



**Amoth & 3 others v Ismael (Environment & Land Case 150 of 2021)  
[2022] KEELC 13381 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 13381 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 150 OF 2021  
LL NAIKUNI, J  
SEPTEMBER 29, 2022  
IN THE MATTER OF: A CLAIM FOR ADVERSE POSSESSION  
AND  
IN THE MATTER OF: PLOT NO. MOMBASA MAINLAND  
SOUTH /BLOCK II/33**

**BETWEEN**

**SELINA ATIENO AMOTH ..... 1<sup>ST</sup> PLAINTIFF  
SIMON PETER OCHIENG ..... 2<sup>ND</sup> PLAINTIFF  
PETER JOHNSON AGUNDA ..... 3<sup>RD</sup> PLAINTIFF  
CAROLINE AKOTH OKOYO ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**MOHAMED HASSAN ISMAEL ..... DEFENDANT**

**JUDGMENT**

**I. Preliminaries.**

1. This is a judgement pertaining to a suit instituted by the 1<sup>st</sup> to 4<sup>th</sup> plaintiffs herein through an originating summons dated July 31, 2021. The suit was filed in court on August 4, 2021.
2. The plaintiffs sought for the orders of land adverse possession claiming to be entitled to ownership of all that parcel of land known as land reference numbers Mombasa Mainland South/Block II/33 (hereinafter referred to “the suit land”) by virtue of the following questions as stated out under the provisions of order 37 of the *Civil Procedure Rules, 2010*. These are:-
  - a. Is the defendant the registered proprietor of the suit land/



- b. Have the plaintiffs been in possession of the suit land since the years of 1970/;
  - c. If so, has the said possession of the plaintiff's onto the suit land been quiet, continuous and adverse to the title of the defendant?
  - d. If so, should the land registrar, Mombasa district be ordered to have the plaintiffs herein, be registered as the absolute proprietors of the suit land free from all encumbrances?
  - e. What orders as to the costs?
3. The 1<sup>st</sup> plaintiff herein obtained an authority to plead under order 1 rule 12 of the [Civil Procedure, 2010](#) from the other plaintiffs. It is dated July 31, 2021. The said originating summons was premised on the grounds, testimonial facts and averments made out in the 12 paragraphed supporting affidavit of Selina Atieno Amoth dated on the even date. Through a six (6) paragraphed affidavit of service filed in court on October 18, 2021 sworn by a High Court process server, one Mr Alex Nzuki sworn and dated the September 15, 2021 and in particular the contents of paragraph 3, 4 and 5 of the said affidavit it indicated having made efforts to effect serve upon the defendant in vain thus:-
- (3). "That on August 9, 2021, I proceeded to Likoni, Shelly beach area to try and look for the defendant, Mr Mohamed H Ismael for personal service. After inquiry at all prominent public utility companies around area I was informed that the defendant was not known at that area by anybody.....(4). That on the August 11, 2021, I commenced investigation to find the defendant residential or working place. My search started at Shelly beach, Ngombeni area, Shika Adabu all those places in Likoni but all in vain. Since then up to August 28, 2021 with the help of the plaintiffs we have tried our best attempts for personal service upon the defendant without success.....
  - (5). "That after using all due and reasonable diligence and being not able to find the defendant herein from August 9, 2021 up to August 28, 2021 or ay person whom service could be made on, or any building/house where the defendant resides or carries business to fix a copy of the originating summons on the outer doors I return the originating summons to this court unserved....
4. Based on the above averments by the High Court process server, on October 28, 2021, the plaintiffs filed a notice of motion application under a certificate of urgency and under the provisions of order 5 rules 17 (4) and order 51 of the [Civil Procedure Rules](#) seeking orders to serve the summons and the pleadings upon the defendant through substituted means by publishing an advertisement in any local newspaper of wide national circulation.
5. On January 20, 2022, the plaintiffs demonstrated to this court that December 15, 2021 was duly served. This was proved through a four (4) affidavits of service sworn on January 19, 2022 by Peter Omwenga an advocate of the High Court of Kenya to the effect that an advertisement as ordered by this court on November 29, 2021 had been published in the copy of the Daily Nation newspaper an edition of December 15, 2021 and an extract attached thereof. Pursuant this, the honorable court directed being satisfied that the defendant had been properly served with the pleadings as required by law. Further, to this court provided directions on how to proceed with the originating summons under the provision of order 37 rules 16, 17, 18 and 19 of [Civil Procedure Rules, 2010](#) as follows to wit that: -



