



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO.77 OF 2017(OS)

1. HAMISI MAKAME HAMISI

2. SAID MAKAME

3. MARIAM MAKAME.....APPLICANTS

VERSUS

FERAJI BIN HUSSEIN BIN SALIM.....RESPONDENT

JUDGMENT

1. The plaintiffs commenced this suit by way of an Originating Summons dated 7th March, 2017 seeking, inter alia, to be registered as proprietors of all that PARCEL OF LAND PLOT NO. 513/II/MN CR. 686 measuring 8.20 acres in place of the defendant, Feraj Bin Hussein Bin Salim for reason that they have become entitled to the said land by adverse possession. The plaintiffs aver that they have been in uninterrupted exclusive possession of the suit land for a continuous period of over 12 years and that the defendant's rights and/or interest in the land has been extinguished.

2. In support of their claim, the plaintiffs filed an affidavit sworn by Hamisi Makame Hamisi, the 1st Plaintiff on 24th February, 2017 in which he deposes that they live and carry on business on the suit land with their family and cultivate the same peacefully and without any interruption for over 12 years and have it as their only homes. The plaintiffs have annexed a copy of the certificate of ownership in the defendant's name and stated that they have lived on the suit property and developed it openly and without hindrance or interruption from the defendant or anyone for over 12 years.

3. The 1st plaintiff testified and stated that he has lived on the suit property for over 15 years and that he carries out farming on it.

He produced a copy of the title in the defendant's name as well as a certificate of official search and urged the court to grant them the orders sought. He stated that they have never seen the defendant.

4. Said Makame Hamisi, the 2nd plaintiff also testified that he is aged about 66 years and stated that the other plaintiffs are his brothers. That they do farming on the suit property. He confirmed that they have been on the land for over 12 years and that no one has ever come forward to claim it from them.

5. Pursuant to leave granted by the court on 22nd January, 2018, the defendant was served by substituted service through advertisement in the Standard Newspaper of 14th April, 2018. The defendant did not enter appearance within the stipulated time or at all and the case proceed ex-parte.

6. The law on adverse possession is now well settled and the essential requirements that one has to meet in order to succeed in an application for adverse possession have been discussed by the courts. In **Wambugu –v- Njuguna (1983) KLR 173**, the Court of Appeal held that adverse possession contemplates two concepts possession and discontinuance of possession. It further held that the proper way of assessing proof of adverse possession would be whether or not the title holder has been dispossessed 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.

7. 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, 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 is

twelve (12) years.”

8. 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, peaceful, open and continuous.

9. The plaintiffs have stated that they have been in occupation and possession of the suit property for over 12 years. The 1st plaintiff in particular testified that he has been in occupation for about 15 to 16 years. The plaintiffs have stated that they have lived on the suit land with their families and have used it as their only home all these years. The plaintiffs produced a copy of the title of the suit property as required by law. The plaintiffs evidence remains uncontroverted.

10. Considering the evidence availed in this case, and applying the legal principles as outlined above, it is clear 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.

11. In the result, the suit by way of Originating Summons dated 7th March 2017 is allowed and I enter judgment as follows:

a. That the defendant’s interest in PLOT NO. 513/II/MN CR 686 measuring 8.20 acres has been extinguished.

b. That the plaintiffs be registered as the proprietors of all that parcel of land known as PLOT NO. 513/II/MN CR 686 measuring 8.20 acres

c. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH DAY OF JULY 2020.

C.K. YANO

IN THE PRESENCE OF:

Yumna Court Assistant