



**Abdalla & 2 others v Mjape & 2 others (Environment & Land Case
34 of 2020 & Environmental and Land Originating Summons 37 of 2020
(Consolidated)) [2022] KEELC 13320 (KLR) (4 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13320 (KLR)

REPUBLIC OF KENYA

**IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 34 OF 2020 & ENVIRONMENTAL AND
LAND ORIGINATING SUMMONS 37 OF 2020 (CONSOLIDATED)**

MAO ODENY, J

OCTOBER 4, 2022

BETWEEN

SWAFIA ABDALLA AKA SWAFIA SWALEH MANDI 1ST PLAINTIFF

**FATMA SWALEH MAHDI (AS ADMINISTRATIX OF THE ESTATE OF
SWALEH MAHDI (DECEASED) 2ND PLAINTIFF**

AND

GEORGE MJAPE DEFENDANT

AS CONSOLIDATED WITH

ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 37 OF 2020

BETWEEN

PROF. GEORGE MJAPE DEFENDANT

AND

SWAFIA ABDALLA (AKA SWAFIA SWALEH MANDI) 1ST RESPONDENT

**FATMA SWALEH MAHDI (AS ADMINISTRATIX OF THE ESTATE OF
SWALEH MAHDI (DECEASED) 2ND RESPONDENT**

JUDGMENT

1. By a plaint dated May 7, 2020, the plaintiffs herein sued the defendant seeking the following orders: -



- a. An injunction to permanently restrain the defendant by himself, his servants, agents, proxies or otherwise howsoever, from remaining on or continuing with construction or occupation of the said land and incomplete structure or otherwise dealing with the suit land or any part thereof in any manner whatsoever.
 - b. Ejectment and possession of the said land, and demolition to the ground of the incomplete structure, at defendant's expense.
 - c. Damages or mesne profits at the rate of Kshs 20,000/ per month from September 1, 2019 until possession is delivered up free of debris as the defendant found the land,
 - d. Costs of the suit and demolition of the structure and removal of the debris should the defendant ignore or decline to obey court order.
2. By an originating summons dated June 15, 2020 Mr George Mjape, the plaintiff filed Malindi ELC No 37 of 2020 (OS) seeking the following issues to be determined: -
- a. Whether the applicant has acquired 7 acres of the suit land by reason of adverse possession against the respondent herein.
 - b. Whether the applicant is entitled to be registered as the proprietor of 7 acres of land known as Plot No 358 Malindi and should a vesting order be issued in favour of the applicant.
 - c. Whether the respondents should be ordered to execute a transfer to convey the land, and in default the deputy registrar of court be authorised to sign the transfer on behalf of the respondents?
 - d. Whether applicant is entitled to costs?
3. The two matters were consolidated and the parties gave evidence respectively in support of their cases.

Plaintiff's case

4. PW1 Fatma Swaleh Mahdi adopted her statement and produced her list of documents as Pex 1 to 7. She testified that the suit property initially measured 112 acres but the government acquired 8.82 acres which was given the No 1738 Malindi.
5. PW1 stated that on unknown dates in late 2019, the defendant wrongfully entered the property Plot 358 Malindi measuring approximately 73 acres and erected a permanent structure thereon. She further stated that the suit property was and still is part of the estate of one Swaleh Mahdi (deceased).
6. It was PW1's evidence that the deceased, subdivided the remaining plot into 22 plots as per exhibited in exhibits Nos 2 & 3. PW1 further stated that the defendant's father was one of the plaintiffs in HCC No 155 of 1993 which was dismissed. The court ordered that they be compensated.
7. PW1 testified that they conducted a valuation to enable pay the compensation, where the defendant's father was to be paid Kshs 40,000/- but declined to accept the same.
8. It was PW1's evidence that the plaintiffs were dissatisfied with the judgment and filed an appeal No 105 of 2018 which was also dismissed and another appeal No 89 of 2019.
9. PW1 filed a replying affidavit to the originating summons which she adopted her evidence together with the annexures.



