



**Baya & 2 others v Nazerali & 6 others (Environment & Land Case  
10 of 2015) [2022] KEELC 3127 (KLR) (28 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 3127 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 10 OF 2015**

**NA MATHEKA, J**

**JUNE 28, 2022**

**BETWEEN**

**MASELINA KAZUNGU BAYA ..... 1<sup>ST</sup> PLAINTIFF  
JUMAA KATANA CHARO ..... 2<sup>ND</sup> PLAINTIFF  
KACHE CHENGO KARISA ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**HUSSEIN AHMED NAZERALI ..... 1<sup>ST</sup> DEFENDANT  
MARIYAM HUSSEIN NAZERALI ..... 2<sup>ND</sup> DEFENDANT  
GRISHCHANDRA DEVIPSAND BHATT ..... 3<sup>RD</sup> DEFENDANT  
AVAND BHATT ..... 4<sup>TH</sup> DEFENDANT  
NARANJANA GIRISHCHANDRA BHATT ..... 5<sup>TH</sup> DEFENDANT  
MINISTRY OF LANDS & HOUSING ..... 6<sup>TH</sup> DEFENDANT  
THE ATTORNEY GENERAL ..... 7<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. This originating summons is brought by Maselina Kazungu Baya, Jumaa Katana Charo, Kache Chengo Karisa for the following orders, namely;
  1. That this summons be served on Hussein Ahmed Nazerali, Mariyam Hussein Nazerali, Grishchandra Deviprasand Bhatt, Anand Girish Bhatt, Niranjana Girishchandra Bhatt by affixing a copy thereof on the court Notice Board in the court house or by advertisement once in the Daily Newspaper.



2. That the Respondents' interest in all that parcel of land situated in the Mombasa Municipality in the Mombasa District containing by measurement Nought Decimal one Nought One One (0.1011) Hectares or thereabout and being Subdivision Number 6262 of Section I Mainland North and Nought Decimal one Nought One One (0.1011) Hectares or thereabout and being Subdivision Number 6263 of Section 1 Mainland North which said pieces of land is comprised in a Certificates of titles both dated the 12<sup>th</sup> day of April One Thousand Nine Hundred and Ninety One registered in the Land Titles Registry at Mombasa as Number CR 20752 /1 and CR. 20753/1 respectively both delineated, demarcated and described on the Land Survey Plan Number No. 145641 and 145642 respectively as in entry number 5 on titles have been extinguished.
3. That the Applicants' be registered as the proprietors of all that parcel of land situated in the Mombasa Municipality in the Mombasa District containing by measurement Nought Decimal one Nought One One (0.1011) Hectares or thereabout and being Subdivision Number 6262 of Section 1 Mainland North and Nought Decimal one Nought One One (0.1011) Hectares or thereabout and being Subdivision Number 6263 of Section 1 Mainland North which said pieces of land are comprised in a Certificates of titles both dated the 12th day of April One Thousand Nine Hundred and Ninety One registered in the Land Titles Registry at Mombasa as Number CR 20752 /1 and CR. 20753/1 respectively both delineated, demarcated and described on the Land Survey Plan Number No. 145641 and 145642 respectively in places of Girishchandra Deviprasad Bhatt Anand Girish Bhatt and Niranjana Girishchadra Bhatt by reason of the fact that the Applicants have become entitled to the said land by adverse possession.
4. That the Registrar of Titles, Mombasa do issue certificates of titles for all the two pieces of land situated in the Mombasa Municipality in the Mombasa District containing by measurement Nought Decimal one Nought One One (0.1011) Hectares or thereabout and being Subdivision Number 6262 of Section 1 Mainland North and Nought Decimal one Nought One One (0.1011) Hectares or thereabout and being Subdivision Number 6263 of Section 1 Mainland North which said pieces of land is comprised in a Certificates of titles both dated the 12th day of April One Thousand Nine Hundred and Ninety One registered in the Land Titles Registry at Mombasa as Number CR 20752 /1 and CR. 20753/1 respectively both delineated, demarcated and described on the Land Survey Plan Number No. 145641 and 145642 respectively in the names Maselina Kazungu Baya, Jumaa Katana Charo and Kache Chengo Karisa the applicants herein.
5. That the Order referred to in paragraph 2,3 and 4 above be registered against the two Titles to all pieces of land situated in the Mombasa Municipality in the Mombasa District containing by measurement Nought Decimal one Nought One One (0.1011) Hectares or thereabout and being Subdivision Number 6262 of Section 1 Mainland North and Nought Decimal one Nought One One (0.1011) Hectares or thereabout and being Subdivision Number 6263 of Section 1 Mainland North which said pieces of land is comprised in a Certificates of titles both dated the 12th day of April One Thousand Nine Hundred and Ninety One registered in the Land Titles Registry at Mombasa as Number CR 20752 /1 and CR. 20753/1 respectively both delineated, demarcated and described on the Land0Survey Plan Number No. 145641 and 145642 respectively in terms of Section 38(2) of The Limitation Actions Act, Chapter 22, Laws of Kenya.
6. That the costs of this Originating Summons be provided for.



