



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 57 OF 2010 (O.S.)

**IN THE MATTER OF: REGISTRATION OF TITLES ACT (CAP 281 LAWS OF KENYA)
AND THE**

LIMITATION OF ACTIONS ACT (CAP 22, LAWS OF KENYA)

AND

**IN THE MATTER OF: THE CIVIL PROCEDURE ACT AND RULES ENACTED
THERETO**

**IN THE MATTER OF: LAND REFERENCE NO. MN/V/15 WITHIN MOMBASA
MUNICIPALITY, MOMBASA DISTRICT**

BETWEEN

- 1. MARGARET WALEGWA**
- 2. BENSON LUSWETI WANYONYI**
- 3. PAUL KIZUMBI & 155 OTHERS..... PLAINTIFFS**

AND

- 1. CHANGAMWE HOUSING SCHEME LIMITED**
- 2. TRUST BANK LIMITED (IN LIQUIDATION)..... DEFENDANTS**

JUDGEMENT

By this application brought by way of Originating Summons filed on 1st March 2010 the three Plaintiffs have come before this court seeking the following orders:

“(a) **THAT** the Plaintiff herein be registered as Proprietors of all the **FREEHOLD** interest comprised in all that parcel of land known as **L.R.NO. 15/V/MN** as trustees for themselves and for all the parties who

are named in the list annexed to the “Authority and Consent to Act” filed in this matter in the stead of **TRUST BANK LIMITED (IN LIQUIDATION)** for reasons that the Plaintiffs and the said parties have since become proprietors thereof jointly and severally by virtue of cumulative Adverse Possession against the original owner.

(b) **THAT** the Plaintiffs be registered as the proprietors of land named PLOT NO. 15/V/MN – Mombasa Municipality on the grounds that since the year 1974, the Plaintiffs have been openly and peacefully enjoying occupation for over twelve years preceding the presentation of this summons.

(c) **THAT** the Defendants do execute a transfer and all acts necessary to convey the said title to the Plaintiffs as the rightful proprietors and enable it to be registered as such and in default the Deputy Registrar be authorized to sign the relevant papers on behalf of the Defendants.

(d) Without prejudice or to the alternative in case the 2nd Defendant should exercise its statutory power of sale the Plaintiffs/Applicants be given priority to purchase the suit premises known as **L.R. NO. 15/V/MN** – within Mombasa Municipality **AND/OR** in the alternative the Plaintiffs be apportioned/granted subdivision of the land known as **L.R.NO.15/V/MN**.

(e) **THAT** the costs of this suit be borne by the Defendant jointly and severally.”

The application was supported by the affidavit of one **BENSON LUSWETI WANYONYI** on behalf of the other Applicants.

The 2nd Defendants **TRUST BANK LIMITED (IN LIQUIDATION)** filed their replying affidavit on 6th April 2010 which was supported by the affidavit of **DANIEL MIGUIMA** the liquidation agent. The 1st Defendant **CHANGAMWE HOUSING SCHEME LIMITED** did enter appearance through their Advocates Guram & Company Advocates but did not file any reply.

The Plaintiffs base their claim to the suit property on ‘*adverse possession*’. They aver that they have been in occupation of the suit property since 1974 without any interference from any other party. On their part the 1st Defendants claim to have purchased the suit property from one **Rajnikant Ambalal Patel** at a cost of Kshs.800,000/- on 25th July 1997. The 1st Defendant then mortgaged the suit property to the 2nd Defendant a bank in order to obtain a facility of Kshs.110,000,000/-. The 1st Defendant thereafter defaulted in serving the said mortgage. Therefore the 2nd Defendant’s claim over the suit property is that of a mortgagor. The 2nd Defendant after the default by the 1st Defendant proceeded to advertise the suit property for sale by public auction by way of an advertisement in the Daily Nation Newspaper dated 19th August 2009. The Plaintiffs saw this advert and it was this that galvanized them into action by filing this present suit. These are the brief and undisputed facts of the case. The question this court has to determine is which (or whose) claim over the suit land takes priority.

As stated earlier, the Plaintiffs have based their claim on adverse possession. In his supporting affidavit dated 26th February 2010 **Benson Lusweti Wanyonyi** depones that he and the other 156 Plaintiffs have been in open exclusive and uninterrupted occupation of the suit property since the year 1974. They have built schools, homes and other public utilities on the suit land and have buried their kin thereon. Blacks Law Dictionary 8th Edn (2004) defines ‘*adverse possession*’ at page 1439 as ‘*The use or enjoyment of real property with a claim of right when that use or enjoyment is continuous, exclusive, hostile, open and notorious*’

The Plaintiffs have been in occupation of the suit property since 1974. Photographs annexed to the supporting affidavit show the existence of homes, schools etc on the land. Clearly this was not a ‘*fly by night*’ occupation. The presence of such structures indicates that the Plaintiffs had been in occupation for a considerable period of time. Neither the 1st nor 2nd defendant challenge the fact that the Plaintiffs have occupied the suit land since 1974. Therefore as at 1997 when the 1st Defendant claims to have purchased this property the Plaintiffs were already in occupation of the same. It is curious that the 1st Defendant

would identify a piece of land, pay Kshs.800,000/- for it (no small sum in 1997) and have the same transferred to itself without bothering to visit the property. If the 1st Defendant had visited the premises they would not have failed to notice the persons in occupation, yet no steps were taken to have the Plaintiffs vacate the land. By 1997 when the 1st Defendant was purporting to purchase the suit land the Plaintiffs had been in occupation since 1974 a period of 23 years which is well over the 12 year period required to establish adverse possession. The basic law of adverse possession was stated in the case of **WAMBUGU –VS- NJUGUNA [1983] KLR 72** as follows:

“In order to acquire by statute of limitations little 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”.

