



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**ELC. NO. 1 OF 2011 (OS)**

**IN THE MATTER OF:      PARCEL NO. KWALE/DIANI BEACH BLOCK/1526**

**IN THE MATTER OF:      AN APPLICATION FOR DECLARATION THAT THE**  
**APPLICANT HAS OBTAINED OWNERSHIP OF (0.4.) HA**  
**OF THE SAID LAND BY WAY OF ADVERSE POSSESSION.**

**AND**

**SHADRACK MUSEE MUTHIAKA .....PLAINTIFF/RESPONDENT**

**- VERSUS-**

**THE ESTATE OF THE DECEASED**

**MARIAN NICHOLAS ..... DEFENDANT/APPLICANT**

**JUDGEMENT**

[1] The plaintiff/applicant filed this originating summons on 3rd January, 2011 for the determination of the following questions.

1. *That the honourable court be pleased to issue temporary injunction against the defendant/respondent by itself, servants, agents or employees and or whoever acting on their behalf restraining them from evicting, threatening the demolition of the plaintiff's houses and/or crops on Plot No. Kwale/Diani Beach Block/1526 pending the hearing and determination of this application.*
2. *That the Honourable Court be pleased to issue a temporary injunction restraining the defendants from alienating and/or transferring Plot No. Kwale/Diani Beach Block/1526 to any third party and/or dealing with the suit premises in any manner detrimental to the plaintiff's interest, pending the hearing and determination of this suit.*
3. *That the order be directed at the District Land Registrar, Kwale, the District Officer Diani as well as the OCS Diani.*

[2] In his Supporting Affidavit, he deponed that the respondents are the registered owners of plot

Kwale/Diani Beach Block 1526. He stated that he has resided on the suit premises for 17 years and that he has planted cash crops and erected a house structure and a restaurant as a source of his livelihood. He stated that he has built both permanent and semi permanent structures on the premises. He stated that two of his brothers are beneficiaries of the defendant estate as they were employees who were provided for in the respondents will. He states that his entry to the premises was without anybody's permission and/or authority and/or consent and that he has been continuously and exclusively been on the premises which occupation is adverse to the registered owner and that he is finally entitled to be registered as the owner of 0.4. Ha of the suit premises by way of adverse possession under the provisions of Sec. 38 of the Limitation of Actions Act. He averred that he has now been threatened with eviction by the registered owner and that he and his family stand to suffer irreparable loss and damage and he will be rendered homeless and jobless if the defendant is not prevented from making good his threats to demolish the applicants premises and evicting him from the premises.

[3] One Diccon Croft Wilcock swore an affidavit that he is the executor of the Estate of the late Marian Nicholas who died in 1999. He annexed the certificate of death dated 21st October, 1999 and the Confirmation of Grant dated 26th November, 2002. He stated that the respondents leasehold interest on the suit property was extinguished when the respondent surrendered it back to the Government vide a surrender instrument dated 13th November, 2007. The said surrender was registered on 9th May, 2008. He also argued that the applicants adverse possession is premature because the respondents proprietary interest Kwale/Diani Beach 1526 is a lease dated 9th March, 2008 for 99 years commencing on 1st July, 2007 granted by the Government of Kenya for an annual consideration of Kshs. 42,010 per annum. The respondent argued that Adverse Possession cannot apply where the respondent itself has not held the property interest for 12 years as required by Sec. 13 of the Limitations of Actions Act Cap. 22 Laws of Kenya and that time cannot have started running before the respondent acquired the suit property. He equally argued that time did not run between 16th October, 1999 when Marian Nicholas died and 26th September 2002 when the Administrator of the Estate was appointed.

The respondent attacked the originating summons on the grounds that;

- (a) It was fatally defective for not attaching the extract of title required by Order 37 rule 7 (2) of Civil Procedure Rules.
- (b) The Chamber Summons contravened the direct provisions of Orders 51 Rule 1 of Civil Procedure Rules.
- (c) That the claim is premised on Section 38 of the Limitations of Actions Act and Order 37 Rule 7 1) of Civil Procedure Rules which are Acts of Parliament.
- (d) That Article 40 (2) of the Kenya Constitution expressly prohibits Parliament from enacting any law that permits the state or any person to arbitrarily deprive a person of property of any description or interest in right over any property of any description.

