



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 144 OF 2019 (O.S.)

MOHAMED HASSAN BASHAED & 46 OTHERSPLAINTIFFS

VERSUS

RAS KISAUNI HOLDINGS LTD.1ST DEFENDANT

LAND REGISTRAR MOMBASA2ND DEFENDANT

JUDGEMENT

I. PRELIMINARIES

1. The suit was instituted by the Plaintiffs against the 1st and 2nd Defendants by way of Originating Summons dated 24th July, 2019. Subsequently on the 20th January, 2020 it was amended with a further amended Originating Summons dated 7th July 2021. Under the provisions of Order 37 Rule 7 of the Civil Procedure Rules and Section 38 of the Limitation of Actions Act Cap 22 of the Laws of Kenya. Indeed, directions were taken here taken according to these provisions of the law.

II. THE PLAINTIFF'S CASE

2. By this suit, the Plaintiffs seek against the 1st and 2nd Defendants jointly and severally for the following Orders:-

(a) An Order declaring that the Plaintiffs have acquired title of the whole parcels of land Known as MN/I/11723 and MN/I/11726 situated in Kisauni within the County of Mombasa by way of Land Adverse possession.

(b) An Order declaring that the Plaintiffs are the absolute owners in possession and enjoyment of the whole of the parcels of land known as MN/I/11723 and MN/I/11726 situated in Kisauni, the County of Mombasa.

(c) An Order directing the 2nd Defendant to rectify his record by deleting the name of the 1st Defendant and replacing it with the names of the Plaintiffs as the registered proprietors of the whole of the parcels of land known as MN/I/11723 and MN/I/11726 situated in Kisauni the County of Mombasa.

(d) A permanent injunction against the Defendants, their officials or anybody claiming right through or under them restraining them from evicting or in any way interfering with the Plaintiffs peaceful possession and enjoyment of that whole parcel of land known as MN/I/11723 and MN/I/11726 situated in Kisauni within the County of Mombasa.

(e) An order for costs of the suit.

(f) A such other orders as may be deemed appropriate under the Circumstances of the case

3. On 12th November, 2020 and the 29th September, 2021 respectively directions on how the Originating Summons suit was to proceed under the provisions of Order 37 Rule 16, 17, 18 and 19 of the Civil Procedure Rules 2010 were taken. On 29th September, 2021 the matter proceeded for full trial by witnesses adducing *viva voce* evidence. PW -1 – Mr. Mohamed Omar Mungamba was sworn and testified in the Kiswahili language. He held to be a holder of the national Identity Card bearing number 0503010 a copy of which was marked as Plaintiff Exhibit 1. He stated that he lived at Kisauni a place called Mwandoni within the County of Mombasa with his family. He was retired from the Civil Service. He produced the authority to plead authorizing him to plead on behalf of the other Plaintiffs. It was marked as Plaintiff Exhibit – 2. He testified that he and others had bought the suit parcels from the first registered owner. He also produced a copy of the Deep

Plan, official searches, Transfer forms, copies of title deeds and a set of photographs all produced and marked as Plaintiff's Exhibit Numbers 3, 4, 5 and 6 respectively. He adopted his recorded witness statement and which was admitted as part of the evidence in chief in these proceedings there being no objection whatsoever.

4. He testified that they were over 47 people who lived on the said two (2) parcels of the suit land. PW-1 testified that they started living on the land from the year 1981. He stated that he had gone to purchase a portion of land and which he did from one Mama Said. The Mama Said Hemed Suleiman's parcel was Plot No. 49/I/MN measuring 60 by 40 square feet. They agreed they would be paying her rent. In the year 2004 PW1 stopped paying rent as she refused to further continued receiving any rent as from them as she held that the land was never hers anymore. PW1 stated that by then she had sub-divided the land into two parcels. According to PW-1 they got together that the two (2) portions got sold to a company trading in the names and style of "RAS Q. HOLDINGS LTD." The parcel were No. MN/I/11723 and MN/I/11726.

5. PW1 testified that they had constructed their houses on these parcels of land. Further, by this time, some of them had already sold off their parcels with some structures – some temporary Kiswahili whiles other permanent structures on it.

PW - 1 stated that at this point they sought for legal advise from their Advocates who advised them on their legal right and a claim of title deed through the Land Adverse Possession. It was his testimony that they had lived on the land continuously and uninterruptedly from the year 1981 to date. For this reason, PW-1 argued they ought to be granted title deed as prayed from their pleadings. He clarified that the Company that alleged to have bought the suit land was called "Ras Kisauni Holdings Limited". He informed court that it is the said Company which is registered as the legal owners from the due diligence conducted by the Plaintiff's Advocate through official and personal searches conducted at the Land Registry.

