



**Hamisi & another v The Estate Of Mtsonga Matsaki (Environment & Land
Case 45 of 2020) [2022] KEELC 2846 (KLR) (11 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2846 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 45 OF 2020**

**MAO ODENY, J
MAY 11, 2022**

BETWEEN

POLA MWAMANGA HAMISI 1ST PLAINTIFF

BAKARI MTSONGA 2ND PLAINTIFF

AND

THE ESTATE OF MTSONGA MATSAKI DEFENDANT

JUDGMENT

1. By an Originating Summons dated June 26, 2020 the plaintiffs herein sued the defendant seeking the following orders:
 1. That the applicants Pola Mwamanga Hamisi and Bakari Mtsonga Pola have acquired by way of adverse possession parcel No. Kilifi/Mbwaka/Maereni/126 situated in Maereni within Kilifi County measuring apporoximately 2.2 Hectares and a title deed be issued to them.
 2. That by virtue of adverse possession, parcel No. Kilifi/Mbwaka/Maereni/126 situated in Maereni within Kilifi County measuring apporoximately 2.2 Hectares be vested in the names of Pola Mwamanga Hamisi and Bakari Mtsonga Pola and a title deed be issued to them accordingly.
 3. That a vesting order be and is hereby issued by this Honourable court compelling the Kilifi Land Registrar to register and issue the plaintiff/applicants with a title deed to the suit land.
2. The court gave directions that the originating summons be canvassed by way of written submissions which were duly filed.



Plaintiffs' Submissions

3. It was the plaintiffs' case that they have acquired parcel No. Kilifi/mbwaka/maereni/126 by way of adverse possession having resided on the suit property for more than 15 years hence should be registered as owners. The summons was supported by the affidavit of the 1st plaintiff sworn on June 26, 2020 who deponed that he was born in 1973 on the suit land which he has resided todate together with the 2nd plaintiff who is his younger brother.
4. He further deponed that he is aware that the owner of the suit land Mutsonga Matasaki Mwamanga is deceased having passed away in 1981 but is not aware whether a Succession Cause has been filed in respect of the estate. It was the plaintiff's further evidence that they have lived peacefully, openly and continuously on the suit land without interruption for more than 15 years and planted coconut trees and other crops.
5. The plaintiffs urged the court to find that they have acquired the suit land by way of adverse possession.
6. Counsel filed submissions and stated that the Plaintiffs did not enter the suit property with the permission of the deceased or his legal representatives therefore the same was adverse to the interest of the deceased.
7. Counsel further submitted that by virtue of section 16 of the *Limitation of Actions Act*, time did not stop running upon the death of the deceased and that at the time the representatives of the deceased obtained letters of administration in January 2021, the suit property was not available for distribution amongst them since the deceased's title had been extinguished as per section 17 of the *Limitation of Actions Act* and the property acquired by the plaintiffs by adverse possession. Counsel therefore urged the court to grant the orders as prayed in the originating summons.

Defendant's Submissions

8. In response to the summons, the defendant filed a replying affidavit sworn on July 16, 2021 by Steuben Nzaro Mtsonga one of the administrators of the deceased estate and a son of the deceased, Mtsonga Matsaki.
9. Steuben the administrator of the deceased estate gave an elaborate background to the case and explained the relationship between the plaintiffs and the deceased whereby he deponed that the deceased acquired the suit property following an adjudication process which saw the deceased being registered as the owner on October 15, 1984. Thereafter, a title deed was issued to the deceased on June 29, 1990 although the deceased died on August 21, 1981.
10. He further stated that his late father invited the plaintiffs' grandmother and father to the suit property, built her a house therein in order to care for her and that prior to the adjudication process, the deceased had commenced the process of removing the plaintiffs' grandmother and father from the suit property. The deceased therefore filed Land Civil Case No. 28 of 1973 at the then Kaloleni District Magistrates Court where judgment was entered in favour of the deceased on October 23, 1973.
11. It was his evidence that the deceased filed another claim vide Land Case No. 28/75-76 against the plaintiffs' father and grandmother claiming ownership of the portion they occupied. Similarly, this case was determined in favour of the deceased on November 14, 1975. The plaintiffs' father appealed this decision to the Arbitration Board vide Case No. 24/75/76 where the deceased was confirmed as the rightful owner of the suit property.