2. It is based on the grounds that the Applicants have been in uninterrupted exclusive physical occupation of all the parcel land known as Subdivision Number 6262 of Section 1 Mainland North and Subdivision Number 6263 of Section 1 Mainland North for a continuous period in excess of 20 years and have constructed permanent and semi-permanent makuti/marara houses. That the Respondents' rights and/or interest all the parcel land known as Plot Subdivision Number 6262 of Section 1 Mainland North and Subdivision Number 6263 of Section 1 Mainland North vis-a-vis those of the Applicant have been extinguished. That it is fair and just that and the Applicants be registered as the owners' of all the parcel of land known as Plot Subdivision Number 6262 of Section 1 Mainland North and Subdivision Number 6263 of Section 1 Mainland North so that they stop leaving in fear that they may wake up to an eviction one day. That the Applicants have peacefully exercised proprietary rights over the suit property for a period of over 20 years and now claim it by law to acquire legal right over the suit property to wit Plot Subdivision Number 6262 of Section 1 Mainland North and Subdivision Number 6263 of Section 1 Mainland North. That the suit property is the only known home for the Applicants.
3. DW1 the 4<sup>th</sup> Defendant testified that, sometime in August 2013 they acquired the same lawfully. That upon moving to the premises to take vacant possession they found the suit premises occupied by about five persons who indicated that they had been in occupation for about 8 (eight) years though they later changed the number of years. That none of the occupants had built any permanent houses on the premises as they only found temporary structures whereupon they also put up a mabati shed. That upon negotiation they entered into an agreement that set out modalities for their leaving and a copy of the said agreement was produced as an exhibit. That they later came to learn that prior to the said Agreement being signed the squatters had sought for help from the Land, Planning & Housing County Executive Member for Mombasa County who then referred the matter to the Deputy County Commissioner, Kisauni Division for resolution. That pursuant to the said agreement three of the occupants duly demolished their temporary structures and moved out. That subsequently on or around 31<sup>st</sup> January 2015 he was informed that the 3<sup>rd</sup> Applicant had also pulled down her structure and vacated the suit premises. That the Applicants have not stayed in the suit premises for 20 years as they allege.
4. The 7<sup>th</sup> Defendant in their defence stated that a Grant by the Government of Kenya for the suit property Plot No. MN/1/6262 and MN/1/6263 was issued on 12<sup>th</sup> April 1991 to Hyjaf Holdings Limited and registered as sub-division No. 6262 (Original No. 9220/32) and subdivision No. 6263 (Original No. 52220/33) resulting in CR. NO. 20752 and 20753 respectively. That in June 1991, both parcels of Land were transferred to Husein Ahmed Nazerali and Maryan Husein Nazerali as joint proprietors. Annexed and marked as Exhibit DJS-1" is a copy of the transfer dated 13<sup>th</sup> June, 1991. That later on 5<sup>th</sup> September 2013, the suit property was transferred to Girish Chandra Deviprasad Bhatt, Girish Bhatt and Niran Jana Girish Chandra Bhatt. Annexed and marked as "DJS- 2" is a copy of the Transfer dated 5<sup>th</sup> September 2013. That both transfers were found to be in good order properly prepared, executed and therefore registered. That no further Transfer has been done therefore Girishchandra Deviprasad Bhatt, Anand Girish Bhatt and N1ranjana Girishchandra Bhatt are still the registered proprietors of the suit property. That the Application herein is scandalous, frivolous and vexatious as it has no basis.