- a. The originating summons to be converted to a plaint, applicant becomes a plaintiff and the supporting affidavit to PW-1 statement.
- b. The matter to be heard by adducing a *viva voce* evidence on May 9, 2022 physically.

## II. The Plaintiff's Case.

### Examination in chief of PW – 1 by Mr Mayieka advocate:-

6. PW – 1 was sworn and testified in the kiswahili language. She stated that her name was Selina Atieno Amoth, a holder of the national identification card bearing numbers 2xxxx1. She was born on June 23, 1962. She produced the said identification card marked as plaintiff exhibit 1. She would be 60 years old by June 2022. She informed court that she lived in Likoni area, within the county of Mombasa. She was a tailor. She was here due to the issue of the ownership of all that parcel of land known as plot Mombasa Mainland South Block II/33. She stated having lived there from the year of 1970, which is over 50 years.
7. She informed court having filed an authority to act/pled dated July 31, 2021 on behalf of the other plaintiffs being Simon Peter Ochieng, Peter Johnson Agundah and Caroline Akoth Okoyo respectively. She produced the said authority as evidence marked as plaintiff exhibit – 2.  
  
She recorded her witness statement dated July 31, 2021 to be relied on and adopted as such. Further, she also filed a bundle of the documents dated July 31, 2021 filed in court on August 4, 2021 as evidence and marked as plaintiff exhibit numbers 3, 4 & 5 respectively.
8. She informed court having continuously and uninterrupted lived on the suit land from the year 1970s which was over 50 years to date. She testified that having been born at Mtongwe in Likoni on a different land. Her parents lived and worked with Kenya cargo which later joined with Kenya Ports Authority. Her father was a boat driver. They were living in a nearby land to the suit land. Her father had bought a portion of the suit land from Mohamed Hassan Ismael. They were four (4) who bought the suit land. These were Peter Johnson Agundah, mother of Simon Peter Ochieng and father of Caroline Akoth Okoyo. He left me with an approval and plan. She testified being young by that time. Hence, she never saw Mohamed Hassan Ismael. They entered into the land. They found mother of Simon Peter Ochieng called Angelina. She died but was buried at Siaya, Yalego.
9. The land measured 1 ½ Acres. She stressed that they moved there from the year 1970. They conducted official search on July 2, 2021 which indicated as belonging to Mohamed Hassan Ismail. They entered the land as four (4) families and constructed out houses - the swahili houses. She informed court that there was a land surveyor's report dated July 17, 2021. It showed the occupants of the land. The houses were worth approximately Kenya shillings three million (Kshs 3, 000, 000.00) and others apart from that of Johnson Agundah is worth Kenya shillings four million (Kshs 4, 000, 000.00). It was her testimony that there had been no interruption. She stated that from that time nobody had come to claim the land. They had had no interruption and lived there continuously with their families. There has never been any dispute with the neighbors. All the families were on the land.
10. Thus in conclusion she prayed for issuance and granting of the certificate of title deed. She stated that this would enable them construct permanent houses and structures and for security reasons. She also urged for the costs of the suit.

That is all.



### III. Submission

11. Upon the closure of the plaintiffs' case on the May 9, 2022, the plaintiffs were granted 15 days to file their written submissions. Judgment was reserved to be delivered on July 5, 2022 by virtual means. Unfortunately, the plaintiffs never fully complied with this timelines as they instead filed their submission on July 5, 2022.
12. Thus, in view of the foregoing, the honorable court directed to deliver its judgement by notice in the next term – most likely on September 28, 2022.

