



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL CASE NO 131 OF 2015 (OS)

IN THE MATTER OF PLOT NUMBER 120/II/M.N (ORG. NO 53/194

SECTION II MAINLAND NORTH/MOMBASA (TITLE NO C.R. 17592)

AND

IN THE MATTER OF AN APPLICATION FOR DECLARATION THAT THE

APPLICANT HAS OBTAINED OWNERSHIP OF NOUGHT DECIMAL

NOUGHT TWO FOUR TWO (0.0242) HECTARES OF THE ABOVE

SAID PLOT BY WAY OF ADVERSE POSSESSION

BETWEEN

LYDIA SHIMULI MUYEYELI.....PLAINTIFF/APPLICANT

VERSUS

FANUEL OPANA OCHIEL.....1ST DEFENDANT

DR. JOY KADENYEKA.....2ND DEFENDANT

HOUSING FINANCE COMPANY OF KENYA LTD..3RD DEFENDANT

JUDGEMENT

1. This case was instituted by way of originating summons under Order 37 rule 7 (1) (2) and (3) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act (Chapter 21 Laws of Kenya) Section 7, 37 and 38 of the Limitation of Actions Act, (Chapter 22 Laws of Kenya) and all other enabling provisions of the law. Later the originating summons was amended on 9th September 2015 to include Housing Finance Company of Kenya Limited as the 3rd respondent/defendant.

2. Let FANUEL OPANA OCHIEL, DR. JOY KADEKENYA and HOUSING FINANCE OF KENYA LIMITED within fifteen (15) days from the service of this summons on them entered appearance to this summons which is issued on the application of the plaintiff/applicant herein on Mombasa who claim to be proprietor of 0.0242 hectares of Plot No. 12002/II/MN (original no 53/194 Section II/Mainland North Mombasa by way of adverse possession for determination of the following questions:-

1. Is the plaintiff/applicant entitled to be declared as the proprietor of 0.0242 hectares of plot no 1202/II/MN (original no 53/194 Section II/MN Mainland North/Mombasa which she has acquired by adverse possession after staying and/or occupying and/or residing on the plot for a period of over 12 years?

2. Is the plaintiff/applicant entitled to be registered as the owner of plot no 1202/II/MN (Original No 53/194) Section II Mainland North/Mombasa and be issued with a certificate of Title?

3. Is the plaintiff/applicant entitled to the cost of this suit?

4. If the answer to 1 and 2 is yes, a declaration that Plot No 1202/II/MN (original No 53/194 Section II Mombasa North/Mombasa belongs and be registered in the names of the plaintiff/applicant.

3. The originating summons is dated 30th March 2015 and amended on 9/9/2015. It is supported by the affidavit of Lydia Stimuli Muyeyeli sworn on the 30th March 2015 and 9th September 2015.

4. Following an order of the court the 1st and 2nd respondents were served through an advertisement in the standard newspaper on 1st March 2017. The 1st and 2nd respondents did not enter appearance and/or file defence on the 15th December 2015. The 3rd defendant/respondent entered appearance. There is also a replying affidavit sworn by David Mareke, the West Regional Manager of the 3rd defendant/respondent, on the 2nd September 2016.

5. On the 2nd September 2017 directions were taken that the originating summons do proceed by way of *viva voce* evidence.

6. In her testimony in court the plaintiff/applicant reiterated what she stated in her affidavit in support. The 3rd defendant/respondent did not call any witnesses but tendered written submissions.

7. It is the plaintiff's/applicant's case that she has been in occupation since 2002, hence for more than twelve (12) years she told the court that she entered as a tenant. That she leased the premises from Fanuel Opana Ochiel the 1st defendants/respondents. Further that she has not seen him since 2003. She however admitted that she used to pay rent at the advocate's office. She failed to tell the court when she stopped paying rent. It is clear from her testimony that she entered the suit premises with permission from the 1st defendant/respondent. This fact has not been disputed.

8. I have considered the originating summons and the annexures, the replying affidavit on behalf of the 3rd defendant/respondent, the evidence on record, the submissions of counsel and the provisions of the law.

9. The plaintiff/applicant cited; **Mombasa HCCC No 151 of 2003 (os) Jefwa Nyale Kithi vs Sugrabai Mulla Mohamed Ali; Mombasa HCCC No 134 of 2004 (os) Christine Nyamalwa vs Syad Walayat Sha Khair UD. Din; Mombasa HCCC No 237 of 2011 (os) Laleine M Suleiman vs Abdulhusein M. A. Norbhai and Salim vs Boyd & Another EA Pg 552.**

10. The 3rd defendant/respondent cited the following authorities: **Mbira vs Gachuhi [2002] 1 EA 137.**

11. In the case of **Kasuve vs Mwaani Limited & 4 others [2004] KLR 184 at page 188.** It was held;

“in order to be entitled to land by adverse possession the claimant must prove that he has been in exclusive possession of land openly and as of right and 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.”

It is not in dispute that the plaintiff/applicant entered the suit premises as a tenant. She entered with permission of the 1st defendant/respondent and was paying rent through the advocate's office. She also admitted that she undertook the repairs with permission and that the costs would be deducted from the rent.

12. I find that she has failed to prove that she has been on the suit premises *nec vi nec clam, nec precario*. I am guided by the authority of Francis **Gicharu Kariri vs Peter Njoroge Mairu Nairobi Civil Appeal No 293 of 2002** which approved the decision of the High Court in the case of **Kimani Ruchere vs Swift Rutherfords & Company Limited [1980] KLR pg 16.**

“Where plaintiffs have to prove that they claim as of right *nec vi, nec clam, nec precario* (no force, no secrecy, no persuasion) so that plaintiff must show that the company had knowledge (or means of knowing actual or constructive) or the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to attempt by way of recurrent consideration”

13. I have considered the evidence in totality. I find that the plaintiff/applicant has not satisfied the conditions set out above for the court to approve her claim for adverse possession. I would say she entered the suit premises with permission as a tenant.

14. Finally I agree with the 3rd defendant/respondent submission that the plaintiff/applicant has no claim against the 3rd defendant/respondent.

15. I find that the plaintiff/applicant claim for adverse possession fails. It therefore follows that her prayer to be registered as the owner of Plot NO 1202/II/MN (Original No 53/194/Section II/Mainland North/Mombasa) and be issued with a title deed also fails. I also decline to declare that Plot No 1202/II/MN (original No 53/194 Section II Mainland North/Mombasa) belongs to the plaintiff/applicant. The plaintiff/applicant suit is hereby dismissed with costs to the 3rd defendant/respondent.

It is so ordered.

Dated and signed in Nairobi on this.....day of2018

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L. KOMINGOI

JUDGE

Dated and delivered at Mombasa on this 5th day of October 2018.

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JUDGE