[4] He further argued that Sec. 7(1) of the Sixth Schedule (Transitional & Consequential Provisions) of the Constitution of Kenya 2010 provides that all Laws in force immediately before the effective date shall be construed with alterations adoptions qualifications and exceptions necessary to bring into conformity with the Constitution of Kenya 2010. It was argued that Sec. 38 of the Limitations of Actions Act was unconstitutional to the extent that it purports to deprive or provide for deprivation of right to property outside the parameters permitted by Section 40(3) of the 2010 Constitution. Mr. Wilcock averred that at the death of Marian Nicholas one Francis Muthiaka who was her permanent employee and now a beneficiary of the estate had erected a kiosk on the suit property with the consent of the late Marian Nicholas. The deponent denied that the respondent had lived in the premises for 17 years or even 12 years and that he is a busybody who is out to abuse court process with a design to frustrate the sale agreements entered into with the respondents and 3rd parties as explained in his affidavit.

[5] The parties brought a Notice of Motion dated 3rd January, 2011 by the applicant herein for injunction to prevent the respondent from evicting the applicant and from demolishing the kiosk. The

other application was dated 4th January, 2011 asking for the injunction orders granted on 4th January, 2011 be set aside and or varied and that the applicant/plaintiff do deposit Kshs. 18,000,000.00 in court. The applications were considered by Nzioka J who ruled that the whole issue in this matter rests on the plaintiffs/applicants claim of adverse possession over the suit property as per Originating Summons dated 31st January, 2011. Further that there was Preliminary Objection argued on 31st January, 2011 which was argued before J.B. Ojwang J (as he then was) for which parties were ordered to file submissions and for which none was submitted and that parties abandoned the said Preliminary Objection.

The Judge stated all the issues raised before her are issued in the Originating Summons. She stated that determining the issues raised in the said application would be to determine the Originating Summons. She ordered the matter be fixed for hearing on priority and that status quo be maintained. The ruling on the main issues of both applications was stayed pending the termination of the main suit.

[6] This matter came for hearing on 26th April 2016. The plaintiff/applicant stated that he occupied one acre. That he cultivates and keeps animals. He said that he was doing food business since 2002 and he later changed the same business to a cafe. That he had been there for 19 years. He stated that he had not been given permission to enter the land and no-one had asked him to leave. He averred that his brother Francis Muthiaka was asking him to leave the premises as the owner wanted the same but his said brother did not tell him who the owner was. He said he heard the plot was up for sale. He produced an agreement for sale from Mr. Diccon Wilcock and Francis Muthiaka his brother. He produced a letter asking his brother to leave the premises. he stated that his brother does not live on the plot. He stated that no one gave him money to stay there.

[7] On cross-examination, he said he did not know the number of the plot he had no title deed. He does not know the owner. He said he had only planted maize and no cash crop. He admitted he had no building plans for the kiosk or business permits. He admitted that he went to school up to form 4 and his fees was paid by Muthiaka Okuse who was working at Diani in the cottages. He said he had an elder brother Francis Muthiaka who is about 30 years older than him. He admitted that his brother was employed in the cottages at Diani next to the kiosk. He however did not know the owner of the cottages. He said that he did not know whether Marian Nichoals employed his father and his brothers.

[8] One Priscilla Mwendu PW2 gave evidence and said that she has a business in Ukunda and that the applicant was her customer. She said that she had supplied meat to him since 1998 and that all these years she had known him to live there. On being cross-examined by Mr. Ndegwa for the respondent, she admitted that she had no invoices to say she sells meat, She had no licenses to sell meat, She did not know the number of the plot, its acreage or beacons. She did not know the applicants family. She stated that she did not know whether on that land there was someone else. She said that she had come from Machakos and had lived there for 16 years and that finally she does not know the hotel is in which plot.