#### A. The written submissions by the plaintiffs

13. On July 5, 2022 the learned counsel the law firm of Messrs Mogaka Omwenga & Mabeya Advocates for the plaintiffs filed their written submissions dated June 30, 2022. Mr Mayieka advocates commenced his submissions by providing the honorable court with the prerequisite detailed background of this matter as stated out clearly from the filed pleadings herein by the plaintiffs. He averred that in support of the claim by the plaintiffs for the title by way of land adverse possession they produced copies showing payment of land rates, approved plans of their respective homes, official searches, green card and the land surveyor's report.
14. He noted that despite being served through advertisement on the press the defendant never entered any appearance nor file responses and hence the matter proceedings on May 9, 2022 whereby the PW1 adduced evidence. He asserted that the plaintiffs were able to prove claim by land adverse possession and whereby the facts were uncontroverted by the defendant. PW-1 stated they had lived on the suit land continuously and without any interruption for over fifty (50) years todate. She testified that her father together with the other plaintiffs parents had entered into a sale agreement with the defendant herein for the suit land and since none of their names appear in the title deed for the suit land it meant the land was still registered in the names of the defendant as indicated from the official search conducted and the green card produced plaintiff exhibit numbers 3 and 4.

The learned counsel averred that PW - 1 reiterated that their move into the suit land was not permitted by the defendant and had been in continued occupation since without interruptions for a period of over 50 years todate to support his claim for the entitlement of the plaintiffs to the title of land adverse possession, he relied on the provisions of section 7 of the *Limitation Actions Act* cap 22 and several authorities to wit:- *Kasuve v Mwaani Investments Limited and 4 others* 1KLR 184 *Maweu v Lin Ranching & Farmers Co - operative Society* 1985 eKLR 430, *Virgina Wanjiku Mwangi v David Mwangi Jotham Kamau* 2013 eKLR where court held:- applicant claim is based on principles of adverse possession whose import is that any person who claim to be entitled to land by adverse possession must prove possession of the land exclusively and openly as of right and without interruption for a period of twelve (12) years, adverse possession requires basic condition being met to perfect the tile of the adverse part.

15. The learned counsel submitted that to discern the key test was that the owner of the land must have been dispossessed of had discontinued possession of the property. He held that it was the plaintiff's case that upon entry into the suit land the defendant herein never at one time disrupted or issued them with any notice to vacate it. On the contrary he held that the plaintiffs had continued to stay on the suit land and even constructed swahili like structured houses with a marked value of over Kenya shillings seven (7) million (Kshs 7,000,000/=). Consequently, he submitted that in deciding the issue of land adverse possession, the primary functions of a court was to draw legal inferences from proved facts while possession was a matter of fact, the question as to whether that possession was adverse or not



was a matter of legal conclusion to be drawn from the findings of facts. On sought reliance from the decision of the court of appeal *Kweyu v Omutu*, CA civil appeal No 8 of 1990.

16. Lastly, he concluded that the plaintiff had proved their case for being granted title by way land adverse possession. He held that they had met all the legal ingredients for the land adverse possession and that the defendants title of the suit land had therefore been extinguished by operation of the law and they should be registered in their names. He urged court to have judgment entered in favour on the plaintiff as prayed.

#### **IV. Analysis & Determination**

17. In order for the honorable court to arrive at a plausible, an informed, fair, reasonable and just decision in this matter, it court has had to keenly assess all the filed pleadings, the written submissions, authorities cited by the advocates the plaintiffs and the relevant provisions of the *Constitution* of Kenya 2010 and statutes.

At the same time, as a guide the honorable court has condensed the following three (3) salient issues for its considerations for its final determination. These are:-

- a. Whether the plaintiff filed suit has met the fundamental ingredients for granting title by way of land adverse possession.
- b. Whether the plaintiffs here are entitled to the relief sought.
- c. Who will bear the costs?

