



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ENVIRONMENT AND LAND COURT CASE NO. 194 OF 2010

**IN THE MATTER OF: THE PARCEL OF LAND KNOWN AS PLOT NUMBER 387
(ORIGINAL**

**NUMBER 280/2(V/MN MEASURING 1764.87 ACRES OR THEREABOUTS SITUATED AT
MIRITINI**

AND

**IN THE MATTER OF: THE LIMITATION OF ACTIONS ACT CAP. 22 OF THE LAWS OF
KENYA**

BETWEEN

1. KAHINDI & 16 OTHERS PLAINTIFFS/APPLICANTS

AND

THE LEGAL REPRESENTATIVE OF CASSAM SULEIMAN SUMAR &

HAJI DADA KUMBERI (executors of the estate of)

HAJI SULEIMAN SUMAR KHAMISA.....1ST DEFENDANT/RESPONDENT

HAKIKA TRANSPORT SERVICES LTD.....2ND DEFENDANT/RESPONDENT

MUNICIPAL COUNCIL OF MOMBASA.....3RD DEFENDANT/RESPONDENT

JUDGMENT

[1] By an amended originating summons dated 14th November, 2012, the applicants applied to this court for the determination of whether they have acquired adverse possession of all that piece of land containing of 132 acres comprised in land Title CR 8813 and registered in the name of Cassman Suleiman Sumar and Haji Osman Dada Kumber, and further whether they are entitled to be registered as proprietors of the same. Finally they pleaded for the determination of the question whether the 2nd and 3rd defendants have the right to demolish and evict the plaintiffs from the suit property.

[2] The applicants called four witnesses. One Kahindi Charo Kalume stated that he had the permission of 1000 members. He produced a letter of authority marked as PExh.1. He stated that the land is 164 acres. He said the land belongs to the residents of Miritini because they live there. He produced the extract of title showing the owners as Cassaman Sulieman Sumar and Haji Dada Kumber. He claimed three (3) acres for himself. He produced thirteen (13) photographs showing their farms and houses and graves. He said he had not seen the land owners at all. On cross-examination by Mr. Birir he admitted that there were no schools, dispensaries or shops there. He admitted that the plaintiffs are seventeen.

[3] Mr. Ngandi Nyawa Kijoja ID. No.[particulars withheld] said he occupies two acres where he has planted coconut, bananas, oranges and food crops. He said he was 42 years and lived there with his wife and children. He said he had not been asked by anyone to leave that piece of land. He said on cross-examination that the land previously belonged to a European who did beef and diary farming. He said that he did not know the defendants.

[4] Mr. Juma Ruwa Mkoli P3 said that he occupied six acres. He said he lived on the land with his father's two wives and two of his own. He said he had planted coconut, cashewnuts and good mangoes. That he lived on the land for 35 years. He averred that no one had ever asked him to move or vacate out of that land. He said that the list of people suing had acreage of what they claimed. He however said the details of his identity card as to the place of issue and his birth were different. He stated that the identity card was issued in the year 2004. Ali Mbaji Mwinyi PW4 said he lives at Miritini. He said he had cultivated three acres. He said he was born in that land. He said he had not been given any notice to quit. He requested the court to grant him title by adverse possession. He further said that they did not invade the area.

[5] The defendant one Kassam Nazir Suleiman Sumar said he is the holder of passport no. xxxx. He said he is a Kenyan citizen. He said that Kassam Suleiman Sumar is his father and that Haji Suleiman Sumar Khamisa is a close friend of his grandfather who is sued here. He stated that his father and Haji were sued as trustees of his grandfather's estate. He stated that his father died in 2010 and left a Will. He produced a copy of the will where he appointed his three sons as the executors of the will.

[4] He said his grandfather had properties in Nairobi and Mombasa Miritini. That he had left for England for six (6) years. That he knew there were people living on the land. He said that they could not access the land. Those people prevented him from doing so. That the land is 162 acres and that from the record the people are not occupying the whole land. He said that they tried intervention through the Chief but to no avail. The witness said that he cannot give evidence as to whether they have been on the land for 12 years or not. He produced a copy of the transmission of the land from their deceased father to themselves. On cross-examination by Mr. Tindi, Counsel for the plaintiff the witness admitted that there was no attempt to evict these people and that he does not know for how long these people have been on the land.

[5] After the close of the originating summons I gave parties an option to find out if an amicable solution could be arrived at either through their own efforts or through mediation. The parties requested for thirty (30) days to do so which I gave. However no agreement was arrived at at all. Having heard the applicants case and having perused all their exhibits, I am on balance of probability convinced that the applicants live in the suit land. The applicants gave evidence that they have been on the suit land for a period in excess of 12 years. The respondent was not at all able to dispute this fact. Infact, in his evidence he said he had been out of the country for a period of six years. The Court was however not told what years. He said that before he went to the United Kingdom there were people on the land. On his own admission, he said he would not know when these people entered the land and that no notice had ever been issued to them to vacate. The version of the applicants that they had been on the land in excess of twelve (12) years therefore remained uncontroverted. I am therefore on a balance of probabilities convinced that the applicants have been on the land for a period of twelve (12) years and having lived there as trespassers and without ever being told to move out and vacate therefrom, they have therefore acquired land by adverse possession.

[5] However, the applicants have only claimed 132 acres in their pleadings. The land is 162 acres. The

plaintiffs shall only be entitled to 132 acres of the land while 30 acres shall remain and belong to the respondents and/or their known personal representatives. For smooth transmission of the land to the various entitled persons I make the following orders;

1. prior to survey and subdivision of this land to the parties herein there shall be no further developments of any sort, no construction of any type of houses at all. Status quo as at recording of this judgment shall be maintained.
2. All parties to this suit shall have access to the entire land to ascertain and confirm the settlement arrears of the applicants.
- 3 Any applicant preventing access for ascertainment and survey purposes shall on application to court lose his entitlement completely and the same shall revert back to th respondents.
4. The survey fees shall be borne by the applicants who shall share *pro rata* according to their acreages.
5. The Surveyor shall try as much as possible to divide the land equitably, all the squatters shall as much as possible be on one side leaving the rest of the land to the respondents. This will take into account roads of access, access to the river/water and public road(s).
6. Subdivision hereof shall take a maximum of six (6) months from the date hereof.
7. The nearest Officer Commanding Station and Administration Police (OCS) officers shall maintain peace and see to it that these orders are obeyed by all parties to this suit and their agents and/or representatives and/or families.

Dated and delivered in open Court at Mombasa this 30th day of October, 2014.

S. MUKUNYA

JUDGE

30.10.2014

In the presence of:

Mr. Tindi advocate for the plaintiff.

Mr. Shimaka Advocate for Birir for the defendant