

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Civil Suit 3 of 2007

KASIMU SHARIFU MOHAMED..... PLAINTIFF

VERSUS

TIMBI LIMITED DEFENDANT

J U D G M E N T

The Originating Summons dated 16th January 2007, pursuant to the provisions of Section 38 of the Limitation of Actions Act and order XXXVI Rule 3D of the Civil Procedure Rules, was taken out by the plaintiff herein, **Kasimu Sharifu Mohammed**. He seeks orders against the defendant, **Timbi Ltd**, for a declaration that he, the plaintiff, is entitled to registration as absolute proprietor of land parcel **No. 503 – Watamu** in place of **Timbi Ltd**, by virtue of adverse possession.

Upon filing suit the plaintiff caused to be served the defendant with summons to Enter Appearance on 27th February 2007 in terms of the provision of Order V Rule 2(b) of the Civil Procedure Rules. There is evidence that the defendant company neither filed appearance nor defence. There is further evidence that upon request the Deputy Registrar entered interlocutory judgment as against the defendant. There is also evidence that the Deputy Registrar, on application, gave directions in terms of Order XXXV Rule 8A of the Civil Procedure Rules that the suit should be set down for hearing.

At the hearing, the plaintiff gave evidence and, called three witnesses in support of his case. In his sworn evidence, the plaintiff testified that as at 1960, he was staying on land parcel **No. 503 – Watamu** – a beach plot. In 1962 when Kenya was still a Colony and Protectorate, Her Majesty's Government loaned him a sum of sh. 162/= for purposes of purchasing fishing nets. He produced receipt NO. 819332 dated 21st October 1962 marked **exhibit 1** in support of his case. He commenced fishing and building dhows on the beach, planted coconut trees, casurina trees in addition to tilling the land for food crops and rearing cattle. He produced exhibit 2 – 6 in support thereof. He has secured the land by planting trees all around it in addition to putting up a barbed wire. It is the plaintiff's case that for a period exceeding 12 years prior to the filing of this suit, he and his family has been in exclusive possession of all that piece of land comprised in parcel **No. 503 Watamu** which is registered in the name of **Timbi Ltd**. He has enjoyed quiet and interrupted occupation of the subject parcel. The defendant has thus been dispossessed of his title by its discontinuance of possession.

Last but not least, he testified that on enquiry at the Mombasa Land Registry he discovered that the defendant, **Timbi Ltd**, was granted a lease in 1983. In order to stop Timbi Ltd from disposing of the subject parcel, he put a caveat. In 1997 Timbi Ltd, despite having knowledge that the suit property is registered under the Registration of Titles Act [Cap 28] Laws of Kenya

instituted a suit against (Malindi PMCC No. 238 of 1997: Timbi Ltd – Vs – Kasimu Sharifu Mohammed). Judgment in respect thereof was delivered, on 9th June 2004, in favour of Timbi Ltd – the defendant herein.

To assert his proprietary rights, he lodged a dispute with the Land Disputes Tribunal at Malindi being Land Disputes Case No. 19 of 1999: Kasimu Sharifu – Vs – Timbi Ltd. Judgment was given in his

favour. Subsequently, the award was filed in court on 4th February 2005 in Land Disputes Tribunal Case No. 3 of 2005. The said award was adopted as a judgment of the court on 16th February 2005. He produced the order adopting the award as Exhibit 9.

The plaintiff's first witness, Salim Swaleh Mohammed, the assistant Chief of Watamu testified that he was born in Watamu and educated there. He has known the plaintiff since he was a child. All this while the plaintiff has been staying on the subject parcel. He confirmed that the plaintiff has undertaken considerable development on the subject parcel including planting of trees, building houses and keeping animals.

The plaintiff's third witness, **Ali Mbwana**, echoed the testimony of the first witness substantially.

To my mind, the issues for determination is whether Timbi Ltd has been dispossessed of the subject land or have discontinued its possession of it. Dispossession of the proprietor that defeats his title are in law acts which are inconsistent with the enjoyment of the soil for the purpose of which he intended to use it e.g. fencing and cultivation. See **WAMBUGU – VS – NJUGUNA (1983) KLR 172.**

The right of action to recover land accrues unless the land is in the possession of same person in whose favour the period of limitation can run. Such possession is called adverse possession. What constitutes such possession is a question of fact and degree; there is no general principle that, to establish possession of an area of land, the claimant must show that he made physical use of the whole of it. See **HALSBURY'S LAWS OF ENGLAND, FOURTH EDITION, VOLUME 28 P343 Paragraph 768.**

The law is that for possession to be adverse, it must be adequate in continuity, in publicity and extent.

See **NJUGUNA NDAITHO – VS – MASAI & 2 OTHERS (C.A.) CIVIL APPEAL NO. 221 OF 1999 at P4 (unreported).**

On the evidence available, it is clear to me that the plaintiff has occupied the subject parcel since 1960 without let or hindrance. He has continually undertaken dhow building, fishing, cultivation of food and cash crops, fencing and built permanent structures for a period of over 12 years before the filing of the suit.

My judgment, on the evidence, is that possession of the suit land by the plaintiff has been adequate in continuity, publicity and extent over a period of 12 years, prior to the filing of this suit. Having heard no evidence to the contrary from the defendant, I am inclined to make a finding, which I hereby, that the plaintiff has thus proved his case on a balance of probability in that his possession has been adequate, continuous and exclusive.

Accordingly, I order that the plaintiff Kasimu Sharifu Mohamed be registered as absolute proprietor of land parcel Watamu/503 in place of Timbi Ltd. There shall be no orders as to costs.

DATED AND DELIVERED AT MALINDI THIS 11th DAY OF JULY 2007

N.R.O. OMBIJA

JUDGE