



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Miscellaneous Civil Application 343 of 2008

IN THE MATTER OF: THE LIMITATION OF ACTIONS ACT CAP 22 OF THE LAWS OF KENYA

AND

IN THE MATTER OF: THE PARCEL OF LAND KNOWN AS TITLE NOL MOMBASA BLOCK XII/94

BETWEEN

1. EVERLYNE KAMBU MATANDI

2. GIBSON MWABILI MATANDI

3. JULIUS MWACHRO MATANDI (suing as the Administrator of the estate of the late

JAPHET MATANDI KASINO (DECEASED).....APPLICANTS

VERSUS

BAMTARAMA WAYAMARESPONDENT

J U D G M E N T

The plaintiffs lodged their Originating summons dated 14.08.08 as Administrators of the Estate of the Late Japheth Matandi Kisawo.

The Defendant is Bartarama Waryama. The plaintiffs were granted leave to serve the summons and by way of advertisement in the daily newspapers and in particular the ‘Standard’ and also affixing copies of the Court Notice Board. The plaintiffs duly advertised the summons prominently in the ‘Standard’ of 4th June 2009.

In the Originating Summons the plaintiffs seek the following questions to be determined by the court:-

1. Whether the applicants are entitled to the parcel of land known as Title Number Mombasa/Block XII/94 by virtue of Adverse possession.
2. Whether the Applicants are entitled to be duly registered as Joint Proprietors of Title Number Mombasa/Block XII/94.

3. Whether the Applicants are entitled to costs of these summons.

It is the plaintiffs' case that they have been on the suit

properties in continuous and uninterrupted occupation since 1964. That the Late Japheth Matandi Kisawo established a garage on the suit premises. That they have always paid the Municipal rate in respect of the suit premises. That at no time did the registered owner resist the occupation.

The 1st and 2nd plaintiff testified on oath. They stated that they have been on the land as a family for over 12 years and have acquired rightly by virtue of adverse possession.

The plaintiffs produce in evidence a copy of certificate of confirmation of grant showing that the deceased died before 1991. The succession Cause was filed in 1999.

In the suit they say they are suing as Administrators of the Estate of the Late Japheth Matandi Kisawo. The deceased died before making any claim in court based on Limitation of Actions i.e. adverse possession. When the suit was filed the deceased had died and he was not in possession of the suit premises.

It is my view if a person who may be entitled to prescriptive rights to land dies before establishing the said right/claim by obtaining Court orders then the said past rights cannot accrue to his estate. The said rights never became crystallized and validated by a vesting order so that his estate can claim it as a right or asset. I hold that a potential right of adverse possession does not survive a deceased person if the right was not translated into a vesting order before his death.

The plaintiffs as Administrators of the estate hence the Estate have no rights over the end property. Perhaps the beneficiaries to the Estate in their own personal respective right could make their own respective claims but it is too late for the Estate to make such a claim.

A puzzling issue herein is that the Title Deed produced in court was issued and the property registered in the name of the Defendant on 22nd September 2009. How was this possible if the Defendant cannot be traced. Who procured the issuance of the title? This is academic now in view of the failure of this action.

I do hereby dismiss the suit by the Estate of the deceased with no order as to costs.

Delivered and dated at Mombasa on the 6th day of November 2009.

M. K. IBRAHIM

J U D G E

In the presence of:

Mr. Waithera h/b for Mr. Mutubia for the plaintiff.