6. PW-1 held that although the said company was served with pleadings through substituted means by placing an advertisement in the Local newspapers with a wide Nationa Circulation being the Standard Newspaper of 19th March 2020 and there being an affidavit of service on record they never entered appearance nor filed any defence whatsoever as required by law. PW-1 urged Court to grant them the orders sought from the pleadings. That was all.

Cross Examination of PW-1 by M/s. Kiti Advocate

7. PW-1 testified and emphasized having taken up vacant possession of the suit parcels from the year 1981. He further held that there were other persons among the Plaintiffs who continued coming into the land and to live on it thereafter. He stated that he would not know exactly how many of these people who came onto the land were after the year 1981. That was all.

8. PW-2 MR. MOHAMED OMAR MOHAMED – EXAMINATION IN CHIEF IN THE KISWAHILI LANGUAGE BY MR. MGUPU ADVOCATE. PW-2 was a holder of the national identity card bearing numbers 5327457 a copy produced and marked as Plaintiff exhibit – 7. He lived at Kisauni – a place called Mwandoni. He was a trained motor vehicle mechanic. He adopted his witness statement dated 24th July, 2019 and admitted as evidence in this proceeding. PW-2 testified having been given his plot by a lady called Saida Hemed Suleiman. From the year 1996 he used to pay rent of Kshs. 200/= per month or Kshs. 2,400/= per year. He stated that she later on refused to receive any rent from him as she indicated having sub-divided the parcels into two (2) portions and sold it off to a third party. According to PW-2 the two (2) portions were parcels Land Reference No. 11726/I/MN and 11723/I/MN respectively.

9. Despite of these developments, PW-1 informed court that they still continued living on the suit land for a long duration though never got to know the real owner. PW-2 stated that after a while they conducted an official search and found out that the land was registered in the names of one RAS KISAUNI HOLDINGS LIMITED. They never interacted with them. PW-2 testified that they sought legal advice from their Advocates who advised them on their legal right and/or, being on land claim under the Land Adverse Possession means and hence they decided to institute this instant case for this claim.

PW-2 prayed to be granted the prayers sought from the Originating Summons having lived on the suit land continuously and uninterrupted for such a long period on the land for over 15 years. That was all.

Cross Examination by M/s. Kiti Advocate

10. PW-2 stated that they were claiming to be granted ownership of the two (2) parcels of land.

That was the close of the Plaintiff's Case.

III THE DEFENCE CASE

M/s. Kithi indicated that they would not be calling any defence

witnesses and would only wish to tender their written submissions.

IV. SUBMISSIONS

11. On 29th September, 2021 in the presence of all the parties and upon the closure of both the Plaintiff and Defence case court directed that each party tender their written submissions. Pursuant to this on 3rd November, 2021 all parties fully complied and court reserved 17th January 2022 as the day to deliver its judgment accordingly.

A. The Plaintiff's written submissions

13. On 2nd November 2021 the law firm of Messrs. Said Mgupu & Company Advocates for the Plaintiffs filed their written submissions dated 2nd November, 2021. The Learned Counsels submitted that the Plaintiffs were entitled to the ownership of all the suit land pursuant to the claim of title and the principles of Land Adverse Possession. They urged court to grant the Plaintiffs the orders sought from the Originating Summons having lived on the suit land continuously and uninterruptedly for over 12 years. The Learned Counsels relied on the specific provisions of the Law being Sections 7, 9, 10, 11, 12 (3), 13 37 and 38 (1) & (2) of the Limitation of Action Act Cap 22, 23 and Sections 28 (h) of The Land Registration Act 2012 which recognizes over riding interest on the land.

14. To buttress their case they relied on the decision of **Kasuve –Versus- Mwaani Investments Limited & 4 Others IKLR 184**. Where the Court of Appeal restated what a Plaintiff in a claim for Land Adverse Possession has to prove in the following terms:-

“In order to be entitled to Land by adverse possession the Claimant must prove that he had been in exclusive possession of the land openly and has of right without interruption for a period of 12 years either after dispossession and the owner or by discontinuous of possession by the owner on his own volition” and in Githu – Versus - Ndeete (1984) KLR 776 where court held “The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such persons adverse possession.”

The upshot of all these the Learned Counsels urged the Honorable Court to allow by granting the Plaintiffs claim as prayed.