10. On cross examination by Mr Jumbale, counsel for the defendant, PW1 told the court that the defendant was born on the suit property and that the Case No 155 of 1993 was determined when the defendant was already on the suit property. She further stated that the defendant has been cultivating the suit property but has never asked him to vacate.
11. PW1 also testified that the compensation was for the defendant's father.
12. PW2 Bartholomew Mwanyungu a land surveyor testified that he was instructed to prepare a report in respect to parcel No 5504 and 5506 which were part of subdivision of the suit property. He produced the report dated January 21, 2021 as PEXH 10 and told the court on cross examination, that he did not consult any person on ground when he did the survey.
13. PW3 Swafiya Abdalla relied on her affidavit dated May 7, 2020 and replying affidavit dated June 29, 2020 as evidence in chief and stated that the deceased acquired the suit property in 1978 vide two instruments of indenture which she annexed to her affidavit
14. PW3 further stated that that prior to his death, the deceased had also successfully sued Kesi Mjape, Charo Mwadzavi and Bahati Temo in Malindi SRMCC No 51 of 1990, for possession of the suit property and another suit Malindi ELC No 76 of 2014 filed on behalf of all the squatters within the suit property but the defendant was not named therein as a plaintiff but filed a statement.
15. Swafia deposed that the defendant's structure was not constructed before 2019, and that his claim over the suit property if any could only stem out of his father's claim in HCCC No 155 of 1993.
16. PW4 Samuel Kabue Gachagwi, produced the original file ELC No 76 of 2014 which contains a statement by the defendant, as PEXH 11.

Defendant's case

17. DW1 adopted his statement dated June 12, 2020 and supporting affidavit in the OS as evidence in chief. He produced the documents on the list of documents dated February 12, 2020 as PEXH 1&2.
18. DW1 stated that he does not know the plaintiffs and testified that he has been living on the suit property for 32 years with no interruption. He denied recording the statement in ELC No 76 of 2014 and the signature thereon.
19. It was DW1's evidence that he is occupying 7 acres which he has always cultivated maize.
20. On cross examination by Mr Kimani, counsel for the plaintiffs, DW1 stated that his father, Kesi Mjape was still in possession of 7 acres which he has occupied since 2002. It was his evidence that he started the construction in 2016 and was not aware that his father was offered any compensation.
21. On re-examination, the defendant testified that he was given the land 32 years back, long before the Case No 155 of 1993 was filed.
22. DW2 equally adopted his statement dated June 12, 2020 and testified that the defendant has always been his neighbour on the suit property since birth.
23. On cross examination, he confirmed being one of the plaintiffs in HCCC No 155 of 1993 but he was not aware of its dismissal. It was his evidence that him together with the other plaintiffs in that case filed an appeal against the order of compensation, and that he has never collected his compensation since the appeal is still pending.



Plaintiff's submissions

24. Counsel for the plaintiffs submitted that the defendant's failure to attach an extract of the title of the portions he claims in adverse possession was fatal to his claim since it is a mandatory requirement that goes to the jurisdiction of this court, as envisaged under order 37 rule 7 of the [Civil Procedure Rules](#).
25. Mr Kimani submitted that the defendant's interest to the suit property emanated from his father Kesi Mjape, whose interest to the suit property was determined in HCCC 155 of 1993, therefore his claim for adverse possession was a non-starter and lis pendens since there was a pending appeal filed by the defendant's father, on his interests over the suit property.
26. Counsel further submitted that the defendant's father gave the defendant land in the pendency of proceedings when he had been ordered to vacate the suit property in SPMCC No 51 of 1990 hence the defendant's father had no interests in land to pass or give to the defendant and relied on the case of [Mawji v USIU & another \[1976\] KLR 185](#).
27. It was Mr Kimani's submissions that the defendant had not made out a case against the plaintiffs and that if it was indeed true that he had taken possession as early as 1993 when the High Court case was filed, then he would have made an application to be joined in the suit.
28. Counsel stated that the trespass began in 2019 when the defendant began construction and that time stopped running with the commencement of the proceedings hence a claim of adverse possession cannot be sustained.
29. Mr Kimani submitted on the doctrine of successive squatters does not apply since neither the defendant nor his father has demonstrated to have dispossessed the plaintiffs and relied on the case of [Mount Carmel Investments Limited v Peter Thurlow Ltd \[1988\] 1WLR 1078 CA](#).

Defendant's submissions

30. Counsel submitted that the plaintiffs' suit was statute barred under section 7 and 17 of the law of [Limitation of Actions Act](#), Cap 22 as the defendant has been in occupation since the year 1989.
31. It was counsel's submission that the judgment delivered in HCCC 155 of 1993 was a judgment in personam and not in rem. That the defendant was not a party in that suit, therefore the judgment could not bind him
32. Mr Jumbale counsel for the defendant submitted that the judgment was delivered over 12 years ago and the plaintiffs' claim was statute barred under section 4(4) of the [Limitation of Actions Act](#) and relied on the case of [Patrick Muchiri v Agnes Mumbi \[2017\] eKLR](#).

