



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**H.C.C. 144 OF 2004 (OS)**

**CHIMBA MBEYO MOKUNGA .....PLAINTIFF**

**VERSUS**

**AHMED ABDULLA .....RESPONDENT**

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

Chimba Mbeyo Mokunga, in an amended Originating Summons prayed to be declared to have acquired the parcel of land know as plot no. 535 II M.N. which land is registered in the name of Abdulla Bin Ahmed. He also prayed to be registered as the owner of the aforesaid parcel of land. Chimba Mbeyo Mokunga was granted leave to serve the origination summons upon Abdulla Bin Ahmed by substituted service through advertisement in a Daily Newspaper. The applicant advertised the originating summons in the Daily Nation of 12<sup>th</sup> August 2004. The originating summons dated 4<sup>th</sup> June 2004 did not attract any response from the Respondent despite the advertisement.

The Originating Summons proceeded for hearing exparte. Chimba Mbeyo Mokunga testified alone. He told this court that he moved onto Plot No. 535 II M.N. in 1969 upon which he started clearing it and cultivated crops thereon to wit: coconut, cassava and cashew nuts. He said he also kept animals on the land. He told this court that he built semi permanent houses on the land and that his occupation has been continuous, quiet, peaceful and notoriously open. He produced photographs in evidence to show the kind of developments he has undertaken on the land. The photographs indicate the following:

- (i) Two semi permanent houses i.e. one with grass thatched roof and the other with a roof made of corrugated iron sheets. Each of these houses are made of mud walls.
- (ii) Animals namely cattle and goats are grazing outside the homestead. Chicken and dogs were evidently present.
- (iii) Crops namely, bananas, coconut trees cassava and maize.

The applicant claimed that he never sought for the permission of the registered owner to occupy the land and that he has never come to complain of his occupation.

The applicant further produced a certified copy of the title to the land in evidence. This annexure indicates that Abdulla Bin Ahmed was registered as administration of Wakf by Mwenyi Yai Bin Abdulla. The registered proprietor on the 13<sup>th</sup> day of April 1959.

The applicant has beseeched this court to grant the prayers set out in the originating summons.

In my mind I think the following issues arose for my determination from the evidence of the applicant.

First whether or not the applicant has established possession adverse to the rights of the registered owner?

Secondly whether or not the applicant is entitled to the prayers sought?

On the first issue, it is important to first discuss the general principles of adverse possession. The Court of Appeal of Kenya considered this issue in detail in the case of Wambugu =vs= Njuguna [1983] K.L.R p. 172.

The revered court held inter alia:

(i) *That the general principle is that until the contrary is proved, possession in law follows the right to possess.*

(ii) *That in order to acquire by the statute of limitation title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.*

(iii) *The limitation of Actions Act, on adverse possession, contemplates two concepts: dispossession and discontinuance of possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years.*

Applying the above principles in this case it is clear that there is no contrary evidence to controvert the fact that the registered owner has not been in possession of the land in dispute since 1969, that is to say about 37 years ago. It is also proved that the applicant has been in occupation and possession of the land for a period of 37 years without any resistance from the Respondent. It is also not disputed that the applicant has been in occupation of the land in dispute without the consent of the owner beyond the statutory period of 12 years. In the circumstances of this I am satisfied that the applicant has established his claim.

On the second issue as to whether or not he is entitled to the prayers, I am of the view that since he has established his claim in law, he is entitled to be given the orders prayed for in the originating summons.

In the end Chimba Mbeyo Mokunga is declared to have acquired Plot No. 535 II M.N. by adverse possession. The name of Chimba Mbeyo Mokunga be inserted in the register as the owner of plot No. 535 II M.N. in place of Abdulla Bin Ahmed whose name should be deleted forthwith by the Land Registrar.

Costs of the suit be met by the Respondent.

Dated and Delivered at Mombasa this 24th day of February 2006.

J.K. SERGON

J U D G EIn the presence of Mr. Gichana for the plaintiff

N/A for the Defendant