

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. APPLICATION (OS) NO. 287 OF 2011

**IN THE MATTER OF: AN APPLICATION UNDER SECTION 38 OF THE LIMITATION OF
ACTIONS ACT**

AND

IN THE MATTER OF: PLOT NO. 262/1/MN CR. 1870

BETWEEN

OMAR SALIM SHEE

CHARLES ONWONGA

GEORGE OKOYO (SUING FOR AND ON BEHALF OF 31 OTHERS)..APPLICANTS

=VERSUS=

MOHAMED BIN SALIM MUHASHANU.....DEFENDANT

JUDGEMENT

[1] The plaintiffs filed an originating summons on 23rd March, 2011 for the determination of the questions as to whether ;

1. The applicants are entitled to the property known as L.R. No.262/1/MN hereinafter referred to as the suit property.

2. The applicants are entitled to be duly registered as the proprietor of the said suit property by virtue of adverse possession.

3. The applicants are entitled to the costs of this summons to be paid by the respondent.

The originating summons was served upon the defendants by substituted service by advertising in the Daily Nation. After the required period of 21 days there being no response from the defendants the suit was fixed down for hearing on 31st October, 2013.

[2] One Omar Salim Shee gave evidence that he is a farmer and he lives in Bamburi. He said he had brought this case on behalf of 72 others. He stated that he had the authority of the others. He produced that authority as "OSS1. He told the court that the suit property was mainland North Plot 262/1/MN. The witness said that he had lived on the Plot for 35 years. That he had lived with his colleagues and that he is in the plot until now. Further that when he went to the plot it was vacant. The witness went further to say that him and his colleagues had built permanent homes. That they entered openly without anyone stopping them. Further that up to now no one has ever asked them to move. He said that he does not know the defendants. He prayed that the court do declare that they had acquired the land through adverse possession. He produced a copy of the record as Exh. 1.

[3] PW2 Charles Onwonga said that he lives at Mwembe Regeza a location within Bamburi. That he is a

jua kali artisan. He stated that he does not know Bin Salim Mahashanu the defendant herein. That they got his name from a search on Plot No. 262/1/MN and found out that he was the registered owner. He stated that he had been given authority by the other defendants to file this suit.

The witness stated that he has lived on the suit land for 20 years. He said that the land was not fenced. That it was a forest. He said that his house is permanent. That he entered the land openly. He averred that he has not been told to move out and vacate therefrom. He stated that he wanted the court to give him title deed for the land. He stated that his identity card shows he comes from Kisii. Mr. Okoyo Omondi ID.No. 8619014 was born on 18th February, 1965 in Siaya. He said he had lived in Mwembe Regeza. He said he had lived in Bamburi location. That he has never met Mohammed Bin Salim Muhashanu. He said that they lived there as 72 families. He stated that there are many who come from upcountry. He said that he was born in Mtongwe as his father worked with Kenya Ports Authority. That he went to Bamburi in 1992. That he has lived there for 21 years. That he was allowed to enter in the suit land by Omar Salim Shee. That he did not enter by force. That he has not seen the defendant in spite of the advertisement. That the respondent has no structures on the premises.

[4] The plaintiffs brought Jumanne Kassim Mwanitsuma who said he had lived on the land for 40 years. That he has not been told to move out. There was also Mwarito Ali Rashid who told the court that he lives in Plot No. 262. That he had held the plot for over 30 years. He said he had a wife and three children Shikane Mbeche Sonje PW3 gave similar evidence. He said he started living there in 1969. He said he has a permanent house there. He said he does not know the owner of the land. He said he knows all the other witnesses who gave evidence and supported what they have said. He urged the court to give them title deeds.

Having heard the plaintiffs and all the witnesses therein I am on the balance of probability convinced that they live on the suit land. I am also equally convinced on balance of probabilities that they have lived in the suit land for a period of over 12 years without interruption from the registered owner. Consequently I order that the plaintiffs and all the people they represent have acquired title that is adverse to the registered owner. I further order that the Registrar of Titles Mombasa to register the 34 applicant as the owners of LR. No. 262/1/MN CR No. 1870 in place of Mohamed Bin Salim Muhashanu the registered owner.

There shall be no orders as to costs. This is the order of the court.

Dated and delivered in open Court at Mombasa this 4th day of September, 2014.

S. **MUKUNYA**

JUDGE

4.9.2014

In the presence of:

Sitonik Advocate for Ojode Advocate for the plaintiff