



REPUBLIC OF KENYA



KENYA LAW
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**Chipira & 300 others v Panju & 5 others (Environment & Land Case
53 of 2020) [2022] KEELC 3803 (KLR) (25 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3803 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE 53 OF 2020

MAO ODENY, J

JULY 25, 2022

IN THE MATTER OF: LAND ACT NO 6 OF 2012 & LAND REGISTRATION

ACT NO 3 OF 2012; THE LIMITATION OF ACTIONS

ACT CAP 22, LAWS OF KENYA

AND

IN THE MATTER OF: AN APPLICATION BY THE 300 PLAINTIFFS THAT

THEY HAVE ACQUIRED TITLE TO LAND PORTION

NO 333 MALINDI REGISTERED AS TITLE NO LT 38

FOLIO 200/A FILE 3486 BY WAY OF ADVERSE

POSSESSION

BETWEEN

DAVID KATANA CHIPIRA 1ST PLAINTIFF

KATANA SHIKARI MAPINGA 2ND PLAINTIFF

MORRIS MATAZA KALENGA 3RD PLAINTIFF

CHARO KATANA MWIJO 4TH PLAINTIFF

GRAMA KAPOMBE KUTOMOLA & 296 OTHERS 5TH PLAINTIFF

AND

MURTAZA YUSUFALI PANJU 1ST DEFENDANT

SHABBIR YUSUFALI PANJU 2ND DEFENDANT

FATIMA YUSUFALI PANJU 3RD DEFENDANT

HUSSEINALI NAZARALI PANJU 4TH DEFENDANT



HASNAIN KASSAMALI PANJU 5TH DEFENDANT

RIYAZ KASSAMALI PANJU 6TH DEFENDANT

JUDGMENT

- 1 By an Originating Summons dated July 20, 2020 the plaintiffs herein sued the defendants seeking the following orders: -
1. That the Defendants' title or right to all that parcel of land situated at Kijiwetanga village near Malindi containing by measurement 327.8 acres or thereabouts and known as land portion no 333 Malindi Township registered as title no LT 38 Folio 200/A File3486 and their claim to own the same was extinguished and time barred by virtue of section 17 of the Limitation of Actions Act chapter 22 laws of Kenya.
 2. That the plaintiffs have acquired legal possession and ownership rights by adverse possession and prescription of all that parcel of land situated at Kijiwetanga village near Malindi containing by measurement 327.8 acres or thereabouts and known as land portion no 333 Malindi Township registered as title no LT 38 Folio 200/A File3486 by dint of adverse possession and prescription.
 3. That the Plaintiffs are entitled to be registered as owners of all that parcel of land situated at Kijiwetanga village near Malindi containing by measurement 327.8 acres or thereabouts and known as land portion no 333 Malindi Township registered as title no LT 38 Folio 200/A File3486 by dint of adverse possession and prescription.
 4. That the Registrar of tiles Mombasa Land Titles Registry, do register the judgment and decree of this court against land portion no 333 Malindi Township registered as title no LT 38 Folio 200/A File 3486 without requiring the plaintiffs to avail the original certificate of title and issue to the plaintiffs a certificate of title for land portion no 333 Malindi Township registered as title no LT 38 Folio 200/A File 3486 in the names of David Katana Chipira, Katana Shikari Mapinga, Morris Mataza Kalenga, Charo Katana Mwijo and Garama Kapombe Kutomola to hold in trust for all the plaintiffs in this suit.
 5. That the defendants do bear the costs of this suit.

Plaintiffs'case

- 2 The summons was premised on the grounds cited in the application and particularly in the Supporting Affidavits of the 1st-5th Plaintiffs.
- 3 The 1st plaintiff David Katana who testified on behalf of the other Plaintiffs stated that he was born on the suit property being land portion no 333 Malindi Township registered as title no LT 38 Folio 200/A File 3486 in 1933 and has lived therein with his family. It was his evidence that they have planted mango and cashew nut trees which are over 12 years old and that the defendants have never interfered with their possession and occupation during this period.
- 4 PW1 further testified that there are about 301 families living on the suit property and that each family occupies its own distinct portion of land separated from the other with clear boundaries. He testified that the other plaintiffs in the suit have also lived on the suit land openly and continuously for more than 12 years and that the entire parcel of land is occupied by the plaintiffs and their families. Further



that the defendants never granted them any permission to reside on the suit parcel of land and that they have buried some of their relatives on the suit property.

