



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 405 of 2005**

**ALI FARAH ADEN )**

**AHMED FARAH ADEN )**

**ASHA FARAH ADEN )**

**KHADIJA ADEN ).....PLAINTIFFS**

**VERSUS**

**MOHAMED AFZAL.....DEFENDANT**

**J U D G M E N T**

1. The 4 Plaintiffs herein commenced this suit by way of Originating Summons dated 9/04/2005. The Plaintiffs claim to have acquired prescriptive title to the whole share of the Defendant in Land Reference Number 36/111/312, Eastleigh Nairobi in Kenya; that the said title is registered in the Government Land Registry at Nairobi in volume N. 40 Folio 354 File 12592. The Plaintiffs therefore pray for Orders that:-

*1. The Plaintiffs are entitled to be registered as the proprietors of the whole share of the Defendant in the Land Reference Number 36/111/312, Eastleigh Estate Nairobi in Kenya title to which is registered in the Government Lands Registry in volume N.40 Folio 354 File 12592 under Section 38 of the Limitation of Actions Act (Chapter 22) Laws of Kenya on the ground that since September, 1974, the Plaintiffs have been openly and peacefully and of right in occupation of the above mentioned land that is to say for a period of over twelve (12) years preceding the presentation of this summons.*

*2. The aforesaid occupancy has been done continuously as of right and without force from the Defendant and without permission from the Defendant and/or any one of the Defendant's Agents and/or servants.*

*3. By occupation for the reasons aforesaid the Defendant's title to the whole share in the said piece of land is extinguished under Section 17 of the Limitation of Actions Act (Chapter 22) Laws of Kenya.*

*4. The Deputy Registrar of this Honourable Court be authorized to sign all the necessary papers on behalf of the Defendant.*

*5. Costs of this originating Summons be provided for.*

2. The Originating Summons is premised on grounds that

(a) *The Plaintiffs have been in occupation and exclusive possession of the parcel of land known as Land Reference Number 36/111/312, Eastleigh Estate, Nairobi in Kenya for a period exceeding twelve (12) years.*

(b) *The Plaintiffs are now legitimate owners of the whole share of land aforesaid and require these proceedings to confirm this claim and have an order to have them registered as the owners both in equity and law.*

3. The application is also supported by the sworn affidavit of ALI FARAH ADEN, the 1<sup>st</sup> Plaintiff herein. He says that all the Plaintiffs are siblings; that they have been in possession of the suit premises measuring 50 feet by 100 feet without any interruption since September 1974. He also says that the Defendant herein cannot be traced despite efforts by the Plaintiffs to locate him. The Plaintiffs want the suit property registered in their joint names as tenants in common in equal shares.

4. By an application dated 2/09/2005, the Plaintiffs sought and obtained leave of the court to serve the Defendant with Summons to Enter Appearance to the Originating Summons dated 9/04/2005. The advertisement was subsequently carried in the Standard Newspaper of Wednesday, August 23, 2003. Despite the said advertisement there was no response from the Defendant. A similar notice appeared in the DAILY NATION of 30/08/2007.

5. By another application dated 27/06/2007, the Plaintiffs sought and obtained directions that the evidence in this matter be taken through affidavits filed herein. The court also directed that the Supplementary Affidavit filed in this matter on the 20/06/2007 be admitted in these proceedings.

6. The Supplementary Affidavit dated 19/06/2007 was sworn by Mohamuud Abdulahi Ahmed, who described himself as the duly appointed Attorney of the Plaintiffs. The deponent attached to his affidavit a certified copy of the Indenture dated 16/02/1967 and marked "MAA1" which is registered in Volume N40 Folio 335/14 File 12592. The deponent says that this Indenture is the Title by which Mohamed Afzal, the Defendant herein became the registered owner of Land Reference Number 36/111/312.

7. Following directions that this matter do proceed by way of the filed affidavits, Mr. M.A. Khan, learned counsel for the Plaintiffs proceeded by way of affidavit evidence when the matter came up for hearing on 15/07/2009. He stated that despite serving the Defendant twice by advertisement in the Standard and DAILY NATION newspapers, the Defendant has to date not answered to the Plaintiffs' claim. He urged the court to enter judgment for the Plaintiffs as prayed in the plaint.

8. I have now considered the evidence contained in the affidavits. I have also considered the submissions made by learned counsel for the Plaintiffs. I note that despite being served twice in the daily newspapers, the Defendant has remained silent to the Plaintiffs' claims. On the basis of the above, I am persuaded that the Plaintiffs' claim remains uncontested. In the circumstances, I find and hold that the Plaintiffs have proved their case on a balance of probability. There is evidence before me that the Plaintiffs have been in occupation of the suit property continuously as of right and without force from the Defendant and without permission from the Defendant and/or any of the Defendant's agents and/or servants since September 1974. It follows therefore that under Section 17 of the Limitation of Actions Act, Cap 22 Laws of Kenya, the Defendant's title to the whole of the suit property is extinguished. Section 17 of Cap 22 provides as follows:-

*"Subject to section 18, 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)"*

9. In the result, I enter judgment for the Plaintiffs as against the Defendant in the following terms:-

(1) *The Plaintiffs be and are hereby entitled to be registered as the proprietors of the whole share of the Defendant in Land Reference Number 36/111/312, Eastleigh Estate Nairobi in Kenya which is registered in the Government Lands Registry in Volume N.40 Folio 354 File 12592 under Section 38 of*

*the Limitation of Actions Act (Chapter 22) Laws of Kenya.*

*(2) The Defendant's title to the whole share in the said piece of land is extinguished under Section 17 of the Limitation of Actions Act (Chapter 22) Laws of Kenya.*

*(3) The Deputy Registrar of this Honourable Court be and is hereby authorized to sign all the necessary papers on behalf of the Defendant.*

*(4) Costs of this Originating Summons shall be in the cause.*

It is so ordered.

Delivered and dated at Nairobi this 30<sup>th</sup> day of July 2009.

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:-

Mr. M. Akhan for the Plaintiffs

No appearance for the Defendant

Weche - Court clerk