



Siwa & 20 others v Binns & another (Environmental and Land Originating Summons E002 of 2023) [2025] KEELC 3469 (KLR) (30 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3469 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2023**

**JO OLOLA, J
APRIL 30, 2025**

BETWEEN

BAKARI HUSSEIN SIWA 1ST PLAINTIFF

DHARO JOSEPH KAHINDI 2ND PLAINTIFF

ESTHER WANJIRU NGUGI & 18 OTHERS & 18 OTHERS & 18 OTHERS & 18 OTHERS & 18 OTHERS 3RD PLAINTIFF

AND

HARRY BINNS 1ST DEFENDANT

HENRY GINNS 2ND DEFENDANT

JUDGMENT

1. By an Originating Summons dated July 7, 2023 as amended on January 26, 2024, the 21 Plaintiffs pray for the following:
 1. That the Respondents interest in all that piece of land situated in Mombasa County containing by measurement 2.08 acres or thereabout being CR No. 1703, Plot No. MN/1/315, Mombasa County has been extinguished;
 2. 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 entries in respect of the applicants without gazetteement;
 3. That the Registrar of titles, Mombasa County do cancel the title in favour of Harry Binns and Henry Binns;
 4. That the applicants be registered as the proprietors of all that piece of land situated in Mombasa County containing by measurement 2.08 acres or thereabout being CR No. 1703, Plot No.



MN/I/315, in place of Harry Binns and Henry Binns by reason of the fact that the Applicants have become entitled to the said land by adverse possession;

5. That the Registrar of Titles, Mombasa County do lift the caveat dated April 9, 1980;
 6. That the Lands Registrar Mombasa without gazettelement do proceed and issue a Title Document/Provisional Certificate for parcel of land in Mombasa County containing by measurement 2.08 acres or thereabout being CR No. 1703, Plot No. MN/I/315, in the names of the Applicants;
 7. That the Orders referred to in paragraphs 1,2,3 and 4 above be registered against the title to property known as CR No. 1703, Plot No. MN/I/315 Mombasa County in terms of section 38(2) of the *Limitation of Actions Act* Chapter 22 Laws of Kenya;
 8. That the Land Registrar, Mombasa County do dispense with the production of the original title document and all other legal documents to be produced by the plaintiffs; and
 9. That costs of this Application be provided for.
2. The Originating Summons is supported by an affidavit sworn by Bakari Hussein Siwa (the 1st applicant) on behalf of the other applicants and is premised on the grounds that:
1. The Plaintiffs/Applicants have been in uninterrupted exclusive physical possession of the suit property for a continuous period in excess of 40 years;
 2. That the Respondents have shown no interest in the parcel of land and have never given any notice to the Plaintiffs to vacate the land;
 3. That the Respondents rights and /or interest in the said piece of land have been extinguished.
 4. That it is fair and just that the Applicants be registered as owners of the suit property so that they stop living in fear of an eviction by the Respondents;
 5. That the Applicants have peacefully exercised proprietary rights over the suit property for a period of over 20 years; and
 6. That the suit property is the only home known to the Applicants and their families.
3. On 28th September, 2023, the court allowed the Applicants to serve the Respondents by way of substituted service. Subsequently, the Respondents were served through an advert placed in the Daily Nation of 6th August, 2024. Despite that service, the Respondents did not enter appearance and the suit proceeded undefended.

Analysis and Determination

4. I have carefully perused the pleadings filed by the Plaintiffs, the sole testimony of the 1st Plaintiff as well as the evidence adduced at the trial.
5. By their suit as filed herein, the 21 Plaintiffs pray for a determination that they have acquired all that parcel of land known as CR. No. 1703, Plot No. MN/I/315 measuring some 2.08 acres and situated within Mombasa County by way of adverse possession. They have urged the court to direct the cancellation of the title presently registered in the names of Defendants and to cause the same to be registered in the names of the Plaintiffs. In addition, the Plaintiffs have urged the court to direct the Registrar of Titles Mombasa County, to lift the caveat registered on the title and dated 9th April, 1980.



6. The doctrine of adverse possession in Kenya is founded under the *Limitation of Actions Act* (Cap 22, Laws of Kenya). Section 7 of the said Act places a bar on actions to recover land after the expiry of 12 years from the date on which the right accrued.
7. Section 38 of the Act allows a claimant to apply to court for orders of adverse possession and provides as follows:

“38(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as the proprietor of the land.
8. The doctrine of adverse possession was aptly defined by the Court of Appeal in *Mtana Lewa -v- Kabindi Ngala Mwangandi*: where the court held that:-

“Adverse possession is essentially a situation where a person takes possession of land and 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 is twelve (12) years. The process springs into action essentially by default or inaction of the owner, the essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”
9. In the matter before me, the Plaintiff’s sole witness Bakari Hussein Siwa (PW1) told the court that the 21 Plaintiffs together with their families have been in physical occupation and possession of the 2.08-acre parcel of land since the year 1993 when they entered the land. PW1 further testified that they had during that period constructed both permanent and temporary houses on the land and had utilized the same for other social amenities.
10. PW1 told the court that during their long stay on the land they had never seen the Defendants who are the registered proprietors of the land and no attempt has ever been made to evict the Plaintiffs therefrom.
11. In support of that position, the Plaintiffs produced a certificate of postal search dated 18th June, 2020. They also produced photos of various houses said to be constructed on the land as well as a Valuation Report prepared by Netco Limited dated January 23, 2025 for the suit property.
12. While it was clear from a perusal of the photographs produced that the Plaintiffs had made some developments on the land, it was not clear from the material placed before the court the portions or sizes of land claimed by each of the 21 Plaintiffs. From a perusal of the photographs produced herein, it was apparent that the constructions were done haphazardly and that there were no clear demarcations on the properties being claimed. Without a proper survey and demarcation of the properties, it was clear to me that to grant a blanket order of adverse possession would only lead to anarchy.
13. Perhaps more importantly, it was evident from a perusal of the Certificate of postal search that there was a caveat registered against the suit property on 9th April, 1980 in favour of the East African Power & Lighting Company Limited that was claiming a grant of easement over the land. While the Plaintiffs have asked this court to direct the Registrar of Titles to lift the said caveat, there was no evidence that the caveator or its successor in title had been made aware of this suit.



14. That being the case, it was clear to me that if the court were to grant the orders sought herein, the same would amount to condemning the caveator unheard.
15. It follows that in the circumstances herein, I was not persuaded that the plaintiffs had proved their case to the required standards. The same is hereby dismissed with no order as to costs.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 30TH DAY OF APRIL, 2025

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J.O. OLOLA

JUDGE

In the presence of:

- a. Ms. Firdaus Court Assistant.
- b. No appearance for the Plaintiffs
- c. No appearance for the Defendants

