



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO 26 OF 2018(O.S)

ALI MWADHI MULEWA AND 40 OTHERS.....APPLICANTS

VERSUS

GIUSEPPE GALGALO.....RESPONDENT

JUDGMENT

By an Originating Summons dated 1st February 2018 the Applicants herein sued the Respondent seeking for the following orders:

- 1. That the Applicants are entitled to be declared as proprietors of the parcel of land reference number 413 Malindi which they have acquired by way of adverse possession having lived, occupied, developed and/or in actual possession for over 12 years well beyond the statutory period and used it peacefully, uninterrupted and without any interference from the Respondent and/or any other person.***
- 2. A declaratory order be issued that the Applicants are entitled to be registered and issued with title documents over land reference number 413 Malindi in place of the Respondent.***

The Originating Summons is supported by the affidavit of Ali Mwadhi Mulewa who states that together with the Applicants have been in possession of the suit property for over a period of 12 years and hence have acquired the suit property by way of adverse possession.

It was PW1's testimony that most of the Applicants were born and brought up on the suit property which is the only place that they know as their home. Further that they have been cultivating and grazing on the suit property without interference from the Respondent or any other person.

PW1 stated that all the Applicants occupy distinct portions which he prays that should be given to them. PW1 produced a copy of official search, extract of the parcel file and photographs of the structures and development carried out by the Applicants. A survey report was also filed to show the respective portions occupied by the Applicants

It was PW1's evidence that the Applicants have constructed permanent structures on the suit property and have buried their loved ones thereupon. PW2 and 3 also gave evidence and corroborated PW1's testimony and urged the court to find that they have acquired the suit land by way of adverse possession.

The Respondent was served via substituted service and did not file any response therefore the matter proceeded undefended.

APPLICANT'S SUBMISSIONS

Counsel reiterated the Applicants evidence and submitted that the Applicants have proved that they have acquired the suit land by way of adverse possession and relied on the case of **Wilson Kazungu Katana & 101 others v Salim Abdalla Bakshwein & another [2015] eKLR**. Counsel therefore urged the court to grant the orders as prayed in the originating summons.

ANALYSIS AND DETERMINATION

The issue for determination is whether the Applicants have proved that they have acquired the suit land by way of adverse possession. The ingredients of the doctrine of adverse possession are well settled by case law in our courts and the law.

Section 38(1) and (2) states;

“(1) Where a person claims to have become entitled by Adverse Possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.

Section 28(h) of the Land Registration Act, 2012 also recognizes overriding interests on land.

For an Applicant to be adjudged as having acquired a property by way of adverse possession, such Applicant must prove that the title holder has been dispossessed or has discontinued his possession for a period of over 12 years which is the statutory period as was held in the Court of Appeal case of **Wambugu –v- Njuguna (1983) KLR 173**, the It is not whether the applicant has proved that he or she has been in possession for a period of 12 years and above

The Respondent was served by way of substituted service but did not file any response therefor the matter proceeded ex parte.

The Applicants gave evidence and produced a copy of an official search, copy of extract of title which confirmed that the suit property is registered in the Respondent’s name. They also stated that they have been in occupation for a period of over 20 years peacefully without any interference from anybody including the Respondent who has never been in occupation of the suit land. This shows that the Respondent had been dispossessed of the suit property.

The requirement for production of a copy of the title, extract of the register or official search is grounded on the fact that the court must be certain that the property that it is dealing with in an application for adverse possession actually belongs to the Respondent. This information is very necessary so as not to grant orders against a party who is not the registered owner of the suit land. Courts do not give orders in vain.

In the case of **Grace Jesoimo Tarus & another v Sarah Rop & 2 others [2018] eKLR** this court held that:

“The need for production of a form of a copy of title document must be exhibited to indicate that the person sued is the registered owner of the suit land. This can be a copy of an extract of the register or an official search showing the details of the registration. Failure of such evidence is fatal to the claimant’s suit as orders can be granted in respect of a parcel of land that does not belong to the respondent.”

In the case of **Johnson Kinyua v Simon Gitura Rumuri [2011] eKLR** the court found that proprietorship can be established by producing a copy of an official search certified by the Registrar or a certified copy of an extract of the Green Card which gives the details of the entries.

In this case apart from the search, extract of the title, the Applicants also went ahead and engaged a surveyor who prepared a ground report which was filed in court together with a sketch map to it indicate the portions Applicants hold. The surveyor’s report further confirm that the said portions can be registered to enable the Applicants obtain titles for their distinct portions.

I have considered the pleadings, the evidence and submission by counsel and find that the Applicants have proved that they have acquired the suit land by way of adverse possession.

I therefore grant the specific orders as follows:

- 1. That the Applicants be and are hereby declared as proprietors of the parcel of land reference number 413 Malindi which they have acquired by way of adverse possession.***
- 2. A declaratory is hereby issued that the Applicants are entitled to be registered as owners of their respective portions and issued with title documents over land reference number 413 Malindi in place of the Respondent.***
- 3. Each party to bear their own costs.***

DATED, SIGNED AND DELIVERED AT MALINDI THIS 4TH DAY OF FEBRUARY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.