



**Juma & 2 others v Shah & another (Environment & Land Case
29 of 2022) [2023] KEELC 22287 (KLR) (6 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22287 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 29 OF 2022
EK MAKORI, J
DECEMBER 6, 2023**

BETWEEN

ALI MOHAMED JUMA 1ST APPLICANT

MWANAHAMISI MOHAMED JUMA 2ND APPLICANT

AMINA MOHAMED JUMA 3RD APPLICANT

AND

HIRJI VIRPAR SHAH 1ST RESPONDENT

ISHERDAS GULABRAI 2ND RESPONDENT

JUDGMENT

1. This is an O.S. brought by the applicants seeking to be declared by the operations of the doctrine of adverse possession to have acquired a parcel of land described as Plot No. 130/III/MN. An order to issue to the effect that the respondents' title over Plot No. 130/III/MN has been extinguished. An order directing the Land Register of Titles Mombasa to register Plot No. 130/III/MN in the names of the applicants herein. Costs be provided. The respondents could not be found for personal service. An application was brought to have the respondents served by way of an advertisement in the Daily Newspapers of wide circulation. It was allowed on 13th March 2023. The matter thereafter proceeded ex-parte.
2. The Applicants claim the land by way of adverse possession. They averred through the evidence of one Mohamed Juma who testified as PW2 who said that the suit property is their home they have been in occupation for more than 50 years. It is where they were born. During the succession process when their father died, they took out letters of administration and included this parcel as part of the estate of their deceased father. When the search was conducted of the land, it was found to belong to the respondents who had never lived there nor set foot there. Their whereabouts are unknown even for purposes of physical service.



3. The advocate for the applicants Mr. Odiagga submitted that adverse possession had accrued in this case citing decisions in *James Maina Kinya v Gerald Kwendaka* [2018] eKLR and, *Murunga Kabangi & 2 Others v Hannah Gitau* & [2019] eKLR on how to prove adverse possession by dint of long and uninterrupted stay of over 12 years. In this case, the applicants have been in occupation of the suit land for over 50 years.
4. The issue for the determination of this court is whether adverse possession has attached in favour of the applicants.
5. As correctly stated and cited in *Maina Kinya v Gerald Kwendaka* [2018] eKLR for adverse possession to accrue it has to be shown:

“The law in respect to adverse possession is now settled. For one to succeed in a claim of adverse possession he must satisfy the following criteria stated in the case of Maweu vs. Liu Ranching and Farming Cooperative Society 1985 KLR 430 where the Court held;

“Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity, and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”.

6. It was held further in *Murunga Kabangi & 2 Others v Hannah Gitau &* [2019] eKLR that:

“As stated earlier, the single issue involved in this appeal is whether the appellants had established that they were entitled to be registered as the owners, by adverse possession, of the disputed land thereby defeating the rights of the registered owners whose title must be cancelled to give way to the registration of the trespasser-turned-owner in the eyes of the law.

In the recent case of David Munene Wamwati & 4 Others vs The Registered Trustees of the Anglican Church of Kenya & Another, Civil Appeal No. 36 of 2015 (UR), this Court had this to say:-

“The conceptual and ethical dilemma presented by the law on adverse possession has long engaged judicial minds in this Court and we need not rehash it. This Court has on many occasions exposed the morality and justice of a law that permits a trespasser to morph, by mere advance of time, into the owner of land he entered into without permission of the owner and at absolutely no consideration thereby defeating an owner, a registered one at that, who in all likelihood invested funds in the purchase of the land. These concerns have been articulated with firmness and passion but have always borne the impotence of equity in the face of explicit provisions of law which must nonetheless be followed until a legislative intervention should effect much-needed change. See, for a thorough exposition of the controversies aroused by the law on adverse possession, the decision of our learned brothers Makhandia, Ouko, and M’Inoti, JJ.A in *Mtana Lewa vs. Ngala Mwangandi* [2015] eKLR. For all of its problematic nature, however, the law on adverse possession is itself quite simple. This Court, differently constituted put



it thus in *Mate Gitabi vs. Jane Kabubu Muga & Others* (Nyeri Civil Appeal No. 43 of 2015 (unreported));

“For one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the landowner. These elements are contained in the Latin maxim *nec vi, nec clam, nec precario*. See also *Eliva Nyogesa Lusenaka & Another v Nathan Wekesa Omacha – Kisumu Civil Appeal No. 134 of 1993* and *KASUVE v Mwaani Investments Ltd & 4 OTHERS* [2004] KLR 184 at page 188 where this Court stated as follows;

‘In order to be entitled to land by adverse possession, the claimant must prove that she has been in exclusive possession of land openly and as of right and without interruption for 12 years, either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.’ See also *Wanje vs Saikwa* [1984] KLR 284.”

And so the law is fairly well settled.”

7. The testimony offered shows that the applicant has been in occupation of the suit property Plot No. 130/III/MN with the co-applicants for over 12 years. The occupation spans over 50 years. It has been open and uninterrupted without secret and to dispossess the registered owners. The registered landowners have never set foot on the suit land. They were even served through advertisements in the local Daily Newspaper. They could not turn up to defend.
8. The Originating Summons will succeed with costs in the following manner:
 - a. The applicants be and are hereby declared by the operations of the doctrine of adverse possession to have acquired a parcel of land described as Plot No. 130/III/MN.
 - b. An order does and is hereby issued to the effect that the respondents’ title over Plot No. 130/III/MN has been extinguished.
 - c. An order does and is hereby issued directing the Land Register of Titles Mombasa to register Plot No. 130/III/MN in the names of the applicants herein.
 - d. The applicants will also be entitled to the Costs of this suit.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 6TH DAY OF DECEMBER 2023.

E. K. MAKORI

JUDGE

In the Presence of:

Ms. Mwanzia for the applicants

In the absence of



The Respondents

