



**Wandary & 104 others v Bharmaz & another (Environment & Land Case 19 of 2021) [2022] KEELC 14976 (KLR) (21 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14976 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 19 OF 2021  
MAO ODENY, J  
NOVEMBER 21, 2022**

**BETWEEN**

**NAROLDS KALAMA WANDARY & 104 OTHERS ..... PLAINTIFF**

**AND**

**FARKHRUDDIN GULAMHUSEIN BHARMAZ ..... 1<sup>ST</sup> DEFENDANT**

**HUSEINBHAI GULAMHUSEIN BHARMAZ ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By an Originating Summons dated September 23, 2021 the Plaintiff/Applicants sued the Defendant/ Respondents seeking the following order; -
  - a. That this summons be served on Husseinbhai Gulamhussein Bharmaz and Fakhruddin Gulamhussein Bharmaz by fixing a copy thereof on the court Notice board in the court house or by advertisement once in the Daily Newspaper of Nationwide circulation.
  - b. That the Respondents interests in parcel of land situated in Kilifi County, containing by measurement 114.5 acres or thereabout that is to say title No Portion No 511 Group 6539 Malindi File Number LT 330 Folio 330 File No 3783 be extinguished.
  - c. That the applicants herein be registered forthwith as the owners of the suit parcel of land in place of the Respondents by reason of the fact the Applicants have become entitled to the said parcel of land by adverse possession.
  - d. That the Registrar of Titles, Mombasa do issue Certificate of title for the parcel of land situated in Kilifi County containing measurement 114.5 acres or thereabout that is to say title No Portion No 511 Group 6539 Malindi File number LT 33 Folio 330 File No 3783 registered in the names of the applicants without gazettelement.



- e. That the registrar of titles Mombasa be and is hereby ordered to reconstruct file/records and Certificate of Title for the parcel of land situated in Kilifi County, containing by measurements 114.5 acres or thereabout that is to say title No Portion No 511 measurement 114.5 acres or thereabout that is to say title No portion No 511 Group 65239 Malindi File Number LT33 Folio 330 File No 3783 without gazettment and cause an entry and register the applicants as the registered owners.
  - f. That the orders referred to in paragraph 2, 3, 4 and 5 above be registered against the title to property known as the parcel of land situated in Kilifi County, containing by measurement 114.5 acres or thereabout that is to say title No Portion No 511 Group 65239 Malindi File Number LT33 Folio 330 File No 3783 in terms of section 38 (2) of The *Limitation of Actions Act*, Chapter 22, Laws of Kenya.
  - g. That the costs of this Originating Summons be provided for.
2. The Originating Summons is supported by the affidavit of Narolds Kalama Wandary the 1<sup>st</sup> Plaintiff who deponed that the Applicants have been in physical occupation and possession of the suit property for more than 12 years with no one claiming ownership despite the same being registered in the names of the Respondents Huseinbhai Gulamhusein Bharmaz and Fakhruddin Gulamhusein Bharmaz.
  3. The Respondents were served vide advertisement in the Daily Nation dated January 31, 2022 but did not file any response. The matter therefore proceeded undefended.
  4. PW1 Narolds Kalama Wandary adopted his Witness Statement dated September 23, 2021 and produced documents in the list of documents as exhibits before the court. Amongst the documents that were produced certificate of postal search, copy of title, photographs of houses and a letter dated May 31, 2016 from the Assistant Chief Shella Sub location confirming that 5 persons mentioned in the letter are residents on Plot No 511 within his jurisdiction. The 5 are namely, Dalla Jillo Shakala, Mukutano Kanza Ngonyo, Joseph Katana Bandari, Katana Shutu Masha, and Joseph Daniel Muhambi.
  5. PW2 Juma Nduya Karisa and PW3 Joseph Daniel also adopted their Witness Statements dated September 23, 2021 respectively and produced a bundle of documents as exhibits 6-10 and stated that they have been in occupation of the suit land for a period of more than 12 years

