



REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 133 of 2012

IN THE MATTER OF: LAND REFERENCE NO. KWALE/MAJORENI/1283,  
KWALE/KIDIMU/15& KWALE/MAJORENI/1284

IN THE MATTER OF: AN APPLICATION FOR A DECLARATION THAT THE  
APPLICANTS/PLAINTIFFS HAVE OBTAINED OWNERSHIP OF 138.48HA OF THE ABOVE  
SAID LAND BY WAY OF ADVERSE POSSESSION

BETWEEN

CHARI CHIMAMBO NYAWA ..... 1<sup>ST</sup> PLAINTIFF

EMMANUEL MWAYONGA ..... 2<sup>ND</sup> PLAINTIFF

DOROTHY KADZO ..... 3<sup>RD</sup> PLAINTIFF

MWANASITI BAKARI CHOMBO ..... 4<sup>TH</sup> PLAINTIFF

MAWAZO ABDALLA MOYO ..... 5<sup>TH</sup> PLAINTIFF

V E R S U S

KWALE INTERNATIONAL SUGAR CO. LTD .... DEFENDANT

RULING

- 1) By way of Originating Summons, the Plaintiffs seek to be registered as proprietors of land described as Kwale/Majoreni/1824, Kwale/Majoreni/1283 and Kwale/Kidimu/15 (**hereinafter jointly the ‘suit properties’**) in place of the Defendant. The Plaintiffs hinge their claim on the doctrine of adverse possession.
- 2) Simultaneously with commencing the summons, the Plaintiffs filed an application for injunction seeking orders to restrain the Defendant from entering into, remaining on and/or committing any acts of trespass on the suit properties. That application, dated 11<sup>th</sup> July 2012 is what I am asked to determine.
- 3) A brief highlight of the Plaintiff’s case. In an affidavit sworn by the Mwanasiti Bakari Chombo (the 4<sup>th</sup> Plaintiff) on behalf of all Plaintiffs, the Plaintiffs claim to have occupied the suit properties for long

periods of time as follows-

- (i) The 1<sup>st</sup> Defendant has occupied Kwale/Kidimu/15 for 16 years.
- (ii) The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants jointly occupy Kwale/Majoreni/1283 for 22 and 22 years respectively.
- (iii) The 4<sup>th</sup> and 5<sup>th</sup> Defendants jointly occupy Kwale/Majoreni/1284 for 22 and 36 years respectively.

That their occupation has been open, continuous and uninterrupted.

4) It is his evidence that the Plaintiffs have about 34 households on the suit property. Attached to that affidavit are photographs of some houses and crops said to be on the property and belonging to the Plaintiffs. The Plaintiffs are apprehensive that the Defendant will evict them and thereby stragulate their claim.

5) The Defendant admits that the Plaintiffs are in possession of the suit properties but contend that the occupation is an illegal act of invasion and trespass. The Defendant avers that the Plaintiffs have continued to construct illegal structures so as to entrench their unlawful position.

6) At this stage of the proceedings the Courts duty is to assess the Plaintiffs claim on the basis of the principles enunciated in case of **Giella –Vs- Cassman Brown & Co. Ltd (1973)EACE**. It is common ground that the Plaintiffs are in occupation of the suit properties. Not surprising, there is no agreement as to the length or nature of that occupation. The Plaintiffs state that it has been over 12 years, open, continuous and uninterrupted. This is denied by the Defendant who say it is an invasion and trespass. In doing so, however, the Defendant has not stated when the alleged invasion happened. These rival positions cannot be resolved without a full blown trial where witnesses are tested in cross-examination.

7) There is also submission by Counsel for the Defendant that the Plaintiffs claim cannot defeat the Defendants titles which it acquired in 2008. From the greencards Kwale/Kidimu/15 was transferred to the Defendant from Whitestone Farms Ltd on 31<sup>st</sup> July 2008. Whitestone Farms Ltd having been registered as first owners thereover on 26<sup>th</sup> August 1993. The history of Kwale/Majoreni/1283 and 1284 is that they were first registered in the name of Abdalla Said Kizere on 13<sup>th</sup> February 1984, transferred to Zainabu Juma Salimini on 6<sup>th</sup> June 2008 and subsequently to the Defendant on 31<sup>st</sup> July 2008. It was argued by the Defendant that it has been the owner of the suit properties for the last 4 years only and the Plaintiffs have not achieved 12 years against its titles.

8) If what the Plaintiffs state in their affidavit evidence is true then they would have each been on the suit properties for over 12 years by 2008 when transfers were effected in favour of the Defendant. In which event the changes in registration of ownership would not take away their rights as adverse possessors who remain in possession. Considering a scenario where subdivision had occurred but did not disrupt possession, Ringera J (as he then was) in **Wasui –Vs- Musumba [2002]1 KLR 397 at page 445** said-

**“As I understand the law, prescriptive rights are in the nature of overriding interests and they run with the land irrespective of changes in proprietorship thereof.”**

The change of ownership in 2008 would not affect any rights that the Plaintiffs may have acquired prior to the changes as they are in possession.

9) Taking all the above into consideration I am inclined to grant orders that maintain the status quo. On the evidence so far presented the claim by the Plaintiffs cannot be dismissed off hand. As they are in possession that status needs to be maintained until this matter is settled on merit. I allow the application dated 11<sup>th</sup> July 2012 with costs.

Dated and delivered at Mombasa this 4<sup>th</sup> day of December, 2012.

**F. TUIYOTT**  
**JUDGE**

Dated and delivered in open court in the presence of:-  
Nyange for Plaintiffs  
Latiff for Defendant  
Court clerk - Moriasi

**F. TUIYOTT**  
**JUDGE**