- 5 PW1 also produced a copy of the certificate of title, certificate of postal search, a survey report showing that the entire suit land is in occupation by the plaintiffs, photographs of house built on the suit property by the plaintiffs, photographs of cashew nut trees and birth certificates of some of the plaintiffs
- 6 PW2, 3 and 4 substantially reiterated the contents of PW1's affidavit save for the information on their years of birth and the number of houses each occupy within the suit property.

Plaintiffs' submissions

- 7 Counsel relied on the adverse possession doctrine whereby he submitted that the defendants' title has been extinguished by operation of law and cited the case of *Wambugu v Njuguna* [1983] KLR 173 quoted in the case of *Leonola Nerima Karani v William Wanyama Ndege* Civil Appeal no 142 of 2007 and the case of *Kimani Ruchire v Swift Rutherford & Co Limited* [1980] KLR 10.
- 8 Mr Shujaa submitted that the plaintiffs have proved that they have acquired the suit property by operation of law under section 17 of the *Limitation of Actions Act*, even before the defendants' predecessors were registered as owners of the suit property on August 21, 1968 and the defendants on September 20, 2011 and that the change in ownership did not affect the adverse possession as it was held in the case of *Githu v Ndeete* [1984] KLR 776. Counsel urged the court to grant the orders as prayed in the Originating Summons.

Analysis and determination.

- 9 The plaintiffs made an application for substituted service which application was allowed on February 15, 2021. The service was effected through advertisement on a daily newspaper but the defendants neither entered appearance nor filed a response within the prescribed period therefore the suit proceeded undefended.
- 10 The doctrine of adverse possession in Kenya is embodied in section 7 of the *Limitation of Actions Act*, cap 22 which provides as follows:

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person

- 11 Section 17 further reads:

Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action, to recover land (including a redemption action) the title of that person to the land is extinguished.

- 12 The period of twelve years starts to run from the moment the trespasser takes adverse possession of the land and the registered proprietor is regarded as having been dispossessed or having discontinued his possession. In the case of *Wambugu v Njuguna (supra)* the Court of Appeal held thus: -
 1. The general principle is that until the contrary is proved, possession in law follows the right to possess.
 2. In order to acquire by the statute of Limitations title to land which has a known owner, that owner must have lost his right to, the land either by being dispossessed of it or by having



discontinued 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....

3. The Limitation of Actions Act, on adverse possession, contemplates two concept; 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 whether or not the claimant has proved that he has been in possession for the requisite number of years.”
- 13 The Court of Appeal also held in the case of *Mtana Lewa v Kabindi Ngala Mwangandi* (2015) eKLR that:

Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person as assertion of his title for a certain period, in Kenya its twelve (12) years. The process springs from action essentially prerequisites being that the possession of the adverse possessor is neither by force or stealth not under the licence of the owner. It must be adequate in continuity, in public and in extent to show that possession is adverse to the title owner.”

- 14 It is not disputed that the Plaintiffs have been in possession of the suit property continuously and uninterrupted for more than twelve (12) years. There is no evidence to contradict the plaintiffs ‘assertion that their occupation and possession has been hostile to the defendants’ title, who are the registered owner as per the copies of indenture and certificate of official search produced as exhibits. The plaintiffs have adduced uncontroverted evidence that their occupation has been actual, open and exclusive.
- 15 The plaintiffs went a step further to commission a surveyor to produce a report to show the occupation on the suit property and the distinct boundaries occupied by the various plaintiffs. In the circumstances, I find that the plaintiffs have on a balance of probabilities proved that they are entitled to be registered as owners of the suit properties by way of adverse possession.
- 16 The upshot is that the Originating summons dated July 20, 2020 is merited and is hereby allowed with each party bearing their own costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 25TH DAY OF JULY, 2022.

M A ODENY

JUDGE

NB: In view of the Public Order no 2 of 2021 and subsequent circular dated March 28, 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.