12. He further deponed that plaintiffs' father then raised an objection to the registration of the deceased as the owner of the suit property which Objection No. 9/78/79 was heard and determined by the Maereni Adjudication Section Committee on March 5, 1981, where the plaintiffs' father and grandfather were granted a lifetime interest in the portion of the suit property they occupied.
13. Despite the lifetime interest, the plaintiffs' father still claimed ownership of the suit property vide a suit Mombasa ELC No. 269 of 2004 where judgment was entered on February 23, 2018 confirming ownership of the suit property to the deceased and the plaintiffs' father's lifetime interest.
14. The deponent further deponed that on various dates in the years 1995, 2016, and 2020, he filed reports to the chief and police whenever the plaintiffs acted contrary to the rights conferred to their father. He therefore stated that this suit is *res judicata* and should be dismissed with costs.
15. Counsel filed submissions and stated that the present suit is *re judicata* and that there should be an end to litigation as it was held in the cases of *John Florence Maritime Services Limited & another v CS for Transport and Infrastructure & 3 others* [2015] eKLR and *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR.
16. Counsel submitted that the dispute between the parties in respect of the same subject matter had been heard and determined by a competent court hence the current suit is an abuse of court process as it offends the doctrine of *res judicata*.
17. On the issue of adverse possession, counsel submitted that the plaintiffs continued occupation in the suit property was only in furtherance of their father's lifetime interest as it was held in the case of *Ndiema Samburi Soti v Elvis Kimtai Chepkese* [2010] eKLR that a party who enters possession by virtue of an interest other than that of a trespasser cannot claim adverse possession.
18. Counsel also submitted that the plaintiffs are on the suit property pursuant to a lawful court order which was affirmed in the court case Judgment in *Pola Mwamanga Matsakii v Nzaro Mutsonga Matsaki & another* [2018] eKLR therefore cannot claim adverse possession and relied on the case of *Kweyu v Omuto* [1990] eKLR where the Court of Appeal held that adverse possession and possession with permission could not co-exist.
19. Mr Onyango submitted that the plaintiffs could not claim adverse possession and ancestral land at the same time, having been born and raised on the suit property and relied on the cases of *Haro Yonda Juaje v Sadakta Dzenge Mbauro & Kenya Commercial Bank Limited* [2014] eKLR; and *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] eKLR.
20. Finally, counsel submitted that the lifetime rights of the plaintiff's father still remain and subsist hence no claim for adverse possession can arise as the limitation period for such a claim to arise has not started running. Counsel urged the court to dismiss the plaintiffs' claim as it is *res judicata*.

Analysis And Determination

21. The issues for determination are whether this suit as filed is proper before the court, whether the suit is *res judicata* and whether the plaintiffs are entitled to the ownership of the suit property by way of adverse possession.
22. On the issue whether this suit is proper as filed before the court, I notice that the suit is filed against the estate of Mutsonga Matsaki Mwamanga (Deceased) who is the registered owner of the suit land. The plaintiffs have deponed at paragraph 8 and 9 of the supporting affidavit to the Originating Summons that they are aware that the deceased died in 1981 and are not aware of who inherited the estate or the representatives of the estate.



