



REPUBLIC OF KENYA



**Shee & 72 others v Asmuhar Developer Limited (Environment & Land Case
187 of 2017) [2024] KEELC 7365 (KLR) (6 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 7365 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 187 OF 2017
SM KIBUNJA, J
NOVEMBER 6, 2024**

BETWEEN

OMAR SALIM SHEE 1ST PLAINTIFF
CHARLES ONWONGA KANANDO 2ND PLAINTIFF
GEORGE OKOYO OMONDI 3RD PLAINTIFF
SAMUEL OTIENO NYANYA 4TH PLAINTIFF
JULIET KAVERE 5TH PLAINTIFF
DOMINIC AGOI 6TH PLAINTIFF
ALFRED NAG HANGA 7TH PLAINTIFF
ATHMAN MOHAMED 8TH PLAINTIFF
RISCO JILLO 9TH PLAINTIFF
SAUMU CHIBULE 10TH PLAINTIFF
KOMBE NZAI KOMBE 11TH PLAINTIFF
KAZUNGU MUENI MRAMBA 12TH PLAINTIFF
FRANK JOSEPH MWANGEMI CHISHENGA 13TH PLAINTIFF
ARNOLD MWAMU ANZAZI 14TH PLAINTIFF
ANZAZI JOSHUA PHIDLIZAR 15TH PLAINTIFF
PINISPA OTIENO MARTINE 16TH PLAINTIFF
UMMY LUKURDHUM FESTUS 17TH PLAINTIFF
MWONGERA IKANDI 18TH PLAINTIFF
ZUHURA FESTUS NIONJIRA 19TH PLAINTIFF



JAIRUS NUTA KAINDI	20 TH PLAINTIFF
ROSEMARY WANYAMA ACHIENO	21 ST PLAINTIFF
ATHMAN MAVINDA GIDEON	22 ND PLAINTIFF
KULTHUM OMAR SAID	23 RD PLAINTIFF
CARIAT OLUOCH OREDO	24 TH PLAINTIFF
BARAKA ALI SENEDA	25 TH PLAINTIFF
LUCY KAINGI KIVUNZI	26 TH PLAINTIFF
KADZO NYALE CHAMANGA	27 TH PLAINTIFF
CAROLINE ACHIENG NYABENGA	28 TH PLAINTIFF
KASSIM ALI SAWA	29 TH PLAINTIFF
ALBERT KILONZO MUSYOKA	30 TH PLAINTIFF
TAMARA JOAN RICHARD	31 ST PLAINTIFF
RICHARD PHILIP KEYAN HASSAN	32 ND PLAINTIFF
HAROLD MWAITA MJOMBA	33 RD PLAINTIFF
GRACE NYAKOMA	34 TH PLAINTIFF
ALI ISSA ALI	35 TH PLAINTIFF
REHEMA MKIWA SINONA	36 TH PLAINTIFF
FRIDAH MORAA ONWONGA	37 TH PLAINTIFF
KASSIM JUMANNE KASSIM	38 TH PLAINTIFF
JOYCE DZOMBO MUNGA	39 TH PLAINTIFF
ALEX BUNGE MWARINGA	40 TH PLAINTIFF
BAKARI SULEIMAN SARAI	41 ST PLAINTIFF
JUMANNE KASIM MWAMTSUMA	42 ND PLAINTIFF
MATANO KATANA CHARO	43 RD PLAINTIFF
NYAWA KOMBO	44 TH PLAINTIFF
SETH MUENI MUMO	45 TH PLAINTIFF
JACKSON SHEDRAKA	46 TH PLAINTIFF
MWAVITU ALI RASHID	47 TH PLAINTIFF
CHIRO POLE TSUMA	48 TH PLAINTIFF
JOHN TUVA DZIMBA	49 TH PLAINTIFF
PATIENCE SARO MWADZANAE	50 TH PLAINTIFF
MARY SCHOLASTICA CHAUSIKU	51 ST PLAINTIFF



JANE AUMA AUGUSTINE	52 ND PLAINTIFF
JOHN OTIENDE NDALO	53 RD PLAINTIFF
JANET JUMWA BENGU	54 TH PLAINTIFF
JEFFERSON MSENGETI	55 TH PLAINTIFF
DAVID CHIKO CHIRONDA	56 TH PLAINTIFF
JANET KINGI JAPHETH	57 TH PLAINTIFF
MAFANIKIO BAKARI CHANGO	58 TH PLAINTIFF
MARGARET MBITHE OTIENO	59 TH PLAINTIFF
JAPHETH MUIA MULLEVU	60 TH PLAINTIFF
WALTER KALUME CHINYEZI	61 ST PLAINTIFF
TSUMA DZUWA MKOBA	62 ND PLAINTIFF
PHILOMENA MWIKALI MUNGI	63 RD PLAINTIFF
FATUMA ALI MASHEDI	64 TH PLAINTIFF
FLORENCE KWAMBOKA MWACHUKI	65 TH PLAINTIFF
WARSTON MBAGAH MWAMU	66 TH PLAINTIFF
ZACHARIA AMOS KACHUBU	67 TH PLAINTIFF
EZEKIAL MUNGATANA	68 TH PLAINTIFF
GEOFFREY ARASA NYAKWARA	69 TH PLAINTIFF
GABRIEL DECHE MWAMU	70 TH PLAINTIFF
VICTOR CHARO KARISA	71 ST PLAINTIFF
MUGAZA MULALA BRDZAME	72 ND PLAINTIFF
NASSIR SWALEH ABDI	73 RD PLAINTIFF

