



**Kalama & 51 others v Two Thirds Investments Ltd & 4 others  
 (Environment & Land Case 232 of 2014 & 3 of 2015 (Consolidated))  
 [2024] KEELC 7366 (KLR) (6 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7366 (KLR)

**REPUBLIC OF KENYA  
 IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
 ENVIRONMENT & LAND CASE 232 OF 2014 & 3 OF 2015 (CONSOLIDATED)  
 SM KIBUNJA, J  
 NOVEMBER 6, 2024**

**BETWEEN**

**KATANA SAID KALAMA & 40 OTHERS & 40 OTHERS & 40 OTHERS ..... PLAINTIFF**

**AND**

**TWO THIRDS INVESTMENT LTD ..... DEFENDANT**

**AS CONSOLIDATED WITH  
 ENVIRONMENT & LAND CASE 3 OF 2015**

**BETWEEN**

**TWO THIRDS INVESTMENTS LTD & 10 OTHERS & 10 OTHERS & 10 OTHERS ..... PLAINTIFF**

**AND**

**KATANA SAID KALAMA & 3 OTHERS & 3 OTHERS & 3 OTHERS ..... DEFENDANT**

**JUDGMENT**

1. Katana Said Kalama & 40 Others, plaintiffs, commenced Mombasa ELC No. 232 of 2014, against Two Thirds Investment Ltd, Defendant, through the originating summons dated 10<sup>th</sup> September 2014, seeking to be declared owners of plot title No. CR.1222, MN/11/390, Area 28.3 acres, suit property, through adverse possession. The originating summons is supported by the affidavit of Katana Said Kalama sworn on the 10<sup>th</sup> September 2014, inter alia deposing that the suit property was cultivated by their ancestors before it was subdivided among an old Indian lady in whose name it is. That the owner



has severally issued instructions to have it subdivided without their consent through the police after failing to satisfy them how they acquired the title. That the purported owner could have obtained title to the suit land through fraud or illegality and should be ordered to transfer to them the portion under their occupation. The originating summons is opposed by the defendant through the replying affidavit and supplementary affidavit of J. K. Wanyoike sworn on 7<sup>th</sup> February 2017 and 24<sup>th</sup> May 2018.

2. Two Thirds Investment Ltd & 10 Others, Plaintiffs, commenced ELC No. 3 of 2015 against Katana Said Kalama & 3 Others, Defendants, through the plaint dated 20<sup>th</sup> January 2015, seeking for permanent injunction against the defendants and vacant possession over the various listed parcels subdivided from MN/11/390 Mombasa, and costs. The 1<sup>st</sup> defendant opposed the claim through the statement of defence dated 26<sup>th</sup> January 2015 inter alia averring he was born on the said land prior to the alleged registration of the plaintiffs as owners. That he has been in occupation thereof for over 35 years.
3. The plaintiffs called Katana Said Kalama, Sidi Masha Wanje, Ali Juma Mwakaneno, Chembe Stephen Kyalo, and Juma Kazungu who are the 1<sup>st</sup>, 33<sup>rd</sup>, 2<sup>nd</sup>, 14<sup>th</sup>, and 41<sup>st</sup> plaintiffs who testified as PW1 to PW5 respectively, while Two Thirds Ltd, the 1<sup>st</sup> defendant, called Jeremiah Karanja Wanyoike, Chairman, and Joshua Mugambi, Surveyor, who testified as DW1 and DW2 respectively. The plaintiff is ELC No. 232 of 2014 and plaintiffs in ELC No 3 of 2015 will hereinafter be referred to as the Plaintiff and Defendants respectively.
4. The learned counsel for the 1<sup>st</sup> plaintiff, 32<sup>nd</sup> to 40<sup>th</sup> plaintiffs, other plaintiffs, and defendants filed their submissions dated 28<sup>th</sup> June 2024, 20<sup>th</sup> July 2024, 26<sup>th</sup> June 2024, and 4<sup>th</sup> October 2024, which the court has considered.
5. The issues for determinations by the court are as follows:
  - a. Who between the plaintiffs in ELC Nos. 232 of 2014 and 3 of 2015 is the legal owner of the suit property(ies) subject matter of the respective suits.
  - b. Whether the plaintiffs, or any of them, is entitled to be declared the owner of the suit property(ies) subject matter of the suit under adverse possession.
  - c. Whether the plaintiff in ELC No. 3 of 2015 is entitled to permanent injunction and vacant possession orders sought, over the suit properties.
  - d. Who pays the costs in each of the suit.
6. The court has carefully considered the pleadings filed, oral and documentary evidence tendered by PW1 to PW5, DW1 and DW2, submissions by the learned counsel, superior courts decisions cited, the record and come to the following findings:
  - a. That as earlier pointed out and for ease of reference, the plaintiffs in ELC No. 232 of 2014 and the plaintiffs in ELC No. 3 of 2015 will hereinafter referred to as the plaintiffs and defendants respectively. Indeed, that is the capacity in which they appeared at the stage of tendering their testimonies in court, following the consolidation of the two suits pursuant to the consent of 2<sup>nd</sup> December 2018.
  - b. In determining who between the plaintiffs and defendant has the legal title to the suit property(ies), I find it necessary to first look at the plaintiffs' claim of adverse possession commenced through the originating summons filed in ELC No. 232 of 2014. A person or persons seeking for prescriptive orders over a suit property on the basis of their occupation of beyond twelve (12) years having extinguished the registered owner's or owners' title under section 38 of the *Limitation of Actions Act*, chapter 22 of Laws of Kenya, is/are required