#### **Issue No (a) Whether the plaintiff filed suit has met the fundamental ingredients for granting title by way of land adverse possession.**

##### Brief facts

18. Before tackling on the above framed issue for analysis under this sub-heading, the honorable court feels it essential to summarize the facts as stated out from the pleadings and the testimonial evidence adduced. It is held that the parents for the four plaintiffs with intention to purchase the suit land, way back in the years 1970 entered into a sale agreement with the defendant. By this the defendant was the legally registered proprietor to the suit land.
19. However, from the forwarding facts, the defendants disappeared and this transaction fell through from their own oblivion, the plaintiff entered into the suit land and caused construction of some swahili like structures onto the suit land worth over Kenya shillings seven million (Kshs 7,000,000/=). They continued living on the suit land without any interruption todate with their beloved families. It's their testimony had been no dispute whatsoever with their neighbors not received any legal notices to vacate the land for having occupied it illegally from the defendant. To this effect they produced in court several supporting documents being receipt for payment of land rates, approved plans of their homes official searches, green cards and the surveyor's report although there were efforts to serve the defendant and eventually did so by placing an advertisement in one of the local newspaper – the Daily which had wide national circulation, as ordered by court, the defendant never entered appearance nor filed any responses to the issues raised by the plaintiffs. However, from the official search, the names of the defendants still appear on the title deed to the suit land. The plaintiff's name does not appear in the title deed. It's for these reasons that they instituted this suit seeking courts intervention that is adequate on the facts.



20. Now turning to the issues for consideration this sub-heading it is trite law that the doctrine of land adverse possession is provided for under the provisions of section 7 of the Limitation Act cap 22 which states:-

“An action may not be brought by any person to recover land after the end of twelve (12) years from the date on which the right of action accrued to him or; if it first accrued to same person through whom he claims to that person”

The rationale for this method of acquiring land was explained in *Adnani v Each of Sanwich* (1877) 2 QB 485 as “The legitimate object of all statutes of limitation is in no way to quite long possession but they all rest upon the broad and intelligible principles that persons, who had at some anterior time been rightfully entitled to land or other property or money, have by default and neglect on their part to assert their rights, slept upon them for long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have, in some sense been tacit parties”

The provisions of section 37 and 38 of the *Limitation of Action Act* cap 22 specify that if the land is registered under on of the registrations acts, then the title is not extinguished but held in trust for the person in adverse possession until he/she shall have obtained and registered a high court order vesting the land on him/her.

21. It's instructive that for an adverse possession suit to succeed the plaintiff must prove that: -

- (a) They have used the suit land as of right.
- (b) The registered owner must know of the possession or occupation.
- (c) The possession – (actual, open and exclusive) of the land must be continuous and uninterrupted – see the decision of *Daniel Kimani Ruchira & others v swift Ruther Fords & Co Ltd & another* (1977) eKLR *Lawrence Muiruri Njuguna v Charles Mwanga Mulwa* (2018) eKLR and *Mtana Lewa v Kabindi Ngala Mwagandi* (2015) eKLR”

From the myriad of court cases, it has been concluded that in the claim for title under the land adverse possession the burden of proof of occupation lies on the title holders. The court has cited the authority relied on by the learned counsel “*Kasure v Mwaani Investments Ltd & 4 others* IKLR 184 where the court of appeal restated what the plaintiff in a claim for adverse possession has to prove is as stated herein:-

“In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a period of twelve (12) years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.