[9] One Josphat Mwambua Ilube said that he knew the applicant for 3 years. That he had been taking water to him and that he had been selling water since 1999. On cross examination, he said he does not know his brothers or his father. He said that he did not even know that there was a white person living there. That is all he knew.

[10] In his defence Diccon Croft Wilcock swore and gave evidence that he lives in Nairobi and that he is the executor of the WILL of Marian Nicholas. He produced a Grant of Probate and a Certificate of Confirmation of Grant. He said Marian Nicholas died in 1999. That he had a property in Diani Block 22 and she lived in the plot at Diani. She had five small cottages which she let out to holiday makers. She operated the business alone. Mr. Wilcock said he met her once or twice while on holiday. She was his wife's aunt. He said that there were absolutely no squatters on the land. The WILL of Manor Nicholas had specific beneficiaries. He said he transferred the land according to the WILL and gave it to specific individuals. 1/3 of the land were to be given to a family member, 1/3 to the nephews and 1/3 of the land went to all the employees. He produced a Grant of Probate dated 25th September, 2000. He said that Plot No. 22 does not exist. That he surrendered it to the Government under a surrender of lease dated 9th May, 2009. The purposes was to get the plots subdivided and to get new leases. He said he became the owner of plot Kwale/Diani Beach block/1526.

[11] On 5th May, 2008 he produced all those documents. He stated that the lease is for 99 years from 1st July 2007 and he said he pays an annual premium of Kshs. 42,000/- he produced receipts to prove payment. He said he had not been sued in the case. He did not know the applicant. He suspected the applicant to be a relative of Boniface Muthiaka deceased.

He stated that Francis Muthiaka was allowed to run a kiosk on block 1526 free, and this was with the consent of all the beneficiaries and with the purposes of keeping out squatters. He said that Francis was an employee of Marian Nicholas. He knew him as running the kiosk and that he even put up some structures. He said they made an agreement to sell block 1526 and had an agreement dated 19th November, 2010. The property was to be sold for Kshs. 18million. The amount was to be distributed to all beneficiaries as per agreement produced in court as Exh. D6. He said he had even offered to compensate Francis for brick and mortar but the sale did not go through. Mr. Wilcock said that the applicant was not a beneficiary. On cross-examination the witness said the structure of the kiosk belongs to Francis Muthiaka. He said that from the word go the said Marian Nicholas had authorized Francis Muthiaka to erect a kiosk at the back plot. That as far as he understand, Shadrack is the nephew of Francis Muthiaka. He said that it was not possible that the deceased would not have seen the kiosk since it faces his drive.

[12] DW2 Said Mohamed Chotea 59 said that he lives at Diani. That he was working with Vindingo Cottages now called Vitalis. He was a painter of Marian Nicholas. She was running the cottages and was his employer. He was employed in 1979 with a salary of Kshs. 300 which rose to 1660 when she died in October, 1999. He said he proceeded to work until 2012. He said Francis Muthiaka was his fellow worker. He was a Clerk. He said Shadrack was the brother of Francis Muthiaka. He said Francis brother one Kathanzu was working there as a watchman and Kathanzu was a brother of the applicant/plaintiff (Shadrack). He said that Kathanzu died about 6 years ago. He said the father of Shadrack and Kathanzu is Muthiaka Ukusia. He said he knew Ukusia. He was working in there as a cook of Marian Nicholas. He is dead. That Ukusia and Shadrack are father and son. On being shown the photographs of the kiosk he said, that he knew it and it was built by Francis Muthiaka in 1994. He said Kathanzu and Shadrack were living there. This was the family of Muthiaka. That Shadrack came to stay with his brothers Francis and Kathanzu. He further said that Francis is the one who asked Mariam Nicholas for permission to build and he was given that permission. He stated that Marian Nicholas gave his properties to his workers. These included himself, Francis Muthiaka and Kathanzu. Shadrack is not mentioned and was not there. He said Shadrack should have been evicted except for his brother Francis.

[13] On Cross-examination by Miss. Otunga he said he was a painter for 30 years. That he was a permanent employee. He said that the applicants father was employed first that he was living in staff houses. He was employed in 1975. Francis was living there too.