B. The 2nd Defendant's Submission

15. On 2nd November, 2021 the Principal State Counsel for the Hon. Attorney General the 2nd Defendant herein filed their written submissions dated 29th October, 2021. The Learned Counsel laid down in a chronological order all the fundamental principles of the law and precedents upon which one was required to fulfill in order to qualify to be considered for the title of the Land Adverse Possession. These were the Provisions of Section 7 of the Limited of Action Act Cap 22 and several precedents including the cases of **“Mbira – Versus - Gachiki EALR 137** – where court held that:-

“.....a person who seeks to acquire title to land by the method of Adverse Possession for the applicable statutory period must prove non - permissive or non-consensual actual open, notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption

Other cases were **Jandu – Versus - Kiplal & Another (1975) E.A. 225, & Mtana Lewa – Versus - Kahindi Ngala Mwangedi (2005) eKLR**.

16. The Learned Counsels submitted that it was trite law that he who alleged must prove their allegations of facts – and held that the Plaintiffs alleged to have been in possession of the suit land from the time of its sale on 10th November 2004 to its consequent transfer to Ras Kisauni Holding on 3rd December 2004 a fact which was never controverted by the 1st Defendant. Further, the Learned Counsel contention was that the Plaintiff had never paid any rent to the 1st Defendant and that there had been no defence filed by the 1st Defendant to counter this claim which was tantamount to an admission.

From the foregoing the 2nd Defendant prayed that the Honorable Court makes appropriate directions and order in the matter.

V. ANALYSIS AND DETERMINATION

16. I have keenly read and analyzed the pleadings filed herein being the Further Amended Originating Summons by the Plaintiffs dated 7th July, 2021, the Defence by the 2nd Defendant the testimony tendered by all the witnesses summoned by the Plaintiffs and the exhibits produced by the Plaintiffs as documentary evidence, the well-articulated written submissions by both the Plaintiffs and the 2nd Defendant's Learned Counsels, the relevant cited authorities and precedents based on the Principles of **“Stare decisis”** and the relevant provisions of law.

In Order to arrive at an informed, fair and just decision in this matter I have framed the following three (3) salient issues for considerations, these are:-

(a) Whether the Plaintiffs have well established the fundamental threshold required to be granted a title under the Principles of Land Adverse Possessions.

(b) Whether the Plaintiffs herein are entitled to the orders sought from the filed Further Amended Originating Summons dated 7th July, 2021

(c) Who will bear the costs of this suit?

ISSUE No. (a) Whether the Plaintiffs have well established the fundamental threshold required to be granted a title under the Principles of Land Adverse Possessions.

16. Prior to embarking on a more detailed and critical analysis of the judgment leading to the final decision on this matter, allow me to extrapolate on the brief facts of the case hereof.

From the filed pleadings, it is not in dispute that the Plaintiffs being indigenous Community members of a place called Kisauni Mwandoni within the County of Mombasa. In the diverse years of 1981 and 1996 or thereabout driven by quest to acquire land through sale started moving onto the suit land. They were welcomed and accommodated by a Lady called Mama Saida Hemed Suleiman.

17. She would allow them to occupy plots measuring 60 X 40 Sq. Feet at a monthly rent of Kenya Shillings Two Hundred (Kshs. 200/=) or Kenya Shillings Two Thousand Four Hundred (Kshs. 2,400/=) per annual. This tenancy agreement and/or relationship persisted on until the year 2004 when she declined to receive their rent anymore ostensibly as she had ceased being the land owner having caused it to be sub-divided into two portions. Indeed, she had sold them to a third party who she never disclosed its identity to the Plaintiffs.

18. For a long period the Plaintiffs whom had by now increased in numbers continued living and constructed structures on the land without any interruption. They were using it for their usual daily chores but not paying any rent anymore as it used to happen there before.

It was later on that they became curious and sought legal advise from their Advocates who advised them on their rights emanating from the Land Adverse Possession upon conducting official search at the Land Registry Offices they established that indeed the land was legal registered to a company trading in the named and style of Ras Holdings Company Limited.

19. On 24th July 2019 they decided to institute this suit by filing the Originating Summons that was subsequently amended on 20th January, 2021 and further amended on 20th January, 2020 and further amended on 7th July, 2021. They sought the orders as stated hereof.

