



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 45 OF 2019 (OS)

IN THE MATTER OF THE REGISTRATION OF TITLES ACT (CAP 281,

LAWS OF KENYA) (now repealed) AND THE LIMITATION OF ACTIONS ACT

(CAP 22, LAWS OF KENYA)

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT AND RULES ENACTED THERETO

AND

IN THE MATTER OF LAND REFERENCE NUMBER PLOT NUMBER 3037 MALINDI

BETWEEN

ADIJA CHEPKASI MOHAMED.....APPLICANT

-VERSUS-

MANFRED OSCAR SCHLESSMAN.....1ST RESPONDENT

MANUELA SCHLESSMAN.....2ND RESPONDENT

JUDGMENT

1. By an Originating Summons dated 1st July, 2019 as filed herein on 2nd July 2019, Adija Chepkasi Mohamed (*hereinafter the Applicant*) prays for:

1. A declaration that the title (held by the Respondents) Manfred Oscar Schlessman and Manuela Schlessman to the freehold interest in Land Reference No. Plot No. 3037 (Original No. 1754/10) Malindi has been extinguished by the Applicant's adverse possession thereof for a period of more than 12 years in terms of Sections 17 and 38 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya.

2. A declaration that the Applicant has acquired the freshold interest in Land Reference No. Plot No. 3037 (Original No. 1754/10) Malindi by her adverse possession thereof for a period of more than 12 years, i.e. from at least 1988 to-date.

3. An order (to) issue requiring and directing the Registrar of Titles, Mombasa to register the Applicant Adija Chepkasi Mohamed as the proprietor of Land Reference No. Plot No. 3037 (Original No.1754/10) Malindi in place of Manfred Oscar Schlessman and Manuela Schlessman and in place of any other person succeeding the Respondents.

4. Costs of the suit.

2. The Originating Summons which is supported by an affidavit sworn by the Applicant is premised on the grounds:

(i) That Manfred Oscar Schlessman and Manuela Schlessman (the Respondents) are the registered proprietors as joint tenants of all

that piece or parcel of land situate in Malindi Township within Kilifi District of the Republic of Kenya containing by measurement approximately 0.5027 Ha. or thereabouts that is to say Plot No. 3037 (Original No. 1754/10) Malindi which piece of land is more particularly delineated and described on the Survey Plan No. 115138 deposited at the Survey Records Office at Nairobi;

(ii) That the suit property was registered at the land Titles Registry, Mombasa as CR No. 18565 on 29th April, 1988 and the Applicant has been in occupation thereof ever since;

(iii) That on 19th August 1997, one Lael Mumbua Kala placed a caveat on the title of the suit property claiming purchaser's interest. Similarly on 26th August 1997, one Karl Lheinz Borner placed a caveat on the title of the suit property claiming purchasers' interest;

(iv) That on 19th August 1997, a prohibitory order dated the same day and obtained in Civil Suit No. 88 of 1996 was registered on the title prohibiting and restraining the transfer or charging of the said property until further orders of the Court;

(v) That the Respondent or any party claiming interest in the suit property have never sought to assert their proprietary rights over the same;

(vi) That the Applicant has to this day remained in actual, open, hostile, continuous and uninterrupted possession of the suit property to the exclusion of the Respondents or any party claiming interest thereon;

(vii) That the Respondents' title in the suit property has been extinguished by the Applicant's adverse possession thereof for a period which exceed 12 years in terms of **Sections 17 and 38 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya.**

3. Despite service by way of substituted service on 30th May, 2020, the two Respondents neither entered appearance nor did they respond to the Originating Summons. The suit hence proceeded as an undefended cause by way of affidavit evidence and written submissions.

4. I have carefully considered the pleadings and evidence placed before me. I have similarly perused and considered the written submissions and authorities placed before me by Mr. Binyenya, Learned Counsel for the Applicant.

5. The suit herein was commenced on 2nd July, 2019 by way of an Originating Summons taken out pursuant to **Order 37 Rule 7 of the Civil Procedure Rules, 2010 and Sections 7, 9, 13, 37 and 38 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya**. It is the Applicant's case that she has been in open and continuous occupation of the suit property since the year 1988 and that given that more than 12 years have lapsed since her occupation thereof, the title of the property in the name of the Respondents has since been extinguished and she has now acquired the same by dint of adverse possession.

6. **Section 37 of the Limitation of Actions Act** provides in respect of a claim for adverse possession as follows:

"37(1).Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, to land or easement or land comprised in a lease registered under any of those Acts, he may apply to the Environment and Land Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land."

7. As was stated by this court in **Said Karam Salim -vs- Kokas M. Nakolo (2017) eKLR:**

"11. Adverse possession has been defined as a method of gaining legal title to real property by the actual, open hostile and continuous possession of it to the exclusion of its true owner for the period prescribed by state law.

12. The period prescribed by the Limitation of Actions Act, Cap 22 of the Laws of Kenya for one to acquire legal title over land in Kenya by way of adverse possession is 12 years.

13. According to Halsbury's Laws of England, 4th Edition, Volume 28, Paragraph 768, no right to recover land accrues unless the land is in the possession of some person in whose favour the period of Limitation can run. What constitutes such possession is a question of fact and degree. Time begins to run when the true owner ceased to be in possession of his land.

14. To constitute dispossession, the acts must have been done which are inconsistent with the enjoyment of the soil by the person entitled for the purpose for which he had a right to use it, thus the term "adverse."

8. The process of adverse possession 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 Applicant deposes that she has occupied and resided on the suit property since the year 1988 and that the Respondents or some other parties that had hitherto claimed purchaser's interest on the property in the year 1997 have to-date never sought to assert their proprietary rights over the property. It is the Applicant's case that she has to this day remained in actual, open, hostile, continuous and uninterrupted possession of the suit property to the exclusion of any other party.

10. In support of this position, the Applicant has annexed to her supporting Affidavit receipts showing that she has been meeting all

outgoings such as land rates to the now defunct Municipal Council of Malindi as well as the current County Government of Kilifi. She has also attached electricity bills to herself by the Kenya Power Company as well as water bills issued by the Malindi Water and Sewerage Company (*Mawasco*).

11. As required by the provisions of **Order 37 Rule 7 of the Civil Procedure Rules** in a matter such as this, the Applicant has produced as Annexure ACM – 1, an extract of the title for the suit property. It is apparent from a perusal of a Certificate of Search attached to the affidavit (*Annexure ACM – 2*) that as at 5th November, 2018, the two Respondents named herein were the registered proprietors of the suit property.

12. Despite service of the summons, the Respondents neither entered appearance nor filed any response to the summons. The result is that the Applicant's assertions in the Supporting Affidavit remain uncontroverted.

13. Arising from the foregoing I am persuaded that the Applicant has proved her case to the required standard and that this is a proper case for this Court to grant the reliefs sought.

14. Accordingly I allow Prayers 1, 2 and 3 of the Originating Summons dated 1st July, 2019. I make no order as to costs.

Judgment dated, signed and delivered virtually at Nyeri this 27th day of January, 2022 via Microsoft Teams.

In the presence of:

Mr. Binyenya for the Applicant

No appearance for the Respondent

Court Assistant - Mugambi

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J. O. Olola

JUDGE