[14] The respondent also called Abdallaff Suleiman Mohamed 86. Who said he was a gardener since 1992, his Manager was Francis Muthiaka. He said the applicant and Francis were brothers. He said Francis and Shadrack were living on the kiosk. He said he knew Ukusia Muthiaka. He was a cook at Vindigo Cottages. He said Shadrack and Kathanzu were brothers and children of Muthiaka. He also said he was beneficiary of the land from Mariam Nicholas.

[15] Daniel M. Mwema gave evidence as DW5. He said he is a carpenter with Marian Nicholas employed from 2005 and worked for five (5) years in Diani Beach at Vindigo Cottages. He said he worked with Francis Ukusia Muthiaka as a manager. He said the kiosk near the road was built in between 1993/1994. The first one was built by him and the second by Francis Muthiaka. He said they were allowed by Marian Nicholas. He said it was a joint business. They wanted to sell fruits. Francis lived there. He said after finishing Francis was given a licence and started a shop. That Shadrack Muthiaka helped him sell the shop. That Francis Muthiaka, Kathanzu and Shadrack were living there. He said the consent to build was word of mouth. He said it is not true that Shadrack built this kiosk. He said that him and Francis were allowed to build. Shadrack was not there he was in Kitui and was a young man. That Ukusia Muthiaka was working at the house of Marian Nicholas as a cook. Shadrack was the son of Ukusia Muthiaka. He said that Shadrack had never cultivated on the land. The saying that he has cultivated is pure lies. His job was to look after the shop. He was the youngest of the Muthiaka family.

*These being the compelling interest in this case, can the question raised in the originating summons be answered in the affirmative?*

[16] The land parcel Kwale/Diani Beach/1526 was registered on 9th May 2008. The same was registered in the name of Diccon Croft Wilcock. This is a lease of 99 years from 1st July 2007. The annual rent is Kshs. 42,010 per annum. A perusal at the proprietorship section shows entry no. 1 on 9th May 2008 as registration into his name and entry no. 2 as the issuance of certificate of lease on the same date.

[17] The Originating Summons for adverse possession against this land was filed on 3rd January, 2011. By the time the originating summons was filed one Diccon Croft Wilcock had been registered for two (2) years seven (7) months as the registered proprietor. Although in the Will he is named as an administrator of the Estate of Marian Nicholas he was registered as absolute proprietor of Kwale/Diani Beach Block/1526. He is not a party to this suit. Can the period of adverse possession ran against him when he has only held the title of the suit for not more than 2 years seven months?. Adverse possession cannot in law run against a registered proprietor who has not himself held the land for 12 years. When Mariam Nicholas died she was the registered owner of Plot Diani 5604/53- Block 22. At her death on 16th October, 1999 Plot No. Kwale/Diani Beach Block/1526 did not exist. This title having come into existence on 9th May, 2008 some 8 years 8 months later. Plot No. Kwale/Diani Beach Block/1526 therefore did not form part of the the estate of Marian Nicholas. This suit in as far as it relates to the estate of Marian Nicholas and refers to Plot Kwale/Diani Beach Block 1526 is therefore misconceived. The property that consisted of the estate of Mariam Nicholas was Diani 5004/53 - Block 22. This property was surrendered to the Government of Kenya on 13th November 2007. The surrender was registered on 9th May, 2008. The applicant who claims to be a trespasser for 12 years and who had not by then filed his claim for adverse possession, his claim disappeared once the surrender was made. The House of Lords of England in ***Fairweather vs St. Marylebone Property Co. Ltd. 1962 2 ALL ER*** at Page 298, Lord Denning stated,

*"I have come to the clear conclusion that a surrender operates as a determination of term."*

This must be so because, the applicant cannot have adverse possession against an interest that has already been surrendered by the registered proprietor and/or his personal representative.