#### **Issue No. (b) Whether the plaintiffs herein are entitled to the relief sought.**

22. From the elaborate surrounding facts and inference stated out here, and the evidence adduced before this court during the full trial, its not in doubt that, the defendant was legally served by the plaintiffs by placing an advertisement in the local dailies newspapers of wide national circulation as ordered by court. Despite all this efforts made, he still never took any steps being filing of any defence or replies to the claim being advanced by the plaintiff. Further to this although no such evidence of the sale was produced, the plaintiffs claim that in the years 1970, their parents and the defendant entered into a sale transaction of the suit land. However, this transaction was never completed as the defendants



disappeared. The law is explicit on where a party relies on an agreement and subsequent adverse possession, the possession becomes adverse from the date of payment of the last installment – see *Peter Mbiri Michuki v Samuel Mugo Michuki* civil appeal No 22 of 2013 Its just unfortunate that this assertion by the plaintiffs was not rebutted otherwise it would be a major roller coaster consideration by this court. In fact, suffice it to say it has been the main weakens on the plaintiffs case. But taking that the civil case, unlike in the criminal proceedings, the burden of proof is not on beyond reasonable doubt but preponderance or probability, the court in the interest of justice and equity had decided to let the plaintiffs fly with this assertion for whatever its worth for another rainy day.

23. Ideally, this honorable court is fully satisfied that the plaintiffs have lived on the suit land for over fifty (50) years continuously and uninterruptedly as no notice to vacate has ever been served on them. All this time, I strongly and rightfully assume the defendant wherever he was had always been aware of this occupation and possession by the plaintiffs. Indeed, the plaintiffs then occupation and possession was actual, open and exclusive with their families to the extent of even constructing swahili like structures worth over Kenya shilling seven million (Kshs 7,000,000/=) a fact which was never controverted to have gone unnoticed by the defendant. He was always aware of it.

24. It has been indicated that and rightfully so there has been no dispute in existence between the plaintiffs and their neighbors.

The only aspect was that none of the plaintiffs was registered in the title deed. The latest official search and the green cards copies which were produced as plaintiff's exhibits. Still reflected the defendants as the duly registered owner. This in accordance with the Provisions of section 37 and 38 *Limitation of Action Act* cap 22 the title deed would not be extinguished.

For this reasons, therefore the court is satisfied that the plaintiffs have proofed their case.

#### **Issue No. (c) Who will bear the costs?**

24. The issue of costs is at the discretion of the honorable court. Costs mean the final award granted at the conclusion of any legal action, or proceedings in any litigation process. The proviso of the provision of section 27 (1) of the *Civil Procedure Act*, cap 21 provides that costs follow the events. By events here it means the result of the any legal action, or proceedings. In the instant case, taking that the plaintiffs have been successful in their case they should be granted costs of the suit

#### **VI. Conclusion And Disposal**

25. Ultimately, after the deliberation on the framed issues hereof, on the balance of preponderance of probability, the plaintiffs have established their case as prayed from the filed pleadings and the questions raised thereof. For avoidance of doubt, this court makes the following orders: -

- a. That judgment be and is hereby entered in favour of the herein.
- b. That the land registrar county of Mombasa be and is hereby directed within the next 45 days from this date ensure that all the title deed to the parcel known as land reference No Mombasa Mainland South/block Mainland South/block II/33 measuring 1 ½ acres is hence forth registered jointly in the names of Selina Atieno Amonth, Simon Peter Ochieng, Peter Johnson Agundah and Caroline Akoth Okoyo.
- c. That the plaintiffs to meet all the prerequisite payments for the approvals, transfers and registration of the suit land in their names whatsoever.
- d. That the plaintiffs to be awarded the costs of this suit



**JUDGEMENT DELIVERED, SIGNED AND DATED AT MOMBASA ON THIS.....29<sup>TH</sup> .....  
DAY OF .....SEPTEMBER.....2022**

**HON. JUSTICE MR. L.L NAIKUNI (JUDGE),**

**ENVIRONMENT & LAND COURT AT**

**MOMBASA**

**In the presence of:-**

- a. Mr. Ben, the Court Assistants.
- b. Mr. Omwenga Advocate for the Plaintiff.
- c. No appearance for the Defendant.