Analysis and determination

33. The issues for determination in this case are: -
 1. Whether the judgment delivered in the HCC No 155 of 1993 was judgment in rem?
 2. Whether the plaintiffs' claim is statute barred.
 3. Whether the defendant's claim for adverse possession is merited.
 4. Whether the defendant has encroached on the suit property.
34. The Court of Appeal in [National Land Commission v Registered Trustee of the Arya Pratinidhi Sabha, Eastern Africa & another \[2019\] eKLR](#) defined a judgment in rem as follows: -



The Black's Law Dictionary, 9th Edition defines a judgment in rem as;

'An action in rem is one in which the judgment of the court determines the title to the property and the rights of the parties, not merely as between themselves, but also as against all persons at any time dealing with them or with the property upon which the court had adjudicated.'

To expound further, a decision in rem was discussed in *Kamunyu & Others v Attorney General & Others (2007) 1 EA 116* as follows;

'In a suit seeking judgement in rem, that is a judgement applicable to the whole world, an individual does not sue on behalf of the whole world, but sues for judgement which is effective against the whole world. In other words, in the present case, the appellants when successful in the suit obtain judgement, which is effective against the whole world but does not confer benefits upon the whole world.'

35. I have perused the judgment in Mombasa HCCC No 155 of 1993 where the plaintiffs therein claimed entitlement to the suit property by way of adverse possession of all the suit property herein. It should be noted that the defendant herein was not a party to the 1993 suit, but it is on record that the defendant admitted to have been given a portion of the suit property which he now claims, by his father, Kesi Mjape, who was a plaintiff in HCCC No 155 of 1993.
36. It follows that the defendant's claim cannot then be said to be independent of the claim by the plaintiffs in HCCC No 155 of 1993. Applying the reasoning in the Court of Appeal case of National Land Commission (supra), I am satisfied that the judgment in HCCC 155 of 1993 was a judgment in rem hence the defendant herein is bound by the outcome of that judgment. There is no evidence that there was an order from the Court of Appeal setting aside the judgment.
37. The defendant argued that judgment in HCCC 155 of 1993 was delivered on November 12, 2002, therefore the plaintiffs were statute barred from claiming against the defendant in terms of section 4 (4) of the *Limitation of Actions Act*. That subsection provides as follows: -

An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.
38. However, the plaintiffs aver that the defendant entered the suit property sometime in late 2019 and erected a permanent structure thereon which action prompted the plaintiffs to file the present suit against the defendant. According to the defendant he stated that he commenced construction in the year 2016, approximately 14 years since the said judgment was delivered and that the plaintiffs instituted the present suit on May 20, 2020. Even if were to go by the defendant's testimony, the cause of action then accrued in 2016.
39. Further, in *Kasuve -v- Mwaani Investments Limited & 4 others 1 KLR 184*, the Court of Appeal restated what a plaintiff in a claim for adverse possession has to prove;

' In order to be entitled to land by adverse possession, the claimant must prove that he has been in exclusive possession of the land openly and as of right without interruption for a



period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition'.

40. In the case of *Joseph Gabumi Kiritu vs Lawrence Munyambu Kabura CA No 20 OF 1993* Justice Kwach JA (as he then was) stated as follows; -

' The passage from Chesire's Modern Law of Real Property to which Porter JA made reference in *Githu vs Ndeete* is important and deserves to be read in full. Time which has begun running under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that merely formal entry was sufficient to vest possession in the true owner and to prevent time from running against him

41. As already established, the defendant's possession has not been exclusive or uninterrupted neither has the defendant dispossessed the owner for a period of 12 years. The defendant's claim for adverse possession therefore fails. In the circumstances, the defendant is a trespasser on the plaintiffs' suit property.

42. I have considered the pleadings in the plaint and the originating summons together with the documents produced and find that the plaintiffs have proved their case against the defendant save for the relief for mesne profits which was pleaded and never proved. Mesne profits is a special damage which must be specifically pleaded and proved. I therefore issue specific orders as follows: -

- a. A permanent injunction is hereby issued restraining the defendant by himself, his servants, agents, proxies or otherwise howsoever, from remaining on or continuing with construction or occupation of the said land and incomplete structure or otherwise dealing with the suit land or any part thereof in any manner whatsoever.
- b. The defendant to give vacant possession of the suit land within 45 days failure to which eviction order to issue
- c. The defendant to demolish the incomplete structures on the suit land at his own expense.
- d. The counter claim is hereby dismissed with costs to the plaintiff and costs of the suit to the plaintiffs.

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