In this case neither the 1st nor the 2nd Defendant at any time entered into or occupied the suit land. All the time the land was being sold, resold and mortgaged the Plaintiffs were in occupation. No challenge has ever been made to their possession or occupation of the suit land to date.

Whilst it is true that Title confers upon a party ownership to a piece of land, such title can only be validly acquired in a case where no pre-existing claim exists. In the case of **MARGARET WAMBUI MAGU – VS- RACHEL NJERI NYAWANGA & ANOTHER HCCC 1509 of 2002 O.S.**, it was held:

“Although the title-holders by [the] formal records, hold a valid position in law, they stand to have their recorded rights taken away and conferred, instead, upon the new moral claimant who has had physical possession of the suit land and who entered thereupon nec vi nec clam nec precario” i.e. no force, no secrecy, no evasion.

This is precisely the position which the Plaintiffs are in. They have had open, clear and uninterrupted possession of the suit land since 1974 and were still enjoying that possession when the 1st Defendant purchased the land in 1997. The 1st Defendant made no attempt to remove or evict the Plaintiffs – all he did was to proceed to mortgage the land (with the Plaintiffs still in occupation) to Trust Bank (the 2nd Defendant). In granting to the 1st Defendant the mortgage facility of Kshs.110,000,000/- the 2nd Defendant also appears to have made no effort to investigate and find out the condition of the land i.e. was it occupied or not. Had the bank exercised due diligence they may have been more wary of accepting as security for such a large sum of money land which was occupied by persons not known to themselves or to their client (the 1st Defendant). There is no evidence that either the 1st or 2nd Defendant made any attempt either by displaying any notice or warning to the Plaintiffs notifying them that they were the owners of the said property nor did they make any attempt to have the Plaintiffs vacate the property. The attitude of the 1st and 2nd Defendant towards the suit property was cavalier to say the least.

Does the fact that the Plaintiffs did not approach court upon the expiry of 12 year seeking a declaration of their ownership by way of adverse possession mean that their rights have been overtaken by the 2nd Defendant’s claim as a mortgagor? I think not. The Plaintiff’s claim of adverse possession accrued in the year 1986 representing the 12 years from 1974 when they have lived on the suit land uninterrupted. This right of adverse possession therefore accrued long before the 1st Defendant **‘acquired’** the land in 1997. The right of adverse ownership is a right against the Title holder to any particular property. Thus even where a property changes hands and where occupants thereon continue to live uninterrupted and unhindered then the rights of adverse possession remain alive and enforceable as against the current Title-holder of that property. It is my opinion that any rights which the 2nd Defendant may have as mortgagor can only be **subject** to the rights of the Plaintiffs as the occupiers of the suit property. The Plaintiffs have been in continuous occupation of the premises and neither 1st nor 2nd Defendant can claim to have been unaware of their presence thereon. By the time the 1st Defendant created the mortgage over the suit property in favour of the 2nd Defendant the Plaintiffs had already been in open continuous and uninterrupted occupation of the suit land, and therefore had already acquired said property by way of adverse possession.

The 2nd Defendant submits that the Plaintiff's claim is time-barred. However theirs being a claim for adverse possession, there is no limitation of time under the Limitation of Actions Act. I am persuaded by the findings of Ringera J. (as he then was) in the case of **WASUI –VS- MUSUMBA [2002]1 KLR 397** that:

“If the applicant had been in adverse possession of the land for 12 years prior to subdivision, the proprietors of new titles would not have been able to shake off his rights”

Similarly the 1st Defendant being a person who purchased this property long after the Plaintiffs had acquired the same by adverse possession having been thereon for a period exceeding 12 years, could not by acquisition of Title been able to shake of the Plaintiff's rights of adverse possession.

Aside from these main arguments this court finds it curious that the 1st Defendant who claims to have purchased the suit land has not tendered into evidence proof that he was paying land rates for his property – no land clearance certificate was exhibited to court. In my view the 2nd Defendant as a financial institution also failed to exercise due diligence before accepting the suit property to guarantee a loan. I find that the Plaintiffs acquired adverse possession of the suit land long before any other transaction involving said land was entered into. As such the Plaintiff's rights take priority. I do therefore allow this application in terms of prayers (a), (b) and (c) thereon. Costs to the Plaintiffs.

Dated and Delivered in Mombasa this 18th day of November 2011.

M. ODERO
JUDGE

In the presence of:

Mr. Mwakisha holding brief for Mrs. Guram for 1st Defendant

No appearance for Plaintiff

No appearance for 2nd Defendant