



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 39 OF 2019(OS)**

**EDWARD TOYA FARA**

**PHILEMON MUGANGA TSORI.....PLAINTIFFS**

**VERSUS**

**JIMMY VERDE VERGE & ANOTHER.....DEFENDANTS**

**JUDGMENT**

1. By their Originating Summons dated 10<sup>th</sup> June 2019, Edward Toya Farah and Philemon Muganga Tsori (the Plaintiffs) pray for the following orders against the two Defendants- Jimmy Verde Verge and Beach Villas Ltd: -

***1. That this Court be pleased to declare that the title of the said Beach Villas Ltd to the leasehold interest in land parcel MN/III/414 Kikambala has been extinguished by the Plaintiffs' adverse possession thereof for a period of more than 12 years in terms of Sections 17 and 38 of the Limitation of Actions Act;***

***2. That this Court be pleased to declare that the Plaintiffs have acquired the leasehold interest in land Parcel MN/III/414 Kikambala by their adverse possession thereof for a period of more than 12 years i.e from at least 1990 to-date;***

***3. That an order do issue requiring and directing the Land Registrar Kilifi to register the joint names of the Plaintiffs and (one) Albert Charo Baya as the Lessees of land parcel No. MN/III/414 Kikambala in place of Beach Villas Ltd and any other person succeeding the Defendants; and***

***4. That the costs of this suit be borne by the Defendants.***

2. The said Originating Summons is supported by an affidavit sworn by the 1<sup>st</sup> Plaintiff and is based on the following grounds: -

***i) That the Plaintiffs have resided openly but peacefully on the subject property for over 20 years without interruption;***

***ii) That during their stay on the suit premises the Plaintiffs have never known of any existing owner of the subject property and there has never arisen any claimant;***

***iii) That the Plaintiffs lived with a certain white man (the 1<sup>st</sup> Defendant) on the premises but he vacated the same in the 1990s and has never come back;***

***iv) That the Plaintiffs parents were all buried on the suitland and their graves remain thereon to-date; and***

***v) That the Plaintiffs have over the time extensively developed their respective portions of the property and have settled their families thereon evidencing their intention to possess the land.***

3. Despite service by way of substituted service vide the Daily Nation of Thursday 12<sup>th</sup> March, 2020 the Defendants neither entered appearance nor filed any response to the summons. This suit accordingly proceeded by way of formal proof.

4. At the trial herein, the 1<sup>st</sup> Plaintiff- Edward Toya Farah (PW1) testified as the first witness for the Plaintiffs. PW1 told the Court that he first entered the land on 26<sup>th</sup> September 1996. As at that time, PW1's Mother-in Law had been given a portion of the land which she wanted

to sell but had no ownership documents.

5. PW1 testified that he entered the land and built a house with the intention to pay the owner but no one turned up to claim the land. Later PW1's neighbour helped him to do a search and they discovered that it belonged to the 1<sup>st</sup> Defendant, PW1 was then occupying the land together with the 2<sup>nd</sup> Plaintiff and one Albert Kadenge. Albert however passed away around the time the Plaintiffs instituted this suit.

6. PW2- Philemon Muganga Tsori is the 2<sup>nd</sup> Plaintiff and a neighbour of PW1. He reiterated the averments made by PW1 in the Supporting Affidavit as well as in PW1's oral testimony in Court. He told the Court they were three occupants of the land and that no one had ever claimed the land from themselves.

7. I have perused and considered the Originating Summons, the Plaintiffs' oral testimonies and the evidence adduced at the trial. I have similarly perused and considered the submissions filed herein by Mr. Atiang, Learned Counsel for the Plaintiffs.

8. The two Plaintiffs have urged the Court to declare themselves together with one Albert Charo Baya who is now deceased to have acquired the suit premises by way of adverse possession. It was their testimony that they were born and raised in the suit property and that they have lived thereon uninterrupted throughout their lifetime.

9. The Plaintiffs told the Court that when they were growing up, a white man by the name Jimmy Verde Verge (the 1<sup>st</sup> Defendant) used to occupy the farthest end of the property whereat a hotel known as Holiday Inn had been erected. The Plaintiffs told the Court that the 1<sup>st</sup> Defendant whom they came to learn was the owner of the hotel later left the Country in the mid-1990s and has never come back.

10. The Plaintiffs further told the Court they have lived openly on the subject property and that they did so without any permission from any person. They further told the Court they have extensively developed the land and have settled their families thereon. When their parents passed on, the Plaintiffs told the Court they did bury them on the suitland where their graves remain to-date.

11. The Plaintiffs further told the Court that when they recently developed an interest in finding out who was the registered proprietor of the land they occupied, they carried out a search in the land registry. The said search revealed that the property initially was registered in the name of Holiday Inn Ltd but was later transferred to Beach Villas Ltd (the 2<sup>nd</sup> Defendant).

12. There was evidence that the registered proprietors of the suit property were served with Summons to Enter Appearance herein by way of substituted service through the Daily Nation newspaper of Thursday 12<sup>th</sup> March 2020. They however neither entered appearance nor filed any response to the Originating Summons.

13. The law on adverse possession has been the subject of a number of judicial pronouncements and is now indeed well-settled. In *Wambugu –vs- Njuguna (1983)1 KLR 173*, the Court of Appeal stated that Adverse Possession contemplates two concepts; Possession and discontinuance of possession. That Court went on to state that the proper way of assessing proof of Adverse possession would be whether or not the title holder has been disposed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.

14. Similarly, in *Mbira –vs- Gachuhi (2002) EA 137*, the Court observed thus: -

**“...a person who seeks to acquire title to land by the method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, notorious, exclusive adverse use by him or those under whom he claims for the statutorily prescribed period without interruption.”**

15. Discussing the ingredients constituting adverse possession in *Mtana Lewa –vs- Kahindi Ngala Mgandi (2005) eKLR*, the Court of Appeal observed that: -

**“Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12 years.”**

16. It is also a well settled principle that a party claiming adverse possession ought to prove that his possession was *nec vi, nec clam, nec precario*, that is to say, peaceful, open and continuous. The possession should not have been through force, not in secrecy and must be without the authority or permission of the owner.

17. In the matter before me, the Plaintiffs have told the Court that they have been in occupation of the suit property since the year 1996. That means they had been in occupation for about 23 years before they filed this suit. They have also stated that their occupation has been open, continuous and without any interruption from either the Defendants or anyone else for that entire period.

18. The Defendants did not enter appearance or file a defence and there was therefore no evidence availed to contradict the Plaintiffs' testimony. The Plaintiffs produced an extract of the title to the suit property and it was evident the property was in the name of the Defendants. The Plaintiffs have also produced photographs showing the developments done on the land including permanent buildings. I have no doubt in my mind that such developments were undertaken over a period of time and that the Plaintiffs have been openly in occupation of the land.

19. Taking into account the totality of the evidence adduced and applying the legal principles as outlined above, I am satisfied that the

Plaintiffs have proved their case on a balance of probabilities and have brought themselves within the limits of the doctrine of adverse possession.

20. Accordingly, I allow the Originating Summons dated 10<sup>th</sup> June 2019 as prayed with no order as to costs.

**Dated, signed and delivered at Malindi this 16<sup>th</sup> day of July, 2021.**

**J.O. OLOLA**

**JUDGE**