



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Civil Suit 286 of 2012**

**1. KAHINDI KATANA**

**2. KHAMIS MWAKAE KHAMIS**

**3. STEPHEN KITI NYALE**

**4. DAVID NGANGA**

**5. MARCOS SEBE & 28 OTHERS.....PLAINTIFFS**

**VERSUS**

**FORT PROPERTIES LIMITED..... DEFENDANT**

**RULING**

The learned counsel for the applicant in this case Mr. Anyoka raised a preliminary print of law that this suit is rejudicatta. The basis of that assertion is that there was a previous Suit No. 381 of 2009 which was heard and determined and a ruling determined on 31<sup>st</sup> October, 2012. It is contended by learned counsel for the applicant that the issues were the same and between the same parties and in respect of the same piece of land.

Counsel further agrees that the suit land LR No. KILIFI/KIJIPWA/53 was property of the Government of Kenya prior to 25<sup>th</sup> March, 2009. That the plaintiffs are therefore barred by Limitations of Action Act Chapter 22 Laws of Kenya from claiming adverse possession against the defendant. The applicant requests the court to strike out the Originating Summons dated 3<sup>rd</sup> December, 2012.

The applicant relies on the affidavit of one Akil Fazlehussein Ebrahimjee who averred that the suit property is the property of Fort Properties Ltd. He annexed a copy of the official search of the said land. He denied any knowledge of Kahindi Katana or any of the plaintiff's in the suit. He averred that the suit property has been vacant and has been used by him for various purposes connected to his business as a developer till recently when he noticed some persons encroaching in his property. He stated that he bought the properties from one Stephen Timothy Mwakisha the original registered proprietor who had been allocated the property in the year 2001 by the Director of Land Adjudication and Settlement. The said Mwakisha registered the land in his name on 25<sup>th</sup> March, 2009.

The property was transferred into the defendant company on 20<sup>th</sup> April, 2009. Mr. Ebrahimjee states in his affidavit that the matter is resjudicatta pursuant to Mombasa Misc. Civil Application 381 of 2009 aforesaid that his company became registered owner only on 20<sup>th</sup> April, 2009 and no claim of adverse

possession can be maintained against his company. He argues that the property was previously Government land before the allotment to Mr. Mwakisha and that Section 41 (a) (1) of Limitations of Action Chapter 22 Laws of Kenya prohibits anyone from claiming adverse possession of land owned by the Government.

The applicant annexed a title dated 25<sup>th</sup> May, 2009 in the name of Stephen Timothy Mwakisha an agreement for sale dated 21<sup>st</sup> July 2009 from Stephen Timothy Mwakisha to Fort Properties Ltd. A letter dated 24<sup>th</sup> August 2009 written by the defendant to OCPD Kilifi Police Station complaining about the invasion of the defendant's land by unauthorized people. They also included proceedings in Mombasa HCCC No. 381 of 2009 among other documents.

Mr. Kirui, learned counsel for the plaintiff argued that HCCC 381 of 2009 was a judicial review seeking for an order of mandamus to compel the Director of Land Adjudication and Settlement to register Kilifi/Kijipwa/53 in the name of the plaintiff's and annul his registration of the same in the name of the defendants. He argued that the court did not determine the case on merit. That the court never made any order as to ownership of the suit land. He argued that the matter is not resjudicatta. He annexed various authorities on the point. He argued that it will not be right to say that this was Government land. He said that Mr. Mwakisha had himself accepted that there were squatters on the land. He argued that under Section 38 of the Limitations Act one can apply for adverse possession.

The issues for determination in this Preliminary Objection are as follows:

1. Is the dispute between the parties herein resjudicatta? Was it determined by Mombasa HCCC 381 of 2009?
1. Prior to the registration of land parcel Kilifi/Kijipwa/53 in the name of Stephen Timothy Mwakisha, was this Government land and if so what was the effect of Section 41 of Cap 22 Limitation of Actions Act.
1. Can a claim of adverse possession by the plaintiff's against the defendant's in the defendant's registered interest in Kilifi/Kijipwa/53 be sustained under the circumstances?

*Is the dispute between the parties herein resjudicatta pursuant to Mombasa Misc. Civil Application 381 of 2009?*

Miscellaneous Civil Application No. 381 of 2009 was filed by Kahindi Katana, Kuvuna Eddison Mwangolo, Khamis Mwakale Khamis, Stephen Kiti Nyale, Marcos Sebe and 28 others against Director of Land Adjudication and Settlement and the Land Registrar Kilifi and Fort Properties being cited as an interested party. They prayed for orders of mandamus compelling the Director of Land Adjudication and Settlement to declare null and void his decision to allocate land known as Kilifi/Kijipwa/53 to the interested party and that the Land Registrar Kilifi to cancel the title issued in favour of the interested party and that they, (Director of Adjudication and Settlement and Land Registrar Kilifi) be compelled to issue new titles in the name of the applicants for portions of 2.5 acres each.

In HCCC 381/2009, the applicants therein argued that it was irregular for one Mr. Mwakisha to be allotted 20 hectares when he was not a squatter like them. Mr. Mwakisha is the one who sold the said 20 hectares to Fort Properties. The court in that case pointed out that Mr. Mwakisha was not a party to the said HCCC 381/2009 and that the court advised that it seemed necessary for the said Mr. Mwakisha to be joined as a party to the suit since he was the original allottee of the controversial land. Counsel for the applicants did not take heed of the court's advise and asked the court to render its decision without Mr. Mwakisha's participation.

