



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Misc Civil Appli 503 of 2005**

**PLOT NO. 360 SECTION 11 MAINLAND NORTH**

**IN THE MATTER OF: SECTION 38 OF LIMITATION OF ACTIONS ACT (CHAPTER 22 OF  
THE LAWS OF KENYA**

**KAZUNGU MALEJA MBARU & 5 OTHERS.....APPLICANTS/PLAINTIFFS**

**VERSUS**

**THATHINI COMPANY LIMITED.....RESPONDENT/DEFENDANT**

**JUDGMENT**

Kazungu Maleja Mbaru, Chengo Thoya Sirya, Kalume Kibone Ruwa, Riziki Fundi Kitsao, Swalehe Omar Beja and Rachel Charo, (hereinafter referred to as the Plaintiff) took out an Originating Summons pursuant to Order XXXVI rule 3D of the Civil Procedures in which they sought for an order declaring them to have acquired Plot No 360 Section II Mainland by adverse possession from Thathini Company Limited (hereinafter called the Defendant). The Originating Summons is supported by the affidavit of Riziki Fundi Kitsao sworn on the 6<sup>th</sup> day of July 2005. The Originating Summons plus the supporting affidavits were served upon the Defendant by registered post. There was no response hence the same proceeded for hearing exparte.

When this suit came up for hearing the Plaintiffs only presented the evidence of two witnesses to support their claim. The first to testify is Chengo Thoya Sirya(P.W.1). He told this court that he and the other five (5) Plaintiffs have been in occupation of Plot No. 360 Section II Mainland North for a period of over 12 years without being harassed or paying rent. He said he is aware that there is a title deed in respect of the aforesaid in the name of the Defendant. This witness pointed out that he relied on the affidavit sworn by Riziki Fundi Kitsao in support of the Originating Summons. PW1 beseeched this court to grant the orders sought in the Originating Summons Swalehe Omar Beja (PW2) told this court that he with PW1 and the other four Plaintiffs occupied Plot No. 360 Section II Mainland North for over twelve (12) years. He claimed he has been in occupation of the aforesaid land for a period of over 40 years.

At the end of the evidence Mr. Weloba advocate for the Plaintiffs chose not to make any submissions. The learned advocate however invited this court to consider the oral evidence tendered by the two witnesses and the facts deponed on affidavits in support of the Originating Summons. I have carefully considered the evidence given by PW1 and PW2. I have also taken into account the verifying affidavit and the affidavit in support sworn by Riziki Fundi Kitsao. In my estimation there is only one issue which arose for my determination namely: Whether or not the Plaintiffs are entitled to claim plot no. 360 Section II Mainland North by adverse possession?

In an attempt to answer this issue it is important to state that an applicant can acquire by statute of limitations a title to land which has a known owner when such an owner loses his right to the land either by being dispossessed of it or by having discontinued his possession of it. In this case the Plaintiffs have claimed that they have been in exclusive and quiet possession of Plot no. 360 Section II Mainland North for over a period of twelve (12) years. In other words the Plaintiffs are saying that they dispossessed the Defendant by occupation of the land thus their acts are inconsistent with the Defendant's enjoyment of

the soil for purposes for which it intended to use. It was incumbent upon the Plaintiffs to prove on a balance of probabilities the existence of these conditions. The evidence of Chengo Thoya Sinya (PW1) indicate that he has been in occupation of the aforesaid land for over 12 years. PW1, does not state what he has done on the land which are inconsistent with the Defendant's rights to the land. PW1 casually mentioned that he has been in occupation of the land for over 12 years. He did not give the date he took possession of the land. Swalehe Omar Beja (PW2) adopted similar evidence as that of the PW1. PW2 claims he has been in occupation of the aforesaid land for over 40 years. None of these two witnesses claim that they jointly occupied the land at the same time. After considering the oral evidence I failed to find anything cogent and tangible to support the Originating Summons. This kind of circumstances prompted me to peruse the verifying affidavit of Riziki Fundi Kitsao. I have referred to the affidavit sworn on 6<sup>th</sup> July 2006. Attached to this affidavit is a copy of the title to Plot No. 360 Section II Mainland North. It shows that the property was acquired by Thathini Development Co. Ltd on the 24-1-1984. I am not sure whether Thathini Development Company Limited is the same company as Thathini Co. Ltd. If they are not one and the same then, it was necessary for the Plaintiffs to make the necessary amendments. At paragraph 15 of the affidavit of Riziki Fundi Kitsao sworn on 6<sup>th</sup> July 2005, it is deponed as follows:

*“15. That the suit premises have for in the last over 9 years been in the Applicants' exclusive usage and occupation and virtually become ours save for the title whose denial would cause us losses of houses constructed therein for considerable and hard earned monies.”*

I do not know why the plaintiffs have failed to state the years they took possession of the land. Such information was so crucial. The aforesaid quotation clearly shows that the Plaintiffs have been in occupation of the land in dispute for a period beyond 9 years but may not be more than 12 years. At paragraph 14 the Deponent makes interesting revelations:

*“14. That from the registered owners lack of interest in the usage, occupation and exploitation for the last twelve (12) years and over of the same, he does not stand to suffer any prejudice, loss or damage by its acquisition.”*

It seems the Plaintiffs are alluding that the Defendant's lack of use of the land supports their case. That is not the law because what is important is for the Plaintiffs to prove the kind of activities they have done on the land that are inconsistent with the Defendant's right to the land. It is also incumbent for the Plaintiffs to prove that their occupation was open, notorious peaceful and uninterrupted for a period of over twelve (12) years. There are ample authorities which are available on this subject. The court of Appeal of Kenya dealt with substantively on the issues raised in this action in the case of Wambugu =vs= Njuguna [1983] K. L.R. P. 172 in which it held *inter alia*:

*(i) That in order to acquire by statute of Limitations title to land which has a known owner, that owner must have lost his right to the land either by being disposed 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.*

*(ii) The Limitation of Actions Act, on adverse possession, contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse 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 prove that he has been in possession for the requisite number of years.”*

In the action before this court the Plaintiffs have not proved that the Defendant had either been dispossessed or had discontinued possession of the suit land for a continuous statutory period of twelve years as to entitle them title to that land by adverse possession. In my appreciation of the evidence tendered by the Plaintiffs, I regret to state that they have failed to prove that the aforesaid ingredients necessary to establish acquisition of land by adverse possession.

For the above reasons, I dismiss the entire Originating Summons. I shall not award costs because the

action was not resisted.

Dated and delivered this 3<sup>rd</sup> day of November 2006

**J. K. SERGON**

**JUDGE**