

That there was a will appointing one Shamsha the defendant No. 1 and Fatu his daughters as executors but that in 1924 the same deceased proprietor had declared buildings and land on Title No. Mombasa/Block/XXVII/101 as WAKF for Madrassa [Muslim Religious School] and handed over possession of both to Mombasa Baluchi Community elders and since then [1924] the plot has been used as a Madrassa without interruption.

The Madrassa Community had then become owners by adverse possession and want to be so registered but in spite of these facts the 1st Defendant got registered on 19.5.1997 as proprietor of the said land as a person entitled under the will now the Plaintiffs contend that the title of the said deceased and his heirs and executors and the Defendants was extinguished under Section 17 of the Limitations Act.

The first Defendant in her affidavit on 4th June 2001 opposes the application on grounds that the applicants have no locus standi. That it is true her late father allowed the Madrassa to be so established and gave possession to the same but that the same had again been transferred to her name on his death. That the Baluchi Community to which Madrassa was given are licencees merely so the applicants could not have been in adverse possession. Thirdly, that where there is a Wakf declared over property no adverse possession can exist on such a property and constitutes the claimants trustees thereof and cannot claim and lastly that there is a case existing.

Mr. Munyao on behalf of the second defendant joined Mr. Balala in his reasoning adding that the procedure is defective as this is not a case falling under O.36 r 3(d) (iii) of the Civil Procedure Rules. But in reply Mr. Kasmani submitted that once a Wakf remains a Wakf. In *ITHONGO V THINDIU* 1981 KLR (206).

Court of Appeal per Law J. A. said:-

“It is immaterial in the absence of fraud whether the Respondent knew or did not know that he was the registered proprietor of Parcel 190 a right to land is extinguished in the absence of fraud, after the statutory period, although the owner is unaware that adverse possession has been taken Rains V Buxton [1880] 1 4Ch. D. 537”.

“As is stated in RUSTOMJEE ON LIMITATION and ADVERSE possession at page 1380, ignorance on the part of the owner whether of his right does not prevent the operation of the statute”

From this the submission by Mr. Balala that it was a license merely does not hold water. As concerns Mr. Munyao's argument I think the decision of the Court of Appeal in Civil Appeal No. 57 of 1997, *PETER NJAU KAIRU and STEPHEN NDUNGU NJENGA* answers it. There the Court said that:-

“That once adverse possession is proved, a purchaser for value cannot acquire title from the registered owners, title stands extinguished after 12 years of adverse possession”

Mr. Munyao in dealing with the issue of Wakf referred to Section 15 of Cap 109 which says:-
“Notwithstanding anything to the contrary in any Act of Law further time being in force, no title to any property the subject of a Wakf, shall after the commencement of this Act be acquired by any person by reason of that person having been in adverse possession thereof or by reason of any law of prescription”.

But I do not think that this is the position here. I agree with Mr. Kasmani that there is no beneficiary in Wakf and that once it is Wakf property it remains Wakf property but here the property had already been transferred. They have treated it as property in the Estate. They cannot derive benefit from it and then deny it.

They are *ESTOPPED*. The Section does not help the Defendants. I grant the prayers of the Originating Summons as prayed with costs to the applicants.

Dated this 20 th day of August 2003.

A. I. HAYANGA

JUDGE