applicants have peacefully exercised proprietary rights over the suit property for a period of over 12 years and now claim it by law acquired legal rights over the suit property to wit containing by measurement one Decimal five (1.5) acres or thereabout being Title Number Mombasa/ Block XXV1/161. That the suit property is the only known home for the applicants and their families.
 3. This court has considered the evidence and the submissions therein. 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."



4. The 1st Plaintiff swore the supporting affidavit and filed an authority to act for the 2nd Plaintiff. On the hearing date he failed to show up. The 2nd Plaintiff gave evidence and stated that the 1st Plaintiff was out of town and could not attend court. PW1 stated that they were friends and they entered the suit property in the 1990s and have developed the place. The Defendant was served by substituted service but failed to attend court or file any defence.
5. For the applicants to successfully sustain a claim founded on adverse possession, they must demonstrate that they had a peaceful and uninterrupted use of the land. The applicants ought to establish that they physically and exclusively possessed the suit land at the exclusion of the respondents. The Court of Appeal in *Richard Wefwafwa Songoi vs Ben Munyifwa Songoi* (2020) eKLR held that;

person who claims adverse possession must inter alia show:

 - a. on what date he came into possession.
 - b. what was the nature of his possession?
 - c. whether the fact of his possession was known to the other party.
 - d. or how long his possession has continued and
 - e. that the possession was open and undisturbed for the requisite 12 years.
6. In my view, the applicants have failed that they collectively and individually occupied and possessed the suit land exclusively at the exclusion of the registered proprietors. More to that, the applicants have failed to establish that their possession and occupation were adverse to the respondent's title and proprietary interest. Adverse possession is hostile possession by clearly asserting hostile title in denial of the title of the true owner. It must start with the wrongful dispossession of the rightful owner. In this case, PW1 was vague on the date of entry to the suit land and I find they failed to demonstrate at what point in time did they dispossess the true owner of possession if they were not even aware of who the true owner was.
7. In the instant matter, the applicants produced photographs of houses and submitted that the respondent has never been in possession of the suit property. However, the non-use of the property by the true owner even for a long period of time will not affect his title. It is not clear how or when the applicants came into possession. The applicants ought to have proved by evidence that they took possession of the property and asserts a right over it, a fact that has not been asserted by evidence. In *Gabriel Mbui vs Mukindia Maranya* (1993) eKLR, it was held;

"Acts of user are not enough to take the title out of the true owner unless they are inconsistent with the enjoyment of the soil for the purpose for which he intended to use it. Accordingly, where a true owner of land intends to use it for a particular purpose in the future, but meanwhile has no immediate use for it, and so leaves in unoccupied, he does not lose his title to it simply because some other person enters on it and uses it for some purpose; not even if this purpose continues year after year for 12 years or more."
8. In a nutshell there is no evidence that the applicants' occupation of the suit premises was continuous and uninterrupted for a period of 12 years. They have failed to demonstrate at what point did time begin running in their favour, it is therefore quite apparent that they never had exclusive and peaceful possession of the suit premises. The applicants' claim therefore fails, the originating summons dated July 19, 2022 is dismissed with no orders as to costs as the same was undefended.

It is so ordered.



DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF OCTOBER 2023.

N.A. MATHEKA

JUDGE