20. Now, having fully started the facts let me proceed on to deal with the issues framed under the above Sub-heading. The legal Philosophy and substratum for the claim of Land Adverse Possession is founded under the provisions of Section 7 of the Limitation of Actions Act Cap 22 which provides as follows:-

“An action may not be brought by any person to recover land after the end of twelve (12) years from the date on which the right of action accrued to him or if it just accrued to some person through whom he claim, to that person”.

In addition to the above, the Provisions of Section 13 (1), (2) and (3) of the Limitation of Action Cap 22 Provides *inter alia*:-

(1) “A right of action recover land does not accrue unless the land is in the possession of some person in whose favour the period of Limitation can run (Which possession is in this Act referred to as adverse Possession) and, where under section 9, 10, 11 and 112 of this Act a right of action to recover accrue on a certain date and no person is in adverse possession on that date a right of action does not accrue unless and until some person takes adverse possession of the land”.

(2) Where a right action to recover land has accrued and thereafter before the right I barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purpose of this section, receipt of rent under a lease by a person wrongfully claiming in accordance with Section 12 (3) of this Act, the land in reversion is taken to be adverse possession of the land.

21. Further, the provision of Section 7 of the Limitation Act further provides:-

Subject to Section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action) the title of that person to the land is extinguished”

The provisions of Section 37 (1) of the Act states:-

“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 the these Acts 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”

While the provisions of Sections 38 (1) and (2) of the Limitation of Action Act Cap 22 states:-

1. Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act 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 proprietor of the land.

2. An order made under Sub-Sections (1) of the sections shall on registration take effect to any entry on the register which has not been extinguished under this Act. The and the provision of the Act or any other law applicable relating to environment and land. title of the proprietor of the land in favour of the adverse possession at the expiry of 112 years in adverse possession of the suit land”.

22. Under the provision of Article 162 (2) (b) of the Constitution of Kenya, it provides that Parliament shall establish Courts with the status of High Court to hear and determine disputes relating employment and labour and Employment & use and occupation of title to land. For an adverse possession suit to succeed, the Plaintiff must prove the following:-

- a) They have used the suit land as a right;
- b) The registered owner must know of the possession or occupation;
- c) The possession must be continuous and uninterrupted for over 12 years.

23. In support of the afore stated principles, I do hereby wish to refer to several decisions in support of these principles of law – **“Daniel Kimani Ruchire & others Versus Swift Rutherfords & Company Limited & Another, 1977 eKLR; Sarah Nyambura Kungu Versus David Njuguna, Civil Appeal No. 20 of 1988; Francis Gichara Kariri – Versus – Peter Njoroge Mairu (2005) eKLR; Lawrence Muiruri Njuguna - Versus – Charles Mweiga Mulwa (2018) eKLR, Muranga ELC; In adverse possession, the burden of proof of occupation lies on the title holder (Sisto Wambugu – Versus Kamau Njuguna (1983) eKLR.**

Whereas the Provisions Section 13 (1) of the Environment and Land Court Act vests the Courts with original and appellate jurisdiction to hear and determine all disputes in accordance with the provisions of Article 162 (2) (b) of the Constitution of Kenya. From the records, through an affidavit of service dated 17th September, 2020 – the 1st Defendant, the registered owners to the two parcels of land, were duly served by way of substituted means. This was effected by publishing an advertisement of the notice in the one of local newspapers with a wide national circulation – “The Standard Newspaper” of 19th March 2020. But despite of this, they failed to enter appearance nor file a Defence as required by the provisions of Order 6 and 7 of the Civil Procedure Rules 2010. In the given circumstances, this being a land matter under Order 10 Rule 10 of the Civil Procedure the matter was fixed for formal proof.

24. In their testimony PW-1 and PW- 2, both tendered evidence which was uncontroverted. – They stated that they and all the other Plaintiffs had been non-permissive, non-consensual, actual, open, notorious, exclusive and adverse users of the suit land continuously and without any interruption from the year 1981 and 1996 to date.

It was their testimony that from the time the land was sold on 10th November, 2004 and its consequent transfer to Ras Kisauni Company. Limited on 3rd December, 2004, the Plaintiffs had caused massive development on the land in form of construction of Permanent houses of several storey buildings, additional units and renovations of old and damaged portions all sitting on the suit land as evidenced from the set of photographs produced in court as Plaintiff Exhibits No. 6. The Plaintiffs have lived on the land to date with their families a fact which was never denied nor refuted by the 1st Defendant hence a clear admission as provided for under Order 13 (1) and (2) of the Civil Procedure Rules.

