



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MALINDI**  
**CIVIL SUIT NO. 18 OF 2010 (O.S)**

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

**AND**

**IN THE MATTER OF: THE PARCEL OF LAND KNOWN AS PLOT NO. 816 (ORIGINAL  
703/47 MALINDI**

**BETWEEN**

**GUDDY K. HARBHAJAN BIRKIGT**

**OLIVER TAVARES .....PLAINTIFFS**

**VERSUS**

**RICHARD KARL ZIPS .....DEFENDANT**

**JUDGMENT**

GUDDY K. HARBHAJAN BIRKIGT and OLIVER TAVARES referred to as 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs respectively, filed this suit against RICHARD KARL ZIPS (2<sup>nd</sup> defendant) by way of Originating Summons under Order XXXVI Rule 1 and 3D of the Civil Procedure Rules where they seek for orders that they are legally entitled to the said property No. 816 (original No. 703/47) Malindi, situated in Malindi, by virtue of adverse possession, having occupied the same for over 20 (twenty) years. The property is registered in the name of Richard Karl Zips (the defendant, and measures 2.10hectares.

The 1<sup>st</sup> plaintiff (OLIVER TAVARES) testified as PW1 and he told this court that he knew the defendant who was his friend, and was a tour operator, running a horse stable.

When the defendant left the country in 1985, he told PW1, that he was going away for two years, and requested PW1 to take care of his business (i.e the horses' stable) and also look after the property. The business was on plot 816. So PW1 took care of the business and property from 1985 by entering onto the land. By 1989, the horses had died. A certificate of postal search, produced as exhibit 1 shows that as at 19<sup>th</sup> September 2003, Richard Karl Zips was the registered owner of the said plot, holding title No. CR 12101, and the land was freehold with no encumbrances. After the lapse of two years, PW1 tried to get in touch with the defendant in vain, so he and the 2<sup>nd</sup> plaintiff rented out a portion of the plot so as to get some income, and lived together on the other portion. Since then, no one has asked them to move out of the plot nor has Richard even communicated. A copy of the Title and Deed Plan in respect of the plot is produced as exhibit 2.

The plaintiffs have been paying the council land rates as per receipts produced as exhibit 3 and now ask to be registered as owners of the land.

GUDY HARBHAJAN BIRKIGT (PW2) confirmed to this court that he lives on the plot, although he seemed to mix up the numbers referring to 186 instead of 816, but he described its location as being

opposite Seaview Lodge (which is the same description PW1 had given). He confirmed that he runs a tourism business on the plot and concurred with PW1's evidence saying, they have been in continuous occupation since 1985. While I have no doubt that the applicants are in occupation of the property, I am just curious as to why they did not find it necessary to present the latest certificate of postal search for 2010 – why rely on a postal search carried out on 19-9-2003, almost seven years from the date this matter was filed? Could it be that there is currently another person registered as owner of the property? Is there a possibility that perhaps the defendant later transferred the property to someone else. The plaintiff elected to rely on a postal search dating seven years ago, I have made by sentiments known, I doubt the bona fides of this application on account of that.

This is compounded by the fact that the certificate of title produced is issued to one JOHN ARCHIBALD BOWMAN EDGAR and STEPHANIE BOWMAN EDGAR as the registered proprietors.

There is nothing to persuade this court that the title was ever transferred to Richard (the defendant) nor has any evidence been presented to this court, to demonstrate the relationship between the defendant and the named proprietors – was the property transferred to the defendant as a gift, was it sold to him? I don't know. The applicants were content to present two documents which relate to the same portion of land, but showing different persons as the registered owners, and urge this court to allow them to be the registered owners – surely there is a missing link.

The upshot is that the plaintiffs have not proved on a balance of probabilities that the defendant named here is the current registered owner of the property and I decline to grant the orders sought.

The prayers are dismissed and applicants shall bear the costs of this originating summons.

Delivered and dated this 28<sup>th</sup> day of **March 2011** at Malindi.

**H. A. Omondi**

**JUDGE**

No appearance for parties at 11.30am