



**REPUBLIC OF KENYA**

**HIGH COURT AT MOMBASA**

**MISCELLANEOUS CIVIL APPLICATION 425 OF 2007**

IN THE MATTER OF: THE REGISTRATION OF TITLES

ACT, CHAPTER 281 OF THE LAWS

OF KENYA AND PARCEL OF LAND

KNOWN AS PLOT NO. II MN/154

-AND-

IN THE MATTER OF: THE LIMITATION OF ACTIONS ACT,

CHAPTER 22 OF THE LAWS OF

KENYA

-AND-

IN THE MATTER OF: THE CIVIL PROCEDURE ACT,

CHAPTER 21 OF THE LAWS OF

KENYA AND THE RULES

THEREUNDER

-BETWEEN-

1. NGATIA WANJAU IRIMU

2. JOSEPH MWAMBURI UTANA

3. STELLA MAKHUNGU AMANGA

4. ANTHONY NGUNJIRI NGUGI

5. RUTH FRIDA ANINDO

6. CHARLES MURIITHI

7. ABEL KIMAIGA OMBUI

8. FRANCIS M. MAWEU
9. EDWARD WAMALWA WANYAMA
10. LEWIS MWACHALLAH
11. WILFRED WAMBUA KIILU
12. MARY WANGOTI
13. PETER MULLI
14. ERNEST NJUGUNA GACHAU
15. CELESTINE NDUKO MUSEMBI
16. NASHON M. LWAMBI
17. ISAIAH KAINGU
18. JUMA CHIVASI MWAMBA
19. DREDAH WACHARO MGANGA
20. MARY MUKIVA MTOTO
21. JOSPHAT MSAGHA
22. MATHEW KAMONI
23. MARTHA WAKIO MWAMBOA
24. PETER MURIGI NJOGU
25. PERIS ACHIENG
26. DALMAS OBARE OCHIENG
27. CHENGO MWAGONA MWARINGA
28. SIDI MWARINGA
29. MOHAMED KIBWANA
30. DOUGLAS MWARINGA MWAGONA
31. TATU HAMISI WANJE
32. JUSTIN MCHARO MWANGUI
33. MBOZE LUGUU MWAMULA
34. MAIMUNA MUTHONI ATHUMANI
35. JUMANNE WANJE

36. BARRACK I. OWANJE

37. VALERIE MANUNDU

38. DENNIS NGALA

39. MOHAMMED DENA SALIM..... PLAINTIFFS/APPLICANTS

-AND-

JANMOHAMMED CASSAM.....DEFENDANT/ RESPONDENT

## JUDGMENT

The plaintiffs, by their Originating Summons dated 28<sup>th</sup> September, 2007, brought under S. 38 of the Limitation of Actions Act (Cap. 22, Laws of Kenya and S. 3A of the Civil Procedure Act (Cap. 21, Laws of Kenya) and under Order XXXVI rule 3D of the Civil Procedure Rules, claim to be the proprietors of plot No. 154 Section II M.N comprising 3.60 acres at Kisauni within Mombasa District, by virtue of adverse possession. The plaintiffs pray for the determination of three questions, namely –

(a) *whether the plaintiffs have become entitled by adverse possession to the land registered as Plot No. 154 Section II M.N. Mombasa (the suit property);*

(b) *whether an order vesting title to the aforesaid land should issue and be registered in favour of the plaintiffs/applicants;*

(c) *whether the costs of this suit may be provided for.*

The application is supported by the affidavit of *Anthony Ngugi Ngunjiri* the fourth applicant. He deposes that he occupies the suit land, and has the consent and authority of the other plaintiffs/applicants to swear the affidavit. It is deposed that sometime in 1976, “the plaintiffs herein by themselves and/or their parents settled on the suit property and occupied the entire [area of] 3.60 acres, and have all along peacefully and without the owner’s permission or [the permission of] any other party lived and/or settled thereat”; “the said applicants’ occupation of the suit land herein [has] been open, continuous and uninterrupted for more than 12 years and [adverse] against the registered owner of the suit property”; occupation of the suit land by the applicants “is evidenced by their continuous cultivation, setting up [of] graveyards, erecting [of] buildings and other structures over the years on the suit property; the applicants have conducted an official search at the Lands Registry, and this revealed the registered owner to be the defendant. It is deposed that the foregoing facts justify “the plaintiffs’ actual and exclusive occupation, possession and control of the suit property [being given] legal effect by registering the plaintiffs as actual owners by way of adverse possession”.