The court was told by the parties that before allocation of the land to Mr. Mwakisha it belonged to Settlement Fund Trustees. The court found that there was nothing placed before it to show that the suit land was exclusively reserved for squatters and that Mr. Mwakisha was not a squatter. The court found that:

**“The evidence before the court is too weak for the court form an opinion that the Director acted unlawfully or unreasonably”**

The court on the last paragraph of its judgment stated:

**“The applicants have asked this court to allocate the suit property to them. It is not for this court to ascertain or identify who are the deserving persons. That power lies elsewhere. That is a function of the 1<sup>st</sup> respondent and his officers.”**

The application dated 6<sup>th</sup> October 2009 was dismissed with costs. It is therefore quite obvious from the above ruling of Justice Tuiyott that the issue of the transmission of land parcel Kilifi/Kijipwa/53 was not exhaustively canvassed between the parties. The judge argued that the issue as to whether the transmission of the suit land to the registered owners was done justifiably or not lay elsewhere. I suppose that is why the applicants herein filed the Originating Summons dated 3<sup>rd</sup> December, 2012. My answer to issue No. 1 is that this matter is not resjudicatta.

*Prior to the registration of land parcel Kilifi/Kijipwa/53 in the name of Stephen Timothy Mwakisha was this Government land and if so what was the effect of Section 41 of Cap 22 of the Limitation of Actions Act?*

Kilifi/Kijipwa/53 was registered in the name of Stephen Timothy Mwakisha on 25<sup>th</sup> March, 2009. On the proprietorship section the said title Mr. Mwakisha is entered as No. 2. There is no entry No. 1. The applicants in this case vide their evidence in Mombasa HCCC 381 of 2009 confirmed to the court that the land belonged to Settlement Fund Trustees. Indeed, by bringing Mombasa Misc. Application 381 of 2009 against Director of Land Adjudication and Settlement and Land Registrar Kilifi the applicants herein in Originating summons dated 3<sup>rd</sup> December, 2012 confirm that this was Government land prior to allocation to Mr. Mwakisha. Mr. Kahindi Katana, in his affidavit dated 6<sup>th</sup> October, 2012 supporting the notice of motion dated 3<sup>rd</sup> December, 2012 stated in paragraph 5:

“That sometimes back, in a bid to resolve the land problem, the Government started allocating the said land to squatters thereon by giving each person residing thereon two and a half acres of land in what became known as the KILIFI/KIJIPWA SETTLEMENT SCHEME, unfortunately some people like one Stephen Timothy Mwakisha who was a former Provincial Commissioner and now Deceased and who was neither landless nor residing on the said property took advantage of the settlement scheme and in collaboration with the land officials secured himself 20 hectares which translates into more than 45 acres.”

If Kilifi/Kijipwa/53 was Government land prior to 25<sup>th</sup> March, 2009 when it was registered in the name of Mr. Mwakisha, could it have been available for anyone allegedly squatting in it under the doctrine of adverse possession? The answer to this question will be found in Section 41 (a) of the Limitations of Actions Act Chapter 22 Laws of Kenya which states:

40 (1) *“This Act does not:-*

*(a) enable a person to acquire any title to, or any easement over-*

*(i) Government land or land otherwise enjoyed by the Government;*

*(ii) mines or minerals as defined in the Mining Act;*

*(iii) mineral oil as defined in the Mineral Oil Act;*

*(iv) water vested in the Government by the Water Act;*

*(v) land vested in the county council (other than land vested in it by section 120 (8) of*

*the Registered Land Act); or*

*(vi) land vested in the trustees of the National Parks of Kenya; or.....*

There is no way therefore, any alleged occupation by the 1<sup>st</sup> to 5<sup>th</sup> applicants can be said to have had time running against the defendant herein when the land belonged to the Government of Kenya.

*Can a claim of adverse possession by the plaintiff's against the defendant's in the defendant's registrable interest in Kilifi/Kijipwa/53 be sustained under the circumstances?*

This land was later transferred to one Stephen Timothy Mwakisha on 25<sup>th</sup> March, 2009. This was the birth of Kilifi/Kijipwa/53. Any claim of adverse possession could only possibly arise from 25<sup>th</sup> March, 2009 against anyone. From 25<sup>th</sup> March, 2009 to the filing of this Originating Summons on 3<sup>rd</sup> December 2012 is only three (3) years. Mr. Mwakisha transferred the suit land to Fort Properties the defendant herein on 16<sup>th</sup> April 2009. In the original Mombasa Misc. Application 381 of 2009 Mr. Mwakisha was not made a party to the suit in spite of advice from the court.

The defendant's herein aver that they bought the suit property in vacant possession. They annexed their letter to OCPD Kilifi dated 24<sup>th</sup> August 2009 complaining of unknown people invading their property. The court has no difficulty in arriving at a conclusion that indeed this is the time around which the applicants entered the defendant's land.

In answering to the issue 3 herein, the court finds that the defendant has been the owner of this property for a period of three years. For a claim of adverse possession to be entertained the applicant must have had adverse occupation on the land of the respondent for a period of over 12 years. The registered owner must also have been so registered for over twelve years or he will have obtained title from some registered owner whose cumulative registration between the predecessor in title and the current registered owner must be 12 years or more. This is not the case here. Mr. Mwakisha's ownership and Fort Properties ownership is barely 4 years.

Having looked at all the pleadings, the annexures on affidavits and having perused Mombasa Misc. Application No. 381 of 2009, I come to the conclusion that the Originating Summons herein is premature and misconceived. I strike down the same with no order as to costs.

Dated and delivered on 12th day of March 2013.

**S. MUKUNYA**  
**JUDGE**