#### **Plaintiffs' submissions**

6. Counsel filed submissions and identified the issues for determination as whether the Plaintiffs have acquired the suit land by way of adverse possession and whether the Defendants' rights to the suit land have been extinguished.
7. On the first issue counsel submitted that the Plaintiffs have been occupation of the suit property for a period of over 12 years without the consent of the Respondent and have carried out developments on the suit land as per the photographs produced.
8. Counsel relied on the case of *Kimani Ruchine v Rutherford & Company Ltd (1980) KLR*, and submitted that the Plaintiffs have to prove that they have been in occupation and use; the possession has to be continuous and not broken by any temporary purpose or continues and uninterrupted use of the suit property is a must and that periodic use of the suit property does not amount to use that is inconsistent with the enjoyment of the land by the proprietor.
9. Counsel also cited the case of *Teresa Wachuka Gachira v Joseph Mwangi Wachira* Civil Appeal No 325 of 2003, where he submitted that the court emphasized the importance of following the prescribed



procedure in adverse possession claims as such a claim is based on the fact that the suit property belongs to a registered owner, which evidence has to be provided, and stated that the Plaintiffs have produced a copy of the title and certificate of postal search showing the that the Defendants are the registered owners of the suit property.

### Analysis And Determination

10. This is a claim for adverse possession. The ingredients of the doctrine of adverse possession are well settled. In the case of *Tabitha Waittherero Kimani v Joshua Ng'ang'a [2017] eKLR*, Ombwayo J enumerated the ingredients to be satisfied in a claim of adverse possession as follows: -

- (A) Open and notorious use of the property -For this condition to be met the adverse party's use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim. The occupation and use of the property by the adverse party must be of such character that would give notice to a reasonable person that someone would claim. If a legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings, or animals that a diligent owner could be expected to know about.
- (B) Continuous Use Of The Property– The adverse party must, for Statute of Limitations purposes, hold that property continuously for the entire limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor's time on the land, not how long true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the test of continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal action, and after some time the adverse party returns and dispossesses him again, then the statute of limitation starts over from the time of the adverse party return. He cannot count the time between his ejection by the true property owner and the date on which he returned.
- (C) Exclusive Use Of The Property– The adverse party holds the land to the exclusion of the true owner. If, for example, the adverse party builds a barn on the owner's property, and the owner then uses the barn, the adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (i.e. owners) in common, so long as the other elements are met.
- (D) Actual Possession Of The Property– The adverse party must physically use the land as a property owner would, in accordance with the type of property, location, and uses. Merely walking or hunting on land does not establish actual possession.”

10. Similarly the Court of Appeal in the case of *Masambaga & 7 others v Malindi Holdings and Estate Limited* (Civil Appeal 165 of 2019) [2022] KECA 782 (KLR) the court stated that: -

“the requirements required to prove adverse possession, which are firstly, the fact of possession, and secondly the continuous possessory intent. As explained in *Elements of Land Law, 5th Edition by Kevin Gray and Susan Francis Gray at page 1179* “Possession is attributed to the squatter (and his possession is adverse) only if he has both factual possession (factum possessionis) and the requisite intention to possess (animus possidendi). These elements of factum and animus interact significantly and must coincide continuously throughout the entirety of the required period of possession.”

10. It was the Plaintiffs' case that they have been in possession for a period of more than 12 years without interruption by the registered owners. They also stated that they have never seen the registered owner



of the suit land. The Plaintiffs further produced a copy of the title deed, a copy of the postal certificate of search and photographs of the developments that they have carried out on the suit land.

11. Even though there was no evidence to counter these assertions by the Plaintiff, it is incumbent upon the Plaintiffs to prove that the possession or occupation is adequate, continuous, openly and adverse to the registered owner as was held in the case of *Maweu v Liu Ranching and Farming Cooperative Society 1985 KLR 430*.
12. The Plaintiff did not state when they took possession of the suit land for the court to determine when time started running. A person claiming land by adverse possession must specifically prove the date he took possession of the land or dispossessed the owner; the fact of actual possession; knowledge of the true owner; openness of the possession and non-interruption of the possession for a period of twelve (12) years. The Plaintiffs just stated that they have been in occupation for a period of over 12 years which is not sufficient without proof of when they took possession and how they came into such possession.
13. The fact that the suit is undefended does not mean that the ingredients must not be adhered to. The rules are still the same and the burden of proof still remains with the Applicant.
14. The Plaintiffs are 107 in number and have not stated the specific portions that they are occupying and for how long, they are not homogeneous, same ages and same entry into the suit land. They have just stated that they are occupying the 114 acres.
15. I find that the Plaintiffs have failed to meet the threshold for proof of adverse possession and therefore the suit is dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF NOVEMBER, 2022.**

**M A ODENY**

**JUDGE**

NB: In view of the Public Order No 2 of 2021 and subsequent circular dated March 28, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