to approach the court through originating summons, under Order 37 Rule 7 of the Civil Procedure Rules; and the summons should be “supported by an affidavit to which an extract of the title to the land in question has been annexed.” Indeed the plaintiffs herein commenced their suit through the originating summons but there was no extract of title or titles to the suit property(ies) attached.

- c. The record confirm that at the end of PW1’s evidence in chief on the 7<sup>th</sup> October 2019, counsel for the plaintiffs applied to be allowed to amend the originating summons and file a further affidavit to capture the subdivisions as the suit property no longer existed, and to attach extracts of title as none had been annexed. The application was opposed by counsel for the defendant, and upon considering the learned counsel’s submission the court ruled as follows:

“...I have looked at the O.S and indeed, I can see that when it was filed, there was no compliance with Order 37 Rule 7, in that an extract of the title was not annexed. Further, in the event that the land mentioned in the OS was subdivided, then that title no longer exists, and it follows that the OS would be incompetent for claiming a title that is no longer in existence.

Strictly speaking, the OS is liable to be struck out for being incompetent.....Having considered the rival submissions, and so that the plaintiffs can be allowed a chance to ventilate their case, I will in my discretion allow the plaintiffs to amend the O.S. .... The OS may be amended and filed and served in 14 days.....”

The subsequent proceedings of 14<sup>th</sup> November 2019, show that the plaintiffs had not carried out the amendments of the originating summons within the time given. Their counsel applied for more time to collect the extracts of about 300 titles but the court declined and ordered that:

“I regret that I am unable to extend the time that I gave on 7<sup>th</sup> October 2019..... The leave to amend is now lapsed.”

The plaintiffs then filed the application dated 4<sup>th</sup> May 2022, seeking for among others leave be granted to the 2<sup>nd</sup> to 32<sup>nd</sup> and 41<sup>st</sup> plaintiffs to amend their originating summons. I heard the application on merit and dismissed it vide the ruling of 2<sup>nd</sup> November 2022. That the procedure prescribed under Order 37 Rule 7 of the Civil Procedure Rules is mandatory, and failure to attach a copy or copies of the extract of title(s) to the land claimed, means the ownership cannot be ascertained. The failure to annex is fatal to the plaintiffs’ originating summons, and even though the plaintiffs called five witnesses who testified as PW1 to PW5, their testimonies is of no value as it was in support of an invalid originating summons. Their originating summons/suit is hereby struck out.

- d. In support of the defendant’s claim, DW1 testified that they bought land parcel MN/11/390, in an auction on 8<sup>th</sup> April 1993 at Kshs.1,400,000, while vacant. That the defendant embarked on the process of subdividing it after obtaining the necessary authorizations. The subdivision scheme was approved by the Director of Survey on the 21<sup>st</sup> June 1996. It was his evidence that the subdivision resulted to 158 plots. During the subdivision, some four families moved onto the land and after meetings with them and government officers, it was proposed they be allowed to purchase the 17 plots they were occupying at Kshs.10,000 each, and the list of



the beneficiaries was prepared and signed on 1<sup>st</sup> November 2014, and forwarded to the DC Kisauni on 10<sup>th</sup> November 2014. The defendant commenced fencing of suit property, but in late 2014, politicians incited the beneficiaries who rejected the plots they had been offered, and with others invaded vast areas of the property, started erecting structures and harvesting the resources from the land. They also uprooted and burnt the fencing materials. Some of those people were arrested and charged with criminal charges at Shanzu Court. That through the court order issued in ELC No. 3 of 2015, the District Surveyor, Mombasa visited the suit land to determine the number of occupants thereon, and a report dated 30<sup>th</sup> June 2015, was filed with the court on 1<sup>st</sup> July 2015, showing the plots occupied by the various people as follows:

