



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA

ELC NO. 64 OF 2015(OS)

- 1. MWANZALA NYAE KIDUNG**
- 2. KAKALA NGALA HINZANO**
- 3. UMAZI KEA**
- 4. JOEL OGEMBO**
- 5. MRS. REGINA WANJIRU NDUNGU**
- 6. LEA DICKSON MUSHAMBA**
- 7. SABINA KISHANGA WANAZA**
- 8. MRS. KHADIJA NYAE**

(Suing on their behalf and on behalf of the squatters/residents of VIKWATANI ESTATE residing upon property/Plot No.180/II/MN TITLE NO.CR.613 numbering 123 whose names appear in the SCHEDULE OF LIST OF MEMBERS OF HAKIKISHO DEVELOPMENT GROUP attached to the Originating Summons herein.....**PLAINTIFFS**

VERSUS

- 1. ATHUMAN M**
- 2. SIIT MZEE SHAFI**
- 3. MKASI MZEE SHAFI**

(Suing as personal representatives of the estate of

MZEE SHAFI MWAHIMA(deceased).....**DEFENDANTS**

JUDGMENT

1. The plaintiffs filed an originating summons dated 23rd March 2015 and amended on 13th April 2018 brought under Section 37 and 38 of the Limitation of Actions Act, Cap 22 Laws of Kenya, Order 37 Rule 7 (1) and 2 of the Civil Procedure Rules, the Land Act No.6 of 20102, the Land Registration Act No.3 of 2012 and all other enabling provisions of the law. The summons invited the court to make a determination of the following questions:

- i. Has (sic) the plaintiffs been in uninterrupted possession of the suit property for more than 12 years?**
- ii. Are the plaintiffs entitled to adverse possession of the suit property?**
- iii. Are the plaintiffs entitled to be registered as the owners of the suit property?**

iv. Whether the possession and occupation by the plaintiffs of the suit property constitutes overriding interest in terms of the provisions of the Land Act 2012 or Section 30 of the Registration of Land Act Cap 300 Laws of Kenya (now repealed).

v. Whether damages are adequate remedies to the plaintiffs and/or whether compensation to the plaintiffs by the defendant is a viable remedy.

vi. Whether a permanent injunction orders can be issued against the defendants by themselves, their servants or authorized agents or independent contractors not to demolish the plaintiffs' houses and/or structures built on the property and/or to evict the plaintiffs from the suit land.

vii. Are the plaintiffs entitled to cost of the suit?

2. The plaintiffs pray to be registered as properties in common of the land comprised in Title No.180/II/MN CR.613 measuring 16.819 acres or thereabouts in place of the defendants and that the defendants, their agents, servants and any other authorized person or independent contractor be restrained by a permanent injunction from entering the suit property or demolishing houses and/or properties and structures therein and/or evicting the plaintiffs, their families, and/or tenants or in any other manner whatsoever interfering with the plaintiffs and their tenants peaceful occupation of the suit land plus costs of the suit.

3. The summons is brought by members of Hakikisho Development Group, a Self Help Group numbering 123 people who are said to be members of the said group and who have endorsed their national identity cards in the list filed in court and gave authority to nine of them to represent the rest in this suit.

4. The originating summons is supported by the grounds thereon as well as the supporting affidavit of Mwanzala Nyae Kidunga sworn on 30th March, 2015. He has sworn that the suit land is registered in the name of one Mzee Shafii Mwahima. He stated that he was among the first group of people to enter into the suit land in the year 1976 and found other people already in occupation. That he duly built his house on the land and started cultivating the same. That thereafter other people started settling on the said land and the settlers/squatters organized themselves into a group known as Hakikisho Self Help Group for purposes of paying the land rates due on the land and infrastructure development thereon. The plaintiffs have annexed copies of certificate of search, map/plan, land rates statement and a certificate of Registration. It is their case that they have each occupied their portions of the land and live thereon for a period of more than twenty (20) years without any interference by either the registered owner or anyone else.