23. Suits against the estate of a deceased person are brought by or against the legal representative of the estate. In this case the suit was brought against the estate of the deceased person. Who is the legal representative of the estate to be sued as provided for by the law and procedure? Section 2 of the [Civil Procedure Act](#) defines a legal representative as a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.
24. The fact that the son of the deceased one Stuben Nzaro Mutsonga filed a response after the grant of limited letters of administration *ad litem* on January 18, 2021 after the filing of this case does not sanitize the anomaly as no amendment was sought and granted to regularize the position.
25. In the case of [Mohammed Abushin Mkullu v Suleiman Abdalla Hassan](#) [2012] eKLR, Ibrahim J (as he then was) held that it is the duty of any party instituting a suit to find out which party they are filing a claim against. The plaintiffs admitted that they neither knew the legal representatives nor whether a succession cause had been filed.
26. On the issue that the suit is *res judicata*, section 7 of the [Civil Procedure Act](#) provides that:
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
27. In the cases of [Invesco Assurance Company Limited & 2 others v Auctioneers Licensing Board & another and Kinyanjui Njuguna & Company Advocates & another \(Interested Parties\)](#) [2020] eKLR the court held that:
- “...for the bar of *res judicata* to be effectively raised and upheld, the party raising it must satisfy the doctrine’s five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that:
- i. The suit or issue raised was directly and substantially in issue in the former suit.
 - ii. That the former suit was between the same party or parties under whom they or any of them claim.
 - iii. That those parties were litigating under the same title.
 - iv. That the issue in question was heard and finally determined in the former suit.
 - v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.”
28. The proceedings to the suits that were between the parties have been provided to the court being Kaloleni Land Case No 28 of 1973, Pola Mwamanga Matsaki, where the plaintiffs’ father sued the deceased over ownership of the suit property. The case was heard on its merits and the same was dismissed. The trial Magistrate observed that the land belonged to Matsaki who was grandfather to the said Pola Mwamanga Matsaki and father to the deceased herein. That the deceased being a son of the said Matsaki had a right to the land bought by his father in priority to Pola Mwamanga Matsaki’s claim.
29. The plaintiffs’ father Pola Mwamanga Matsaki filed another case before the Adjudication Committee in 1975 vide case No 28 of 1975 – 76 where the Adjudication Committee awarded the land to the



deceased. Pola Mwamanga Matsaki appealed to the Kilifi District Arbitration Board which dismissed the appeal.

30. Pola Mwamanga Matsaki filed an objection with the Lands office and on March 5, 1981 the Land Adjudication Officer found that the matter having been heard by the Kaloleni Court and Land Adjudication Committee & Arbitration Board, it was not proper for him to handle it. He declined to make an order for Pola Mwamanga Matsaki to move out of the suit property but inserted at paragraph 8 of the adjudication record of the suit property that the said Pola Mwamanga Matsaki and his mother [(he plaintiffs' father and grandmother) had a lifetime right to live on the land which right did not amount to ownership.
31. It is on record that the suit property was then registered in the name of the deceased but the plaintiffs' father filed another case in Mombasa ELC No. 269 of 2004. In that suit, he sought orders *inter alia* for a declaration that he was the rightful owner of the suit property and an order be directed to the District Land Registrar, Kilifi to rectify the register and register him as the proprietor. He had claimed that the deceased held the suit property in trust for him.
32. The matter was heard and determined on merits where Judge A. Omollo who dismissed the same and held as follows:

“ In light of the foregoing issues dealt with in the above paragraphs, I find the plaintiff's claim does not lie as against the 1st defendant and therefore the 2nd defendant cannot be directed to perform the rectification of the register as prayed in the plaint. The suit also fails on account of *res judicata* and being statute barred.”
33. I find that the plaintiff's suit is *res judicata* and an abuse of court process hence dismissed with costs to the defendant. Litigation must come to an end and a party should not vex the opposing party with numerous suits which have been determined by a competent court of law or tribunal.
34. On the issue of adverse possession, I agree with counsel for the defendant that the plaintiffs' continued occupation in the suit property was only in furtherance of their father's lifetime interest and that a party who enters possession by virtue of an interest other than that of a trespasser cannot claim adverse possession. Further that the plaintiffs are on the suit property pursuant to a lawful court order which was affirmed in the court case Judgment in Pola Mwamanga Matsakii v Nzaro Mutsonga Matsaki & another [2018] eKLR therefore cannot claim adverse possession as adverse possession and possession with permission cannot co-exist.
35. The upshot is that the Originating Summons dated June 26, 2020 is dismissed with costs to the defendant.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF MAY 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