5. This court has carefully considered the evidence and submissions therein. The *Land Registration Act* is very clear on issues of ownership of land and Section 24(a) of the *Land Registration Act* provides as follows:

Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.

6. Section 26 (1) of the *Land Registration Act* states as follows:

The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

7. The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

8. This court in considering this matter referred to the case of *Elijah Makeri Nyangw'ra -vs- Stephen Mungai Njuguna & Another* (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The court in the case while considering the application of section 26(1) (a) and (b) of the *Land Registration Act* rendered himself as follows:-

-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

9. It is not in dispute that the 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> Defendants are the registered owners of the suit property. The issue for determination is whether or not they hold good titles by virtue of the Plaintiffs' claim of adverse possession. Be that as it may, in determining whether or not to declare that a party has acquired land by adverse possession, there are certain principles which must be met as quoted by Sergon J in the case of *Gerald Muriithi vs Wamugunda Muriuki & Another* (2010) eKLR while referring to the case of *Wambugu v Njuguna* (1983) KLR page 172 the Court of Appeal held as follows;

1. In order to acquire by statute of limitations title to land which has a known owner the owner must have lost his right to the land either by being dispossessed of it or by having continued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed of the suit land for a continuous period of twelve years as to entitle him, the respondent to title to the land by adverse possession.



2. The *limitation of Actions Act*, on adverse possession contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not the claimant has proved that he has been in possession for the requisite number of years.
  3. Where a claimant pleads the right to land under an agreement and in the alternative seeks adverse possession, the rule is: the claimant's possession is deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least 12 years after such payment.
10. The court was also guided by the case of *Francis Gicharu Kariri vs Peter Njoroge Mairu*, Civil Appeal No. 293 of 2002 (Nairobi) the Court of Appeal approved the decision of the High Court in the case of *Kimani Ruchire vs Swift Rutherford & Co. Ltd.* (1980) KLR 10 where Kneller J, held that;
- The Plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion)".
11. So the Plaintiffs must show that the Defendants had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it. In applying these principles to the present case, PW1 the 1<sup>st</sup> Plaintiff testified that she has occupied the suit property for the past 20 years and had a business and lived there together with the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs since 1991. That her house was burnt down in 2015. The 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs corroborated her evidence in their statements filed in court. She states that any documents produced by the Defendants with her signature were done under duress. DW1 testified that none of the occupants had built any permanent houses on the premises as they only found temporary structures whereupon they also put up a mabati shed. That upon negotiation they entered into an agreement with the Plaintiffs that set out modalities for their leaving at the DCs office and a copy of the said agreement was produced as an exhibit. The 1<sup>st</sup> Plaintiff confirms that the structures were temporary and she used to sell mnazi a local brew there. She insists that she should have been given adequate notice and be compensated so as to agree to leave the suit property. From the evidence before me I find that the Plaintiffs only had temporary structures on the suit property. I find that the Plaintiffs have not proved that they have been in occupation of the suit land for over 20 years. PW1 testified that in 2008 a Rwandese man can and allowed them to live there until his return claiming to have bought the suit property from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. If this was true, and this has not been established, then they were licensees and cannot claim the land. Indeed, PW1 in her testimony seems to be more interested in compensation than in getting the land registered in her name. I find that the Plaintiffs have failed to establish that their possession of the suit land was continuous and not broken for any temporary purposes or any endeavours to interrupt it for a period of 12 years. I find that the Plaintiffs have failed to prove their case on a balance of probabilities and I dismiss the same with costs.
12. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 28<sup>TH</sup> DAY OF JUNE 2022.**

**N.A. MATHEKA**

**JUDGE**