Authenticating annexures to the supporting affidavit are: photographs showing permanent buildings constructed on the suit land; certificate of postal search, as at 16<sup>th</sup> March, 2007; service of suit upon the registered owner, published in the *Daily Nation* of Thursday, 4<sup>th</sup> October, 2007.

Earlier on the plaintiffs had moved the Court by Chamber Summons of 1<sup>st</sup> October, 2007 praying for leave to serve the defendant by way of advertisement in the *Daily Nation* newspaper, and that the defendant be allowed 21 days within which to enter appearance and file defence, as from the advertisement date. This prayer was granted by *Njagi, J.* on the same date. No response, however, came forth from the defendant. On 30<sup>th</sup> April, 2008 the learned Judge directed that the matter goes to hearing,

on the basis of affidavit evidence.

The matter came up before me on 19<sup>th</sup> August, 2009 and the plaintiffs were represented by learned counsel

*Mr. Jumbale.* He made submissions, and sought orders upholding his client's claim based on adverse possession; for the vesting of the suit property in the plaintiffs; for the creation of title documents in the name of the plaintiffs. Counsel urged that the plaintiffs' affidavit was not opposed, and so it should be taken that the applicants have established a basis for their claim based on adverse possession. The plaintiffs' case, it was urged, carried still more merit, in view of the fact that they had invested substantially in the suit property.

From the information on file, it may be stated as a fact that the plaintiffs have been in peaceful, exclusive occupation of the suit land for the minimum period specified in the Limitation of Actions Act; that they have during that period, occupied the suit land adversely to the ownership rights of the defendant; that they have used the suit land as their own property, without apprehending any risks; that they have made investments of a long-term nature on the suit land – in the shape of structural, economic and even cultural design or activity: so, clearly, the suit land, for all practical purposes has been the property of the plaintiffs. And when the plaintiffs staked their claim to the suit land by way of adverse possession, and they resorted to the authorized legal process and duly served summons upon the defendant, the defendant remained mute and has continued to remain so. In these circumstances, the law is averse to the possible existence of a vacuum, in the ownership status of the suit land; and *prima facie*, ownership rights to the suit property would be formally conferred upon the claimants.

Such, however, is only the *prima facie* position, and the Court before determining the question, will ask certain logical, and operationally significant questions.

It is stated by the plaintiffs that the suit land comprises 3.60 acres. It is also clear that those claiming title to the said land are 39 persons. Are these 39 persons one entity? If so, what is their corporate status? If not, which part of the said 3.60 acres does each of the 39 plaintiffs hold? If the latter is the position, and so each of the 39 plaintiffs is making a personal claim on the suit land, how would an order in answer to prayer 1 of the Originating Summons be cast, so that it is clear, specific, and not an order in vain?

I have had, in *The Assumption Sisters of Nairobi Registered Trustees V. Benson Mukuwa Wachira*, Nairobi High Court Civil Suit No. 2658 of 1998 (O.S.), to deal with this very question, and in the judgment, the following passage occurs:

*“The only business of the squatter is to squat, possess, enjoy and retain; and once the minimum duration [twelve years] is completed he can seek the formal indicia of ownership of the land which he has possessed for so long”.*

This Court was shown structures constructed on the suit land, in the instant case, but it was not stated which of the plaintiffs own those structures; nor was it stated which portion of the suit land had been under the dominion of which plaintiff; nor was it deponed that the plaintiffs could hold the suit land in a corporate capacity.

While in principle I will make a finding in favour of the plaintiffs, I will hold the final orders in abeyance, to avert the possibility that such orders may be in vain; and this will be so until an affidavit is sworn regarding the status of the plaintiffs and their corporate or individual claims on the suit land.

I will make orders as follows:

1. *The plaintiffs/applicants have become entitled by adverse possession to the land registered as Plot No. 154 Section II M.N Mombasa.*
2. *Subject to order No. 3 below, an order vesting good title to the suit land shall be issued and registered*

*in favour of the plaintiffs/applicants.*

*3. The plaintiffs/applicants shall have an affidavit sworn ascertaining their corporate and/or individual standing as title-holders for the suit land and/or any particular portion thereof, and the same shall be filed in Court within 21 days of the date hereof.*

*4. The Registry shall fix this matter for mention and for directions regarding issuance of final orders, on the basis of priority.*

*5. The plaintiffs/applicants shall bear their own costs in this suit.*

DATED and DELIVERED at MOMBASA this 18<sup>th</sup> day of September, 2009.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Kazungu

For the Plaintiffs: Mr. Jumbale

Defendant unrepresented