Additionally, the evidence by the Plaintiffs that since the land was transferred to the Third Party they had never paid any rent to the 1st Defendant not have they been asked to pay rent by the 1st Defendant has to be admitted and accepted as the fact as the same was never controverted by the 1st Defendant whatsoever.

25. In the final analysis I wish to rely on the now famous decision of **“Mtana Lewa – Versus - Kahindi Ngala Mwangandi (2005) eKLR** where Court of Appeal held as follows:-

“Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take an action against such person in assertion of his title for a certain period in Kenya 12 years”.

For these reason, this Honorable Court is completely persuaded that the Plaintiffs have been able to fully meet and/or established all the threshold required to be granted the title under the land Adverse Possession and there the answer to the query under this sub-heading is in the affirmative.

ISSUE No. (b) Whether the Plaintiffs herein are entitled to the orders sought from the filed Further Amended Originating Summons dated 7th July, 2021

26. As indicated, the 1st Defendant who from records – the Officials search dated 30th July, 2019, and produced as Plaintiff Exhibit No. -3 clearly, it is demonstrated that the 1st Defendant Ras Kisauni Holdings Limited is the legal registered and absolute proprietor to the two (2) parcels of land occupied by the Plaintiffs.

For some peculiar reason, this Court has noted the 1st Defendant has depicted some lethargy reluctance and inactive role on this matter.

Despite having been properly served with summons and pleadings herein vide the substituted means published in the local newspapers of wide national circulation, “The Standard Newspaper”, the 1st Defendant still failed, refused and/or neglected to enter appearance nor Defence thereof. Furthermore, taking all the development taking place in form of building of storey buildings and other renovations on the land the 1st Defendant who is not a living person should have been expected to take some legal or administration action restraining and/or preventing the Plaintiffs against these actions. But this never happened

On the contrary, the Plaintiffs from the 3rd December, 2004 to date when the land was transferred to the 1st Defendant they have continued living on the land and using it in form of causing permanent structures and lived there with their families. For all these reasons, therefore, the Honorable Court is fully persuaded that the Plaintiffs are entitled to all the orders they have sought from their further amended Originating summons dated 7th July, 2021.

Thus once again the response to the posed query under this sub-heading is on the affirmative form.

V. DETERMINATION

27. The ultimate analysis and in view of the foregoing in depth analysis I do proceed to enter judgment in favour of the Plaintiffs severally and jointly against the 1st Defendant. For avoidance of doubt I direct and order as follows:-

(a) **THAT** an Order declaring that the Plaintiffs have hereby acquired title of the whole parcels of land Known as MN/I/11723 and MN/I/11726 situated in Kisauni within the County of Mombasa by way of Land Adverse possession.

(b) **THAT** an Order declaring that the Plaintiffs be and are hereby the absolute owners in possession and enjoyment of the whole of the parcels of land known as MN/I/11723 and MN/I/11726 situated in Kisauni, the County of Mombasa.

(c) **THAT** an Order directing the 2nd Defendant to rectify his/her records by deleting the names of the 1st Defendant and replacing it with the names of the Plaintiffs as the registered proprietors of the whole of the parcels of land known as MN/I/11723 and MN/I/11726 situated in Kisauni the County of Mombasa.

(d) **THAT** a permanent injunction be and is hereby issued in favour of the Plaintiffs and against the Defendants, their officials or anybody claiming right through or under them restraining them from evicting or in any way interfering with the Plaintiffs peaceful possession and enjoyment of that whole parcel of land known as MN/I/11723 and MN/I/11726 situated in Kisauni within the County of Mombasa.

(e) **THAT** an order for costs of the suit to be borne by the 1st Defendant to the Plaintiff.

ISSUE No. (c) .. Who will bear the costs of this suit?

Under the provision of Section 27 (1) of the Civil Procedure Rules Costs follow the events. The Plaintiffs have succeeded in getting the judgment entered into their favour. As result, they are entitled to costs to be borne by the 1st Defendant.

IT IS ORDERED ACCORDINGLY.

JUDGEMENT IS DATED, SIGNED AND DELIVERED AT MOMBASA VIRTUALLY THIS 18TH DAY OF JANUARY 2022.

HON. JUSTICE L.L NAIKUNI

JUDGE

ENVIRONMENT AND LAND COURT, MOMBASA

IN THE PRESENCE OF:-

M/S. YUMNA – THE COURT ASSISTANT

MR. MAGUPU ADVOCATE FOR THE PLAINTIFFS.

NO APPEARANCE FOR THE 1ST DEFENDANT

M/S. KITI ADVOCATE FOR THE 2ND DEFENDANT