[18] On the issue whether the applicant is a trespasser for a period of over 12 years on Plot No. Kwale/Diani Beach Block/1526, evidence is on record that the applicant said he cultivates and keeps animals on the suit. He said he runs a cafe. He never produced any evidence to show how he built the Kiosk. he did not produce any permits for running that business at all. He said he did not know the owner. He however admitted that he was the youngest of the Muthiaka family. That his elder brother Muthiaka Ukusia was working in Diani Cottages next to the kiosk. He denied any knowledge that his father and brothers were employed by Marian Nicholas. His two witnesses Priscilla Mwendu and Josephat Mwambua only told the court that they sold to him meat and water for running the kiosk. Mr. Diccon Croft Wilcock the administrator of the Estate of Marian Nicholas told the court that one Francis Muthiaka was allowed to run the kiosk for free. That the purpose of the same was to keep out squatters. Francis Muthiaka was an employee of Marian Nicholas. He said the brick and motor on the kiosk belonged to Francis Muthiaka. He knew Francis Muthiaka running the kiosk and that he even put up some structure. He stated that there was no way the deceased would not have seen the kiosk since it faces his drive.

[19] Mr. Mohamed Chotea 59 said he worked with Vindiggo Cottages now called Vittalis. He said Francis Muthiaka was a fellow worker. He was clerk. He said the applicant was a brother of Francis Muthiaka and their other brother was Kathanzu who worked with Marian Nicholas as a watchman. Their father was Muthiaka Ukusia. The witness stated that Shadrack built the kiosk. He lived there with the applicant. They were the family of Muthiaka.

[20] One Daniel Mwema PW5 said he was carpenter. He worked for 5 years with Francis Muthiaka as Manager. He said there were two kiosks on the road built between 1993/1994. The first one was built by him and the second one built by Francis Muthiaka. He said they were allowed to build by Marian

Nicholas. He said he knew Ukusia Muthiaka. He was a cook in Vindigo Cottages and was the father of Shadrack and the applicant. He stated that after finishing building Shadrack was given a licence to start a shop. That the applicant helped him to sell the shop. He said it is not true that Shadrack the applicant built the kiosk. He said Shadrack was not there. He was a young man living in Kitui. He said that the applicants job when he came there was to look after the shop. That he was the youngest of Muthiaka family.

[21] There is no doubt that the family of Muthiaka worked for Marian Nicholas. Their father Ukusia Muthiaka was a cook, The applicants brother Shadrack Muthiaka was a Manager. Kathanzu Muthiaka was a watchman. The applicant was the youngest brother. Indeed the applicant admitted that the difference in age between the applicant and Shadrack his elder brother is over 30 years. The applicant admitted that he was educated by his elder brother. I am convinced by evidence on record that the kiosk was built by Francis Muthiaka not Shadrack Muthiaka. I also believe the evidence of the witnesses who gave evidence that Shadrack came to an already built kiosk and helped selling in the same. The kiosk was built by his brother Shadrack Muthiaka on authority and consent of Marian Nicholas. This was to help Marian Nicholas to keep out squatters. The Muthiaka brothers who were working for Marian Ni cholas were made beneficiaries of his Will. Shadrack was not provided for as he was neither working for Marian Nicholas nor recognized by Marian Nicholas. The applicant was unable to prove that the kiosk was built by him or that it was his. He was not recognized by her. The applicant was unable to prove that the kiosk was built by him or that the kiosk was his. He was also not able to prove that he has lived there for 12 years cultivating and using the suit land uninterrupted by the registered owner of the land.

[22] Having come to the aforesaid conclusions I need not deal with the form of the Originating Summons and whether it complied with the Civil Procedure Rules in that there was no supporting affidavit and/or whether a Certificate of Title was annexed to the Originating Summons.

[23] The answer to this Originating Summons is that the applicant has not acquired title by adverse possession on Kwale/Diani Beach/1526. I further find that he is not entitled to be registered as the owner of 0.4 ha on plot Kwale/Diani Beach Block 1526 and is not entitled to a title of the same.

Each party shall bear its own costs.

**Dated and delivered in open court at Mombasa this 4th day of September, 2014**

**S. MUKUNYA**

**JUDGE**

**4.9.2014**

In the presence of:

Wanjeri Advocate for the Otunga Advocate for the plaintiff

Sitonik Advocate for the defendants