AND

ASMUHAR DEVELOPER LIMITED DEFENDANT

JUDGMENT

1. The plaintiffs filed this suit through the amended originating summons dated 1st February 2021, seeking ownership of LR No. 8844/1/MN, (Original No.4826/2/)1MN, suit property, and be issued with the title, for having been possession openly, uninterrupted and continuously for over 40 years. The originating summons is supported by the affidavit of Omar Salim Shee sworn on 1st February 2021, in which he inter alia annexed copy of the certificate of postal search dated 8th January 2020 showing the suit property is registered in the name of Asmuhar Developer Limited, the defendant.
2. During the hearing, the plaintiffs called Omar Salim Shee and Mwavitu Ali Rashid who testified as PW1 and PW2 respectively. They adopted the contents of their statements dated 20th May 2019. PW1



testified that he went to the suit land in the 1970's and has lived there for over 40 years. During cross-examination, PW1 told the court the suit land is about one acre, and there are 20 plots of 100 by 50 feet, 40 plots of 40 by 15 feet and 30 plots of 20 by 15 feet, about 70 permanent houses and three temporary houses. On his part, PW2 told the court the suit land is over two acres. That there are 70 permanent houses and one semi-permanent one. That the smallest plots are of 40 by 40 feet, and others are of 80 by 40 feet. That his plot is 50 by 40 feet. During cross-examination, PW2 told the court that he entered the suit property in 1985 and found others already there.

3. The learned counsel for the plaintiffs filed their submissions dated the 26th June 2024, that the court has considered.
4. The following are the issues for the determinations by the court:
 - a. Whether the plaintiffs have met the threshold to be declared as proprietors of the suit property under adverse possession.
 - b. Who pays the costs?
5. The court has carefully considered the grounds on the originating summons, affidavit and oral evidence by PW1 and PW2, submissions by the learned counsel for the plaintiffs, the superior courts decisions cited thereon, the record and come to the following conclusions:
 - a. The record confirms that upon filing the suit, the plaintiffs later moved the court through the notice of motion dated 9th November 2023 seeking to be allowed to serve the originating summons through substituted service. The application was heard and granted on the 22nd November 2023. The plaintiffs filed the affidavits of service of Mathew Oduor Okumu, advocate, sworn on 15th December 2023 and 31st January 2024, annexing copy of page 49 of the Standard Newspaper of 30th November 2023, confirming the substituted service was carried through advertisement. However, the defendant neither entered appearance nor defended the suit. That notwithstanding, the plaintiffs are pursuant to sections 107 to 109 of the Evidence Act chapter 80 of Laws of Kenya, under legal duty to prove their claim to the standard required of balance of probability.
 - b. The proceedings of 28th October 2019 and 13th February 2020 show that the court had directed the plaintiffs to file a copy of an extract of the suit property's title. The plaintiffs complied and annexed a copy of the certificate of title issued on 13th November 2008 to the further further affidavit of Omar Salim Shee, sworn on 14th May 2020. The court also directed the plaintiffs on 21st July 2022 and 15th February 2023 to have a licensed surveyor prepare a ground report and have it filed in court. This was also complied with and a report prepared by Pimatech Land Surveyors and Consultants dated 3rd March 2023 was filed.
 - c. Though there were minor differences in the oral testimonies of PW1 and PW2 on for example the sizes of the plots occupied by the plaintiffs on the suit property, they were both in agreement that they have lived on that land exclusively of the registered owner, continuously and without interruption for over 12 years. They also confirmed that the 73 families have occupied the whole land, built mostly permanent houses and a few semi-permanent ones. The surveyor's report confirmed there were 72 structures on the suit property as detailed in the annexed plan, which show the structures are of different sizes and dimensions. The court is satisfied that the plaintiffs have discharged their duty and proved their claim of adverse possession over the suit property to the standard required.
 - d. That as the defendant did not defend the suit, the plaintiffs will meet their costs.



6. That from the foregoing, the court finds that the plaintiffs have proved their case to the standard of balance of probability. The court therefore enters judgement for the plaintiffs against the defendant and orders as follows:

- a. That prayers (1) to (3) of the amended originating summons dated the 1st February 2021 are granted.
- b. Plaintiffs to bear their own costs.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 6TH DAY OF NOVEMBER 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Plaintiffs : Mr. Odour

Defendants : No Appearance.

Leakey – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

