



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

Civil Suit 134 of 2004 (OS)

**IN THE MATTER OF: PLOT NO. 362/MN/11
AND
IN THE MATTER OF: THE LIMITATIONS OF ACTIONS ACT CAP 22 OF
THE LAWS OF KENYA**

BETWEEN

CHRISTINE NYAMALWA
PLAINTIFF/APPLICANT

VERSUS

SYAD WALAYAT SHA

**KHAIR-UD-
DIN**

**.....DEFENDANTS/RESPON
DENTS**

Coram : Before Hon. Justice Mwera

**Okemwa for Applicant
No appearance for Respondent
Court clerk – Kazungu**

JUDGEMENT

This case was instituted by way of originating summons (O.S.) under O.36 r. 3D Civil Procedure Rules, S. 3A Civil Procedure Act and S.38 of the Limitation of Actions Act (Cap.22). Due directions issued and the trial took the course of a suit (by plaint) and evidence was taken. The issues to be determined were:

- i) Whether the plaintiff had become a beneficiary of Plot No. 363/MN/11 by virtue of adverse possession.
- ii) Whether the plaintiff is thus entitled to be registered as the owner of the said land she occupies and
- iii) Costs.

It needs no repeating the grounds on which the original originating was based or the supporting affidavit thereof because the plaintiff/applicant Christine Nyamalwa gave evidence.

The plaintiff applied and on 16-7-04 this court granted her leave to serve the two defendants by way of advertisement on the reasons advanced. That was duly done but the defendants did not appear and/or file defence. The plaintiff took the witness stand (PW.2) and testified thus:

The applicant, a businesswoman living at Utange, on the subject plot, told the court she had been on it for over 30 years. That the plot was left to her grand parents by owners she never met or knew. That the parcel of land was not registered in her names and she did not know where the registered owners were. So she got leave and served them (the defendants) by advertisement on 9-8-04. There was no appearance following that service. She PW.1 continues to live on the subject plot with her family – a demarcated and marked – off parcel. That she has openly lived and tilled the land without anybody attempting to evict her. That in the meantime she got the names of the registered owners (the defendants) from a copy of details given to PW.1 by the registrar of titles. That during the occupation of the subject plot (7 ½ acres in area and near the road) the local Municipal Council has been serving rates notices on PW.1 (Ex. P) That she intended to pay off these rates if the court grants her prayers.

Geoffrey Gaikuru (PW.2), a senior registrar of titles held the record of the subject plot. When the applicant/plaintiff served him with a request to inform her of the original registered owners thereof, PW.2 could not trace a copy of the title from the deed file (No.1002) but he brought a transfer executed on 18-4-49 from the public trustee administrator of the late Mwidau bin Suleiman) to Syad Wilayat Shah s/o Syat Amir Shah and Khair Udin s/o Chaudri Jang as tenants in common in equal shares (the defendants) (Ex. P2). With this the applicant/plaintiff closed her and then submitted.

This followed the pattern of the pleadings, evidence and the law (s.38 of the Limitation of Actions Act) to the effect that with the plaintiff having lived on the subject land for as long as she did openly and without interference, she was entitled to the order of this court to be registered as the owner of this plot by virtue of the law governing adverse possession. That the known owners (defendants) had lost the right to this land or had been dispossessed. Citing the case of **SISTO WAMBUGU VS. KAMAU NJUGUNA CIVIL APPEAL NO. 10/83, Halsbury's Laws of England Vol. 24 (3rd Edn) paras 481, 482 and RUCHINE & ANOTHER VS. SWIFT, RUTHERFORD & CO. LTD & ANOTHER (1980) KLR 10**, this court was urged to find that the applicant/plaintiff had proved her case and was entitled to the orders. That she had used the land without force, not secretly and no invasion in a continuous manner.

With all the above this court was satisfied that the orders sought in the Originating Summons herein should and do issue, with costs.

Judgement/orders accordingly.

Delivered on 20th July 2005.

J.W. MWERA

JUDGE