- i. Katana Said Katana- 0.03 acres in subplots 6239 and 6240.
- ii. Juma Kazungu Mweni- 0.20 acres in subplots 6263, 6264, 6270, 6269, 6268, 6262, 6314, 6273 and 6285.
- iii. Chembe Stephen Charo- 0.30 acres in subplots 6298, 6299, 6300, 6303, 6332, 6333, 6334, 6320 and 6335.
- iv. Ali Juma Mwakaneno- 0.13 acres in subplot 6245, 6246, 6253, 6247, 6248, 6255, 6256, 6272 and 6273.

The report further shows that the total occupied area was 0.66 acres out of 17.29 acres. That while all the plaintiffs claim to occupy different portions of the suit parcels, the defendants position is that only a few are indeed on the land. DW2 testified going to the suit properties in 2014 and finding only six of the plaintiffs, in addition to four others, who are named above, who had houses there. His testimony, confirms that of DW1, that the other people came onto the land after, and not before 2014. By the time these two suits were filed in 2014 and 2015, definitely the time required for one to have been in occupation of land so as to have the basis in a claim based on adverse possession had not lapsed.

- e. The testimonies by PW1 to PW5 were primarily in support of their adverse possession claim, commenced through the originating summons filed in ELC No. 232 of 2014, which the court has found to be fatally defective for failure to comply with Order 37 Rule 7 of Civil Procedure Rules. They appeared to testify on their own behalf and other families, including some who are not among the plaintiffs. The originating summons was by 41 plaintiffs and does not in any way amount to a representative suit. That so as to succeed in an adverse possession claim the claimant need to prove actual, continuous occupation of specified land or portion of land for at least 12 years. That even if the originating summons filed in ELC no. 232 of 2014 was not fatally defective, each of the plaintiffs would have been required to tender proof over their respective claims to succeed. That as parties are bound by their pleadings, and the originating summons was over plot title No.CR.1222, MN/11/390, Area 28.3 acres, suit property, then the evidence tendered by PW1 to PW5 was in support of their claim over that land, which is evidently non-existent following its subdivision into 158 parcels in 1996.
- f. The plaintiffs had questioned the legality of the defendant's title to the suit property, alleging through their originating summons illegality and fraud in its acquisition. Remembering that a claim based on adverse possession is against the title of the registered proprietor, then, a claimant who questions the legality of the title held by the registered proprietor would better commence their claim through a plaint and not originating summons. That way, the claimant would get the opportunity to set out among others the alleged particulars of illegality and or fraud, and the opposing side would get the opportunity to respond. Thereafter, the parties



would be required to tender proof in accordance with sections 107 to 109 of the *Evidence Act* chapter 80 of Laws of Kenya, to the standard required. The defendant has through DW1 given a history of how it acquired plot title No.CR.1222, MN/11/390, Area 28.3 acres, suit property, which has since been subdivided into several plots. There is no evidence tendered by the plaintiffs that suggest that the title was obtained illegally, irregularly or through a corrupt scheme. The defendants therefore have the right to enjoy possession and occupation of their land, and I find they are entitled to the prayers sought in their plaint dated the 20<sup>th</sup> January 2015, filed in ELC No. 3 of 2015.

g. Under section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya, the costs follow the event unless where otherwise ordered. In the consolidated suits, and considering the history in the disputes between the parties, I am of the view an order that each party bears their own costs will booster a sense of justice between the parties.

7. In considerations of the foregoing determinations, the court finds and orders as follows:

- a. That the plaintiffs' claim through the originating summons filed in Mombasa ELC No. 232 of 2014, is fatally defective and is struck out.
- b. That the defendants, who are plaintiffs in Mombasa ELC No. 3 of 2015, have proved their case against the four named defendants. Judgement is therefore entered for the plaintiffs and against the four defendants in terms of prayers (a) and (b) of the plaint dated 20<sup>th</sup> January 2015.
- c. Each party to bear their own costs in both suits.

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 6<sup>TH</sup> DAY OF NOVEMBER 2024.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In The Presence Of:

Plaintiffs : Mr Kamunda For 1<sup>st</sup> Plaintiff

Ms Chengo For Kenga For 2<sup>nd</sup> And 32<sup>nd</sup> Plaintiffs And 41<sup>st</sup> Plaintiff

Mr Muyala For 33<sup>rd</sup> To 40<sup>th</sup> Plaintiffs

Defendants : Mr Maundu.

Leakey – Court Assistant.