5. At the hearing Justus Bushiti Mkongo testified as PW1. He stated that he stays with his family on plot No.180 in Vikwatani Estate Kisauni, Mombasa County together with other people number about 500. That they formed their group which was registered in the year 2010. PW1 produced the Certificate of Registration of Self-Help Group/Project for Hakikisho Self Help Group as P.exh.1. PW1 stated that he was the current Chairman of the Group. That this suit was brought by the 500 members who have authorized the plaintiffs herein to file suit on behalf of the rest. He stated that he moved into the suit land in 1997 and found some people already settled there while others came thereafter. That there were no developments on the land and they began by drilling boreholes, then built a primary and a secondary school called Maranata, and churches and are currently building a mosque. PW1 testified that they have built permanent and semi-permanent houses and have connected water to their homes. That there are also cabro and murrum roads and that the Mombasa County Government has constructed a hospital known as Vikwatani Referral Hospital which serves both in-patient and out-patients. That there are also other developments such as shops and kiosks which have been carried out over a period of time. He also produced a certificate of official search, newspaper cutting, and receipts as well as list of members as p.exhibits 2-6 respectively. His claim is that they have lived on the land for more than 12 years and urged the court to grant them the orders sought in the originating summons.

6. PW2 was Lea Dickson Mushamba who testified that she has lived on the suit land since the year 2000, and that since then, nobody has interrupted her stay. That the plot she occupies measures 70 feet by 40 feet.

7. The defendants filed a response/defence dated 27.4.18, and an affidavit in Reply sworn by Athuman Mzee Shafi on 7th May, 2018 and a further affidavit sworn on 13th December, 2018. It is the defendants' contention that the original title to the suit land was sub-divided and some of the sub-divisions sold to third parties. It is further contended that in the year 1999 the plaintiffs trespassed on the suit land without the consent of the original owner, the late Mzee Shafi Mwahima (deceased) who died on 30th October, 2007.

8. Athuman Mzee Shafi testified on behalf of the defendants who are the children of the late Mzee Shafi Mwahima and administrators of the estate of the deceased. He testified that the deceased bought the suit land in 1989 from one Batulbai Badrudin Mula Adamji. The sale agreement dated 27.6.1989 has been exhibited. That the land was subdivided into various plots some of which have been sold to third parties. He denied that, the plaintiffs have lived on the land since 1976, but admitted that there have been invasions on various occasions. That they went to the land in 1991 with a surveyor and elders as well as two chiefs but were repulsed by about 200 people who threatened to attack them, one of whom was named Amigo, and they went back without carrying out the work they had gone to do. That they obtained a letter from the chief and went to the offices of Gikandi & Company Advocates who wrote a letter to Ali Mwakombe and 5 Others who left the land but returned again. The witness confirmed that there were over 200 squatters who have invaded the land. He denied that the plaintiffs have occupied the land for over 12 years and stated that he did not know schools and shops have been constructed on the land. He urged the court to dismiss the plaintiffs' suit.

9. Hamed Faki Mwidadi, a retired Assistant Chief testified as DW2. He adopted his witness statement filed on 27.1.2020 as his evidence –in-chief. His evidence was that in the year 1999, he was approached by Athman Mzee Shafi, the 1st defendant herein and in the company of a surveyor and others went to view a survey exercise and identification of beacons that was to be carried out on the suit parcel of land. That on arrival, they were attacked by a group of violent people who chased them away and threatened to beat them up if they proceeded with the survey exercise. That the said persons had forcefully and illegally entered and occupied the suit land which belonged to Mzee Shafi Mwahima without his consent or authority. That they left the place without the survey being carried out.

10. The plaintiffs filed written submissions on 10.2.21 in which they submitted that they have proved all the requirements of adverse possession by producing a certificate extract of title and proved in their evidence that they have lived on the suit land for more than 12 years. That their possession has been continuous, exclusive, actual and uninterrupted and there has been no obstruction. That they have also build permanent and semi-permanent houses, including schools, churches, shops, a clinic and have connected electricity and water. The plaintiffs relied on various decided cases including **Teresa Wachuka Gachira –v- Joseph Mwangi Gachira (2009) eKLR**; **Kweyu –v- Omuto (1999) KLR 709**; **Johson Kinyua –v- Simon Gitura Rumuri (2011) eKLR**; **Mbaru Johnson & Others –v- Taveta Teachers Investment Limited, (2019) eKLR** and **Kimani Ruchine –v- Swift Rutherford & Co. Ltd (1977) KLR**.

11. In their submissions filed on 10.3.2020, the defendants submitted that the plaintiffs have not proved their interest in the suit land. That there were no signatures against the names produced on the list of 125 people produced in court and that the court cannot verify the same. That the said document is not authentic and cannot be taken as a legal document and has no probative value. That Mwanzala Nyae Kidunga who swore the affidavit in support of the summons never testified and therefore anything sworn therein is mere hearsay and should be disregarded. The defendants accuse the plaintiffs of attempting to grab their property by way of illegal means and using the court process to sanitize their actions by claiming adverse possession. That the plaintiffs were never authorized to occupy the land and did so without the consent of the defendants’ deceased father. The defendants submitted that the plaintiffs should be treated as trespassers whose actions were illegal and criminal. The defendants relied on the case of **Peter Njua Kairu –v- Stephen Ndungu Njenga, Nairobi Civil Appeal No.57 of 1997** in which it was stated “*in order that a registered owner of land may be deprived of his title to such land, in favour of a trespasser (who claims by adverse possession), stringent but straightforward proof of possession is necessary.*” The defendants submitted that if the application is allowed, the deceased’s children and grandchildren would be disinherited and caused to suffer damage. It was their submission that the plaintiffs claim has not been proved to the required standard and that the originating summons should be dismissed with costs.

12. Having considered the pleadings, the evidence on record and submissions, the issue for determination is whether the plaintiffs are entitled to the orders sought. Adverse possession is a common law doctrine under which a person in possession of land owned by someone else may acquire valid title to it. In Kenya, this doctrine is alive in Section 7 of the Limitation of Actions Act Cap 22 Laws of Kenya that states:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

13. In the case of **Kweyu –v- Omuto (supra)**, the Court of Appeal (Gicheru JA) stated inter alia that:

“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite periods (12 years), it confers an indefeasible title upon the possessor.....

.....in other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant’s use, done publicly and notoriously.”

14. Section 17 of the Limitation of Actions Act provides as follows:

“Subject to Section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action, to recover land (including a redemption action) the title of that person to the land is extinguished.”

15. The period of twelve years starts to run from the moment the trespasser takes adverse possession of the land and the registered proprietor is regarded as having been dispossessed or having discontinued his possession. In the case of **Wambugu –v- Njuguna (1983) KLR 173**, the Court of Appeal held inter alia, that:

“1. The general principle is that until the contrary is proved, possession in law follows the right to possess.

2. In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.....”

16. The ingredients were recently discussed by the court of Appeal in the case of **Mtana Lewa –v- Kahindi Ngala Mwangandi (2015)eKLR** where it was stated:

“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglect to take action against such person in assertion of his title for a certain period, in Kenya is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

17. The plaintiffs have to prove that they have used the suit land as of right: *Nec vi, nec clam, nec precario*. They must show that the registered owner of the land had knowledge (or means of knowing, actual or constructive) of the possession or occupation. Further, the possession must be continuous.

18. In this case, it is the plaintiffs' case that they have been in uninterrupted possession of the suit land for more than 12 years. PW1 testified that he moved into the land in the year 1997, which is a period of about eighteen (18) years before this suit was filed. He stated that when he moved into the land, he found some other people already settled while some of the plaintiffs came thereafter. The plaintiffs' evidence is that over the years, they have carried out various developments, including construction of schools, churches, shops and a clinic. The defendants' evidence confirm that by the year 1999, a group of people were already in possession and occupation of the suit land. From the material on record, it is quite clear that no action was taken by the registered proprietor of the suit land and/or his successors to recover the land before the expiry of twelve (12) years. It is also not in dispute that the plaintiffs' possession was hostile to the defendants. No doubt, the developments referred to above were undertaken openly and over a period of time without interruption. The evidence that the defendants presented confirms that the defendants were aware of the possession and occupation of the suit land but did not take action to evict the plaintiffs. The defendants, as the true owners of the land were on notice that trespassers were in possession of the land but neglected ignored and/or refused to take action against them.

19. From the material presented before this court, I find that the plaintiffs have on the balance of probabilities proved that they have a claim over the suit property by way of adverse possession. I find the amended originating summons filed on 13th April, 2018 has merit and the same is hereby allowed. I enter judgment as follows:

a. That the plaintiffs are hereby declared to have become entitled by virtue of adverse possession of all that parcel of land comprised in TITLE NO.180/II/MN CR.613 measuring 16.819 acres or thereabouts.

b. That the plaintiffs are entitled to be registered as proprietors in common of the suit land in place of the defendants

c. That the defendants, agents, servants and anyone else claiming under them are hereby restrained by a permanent injunction from entering the suit property or demolishing houses and/or properties and structures therein and/or evicting the plaintiffs, their families, and/or tenants or in any other manner whatsoever interfering with the plaintiffs' peaceful occupation of the suit land.

d. Each party to bear their own costs.

20. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 19th day of May, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE