

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**CIVIL CASE NO.64 OF 2015 (OS)**

- 1. MWANZALA NYAE KIDUNGA**
- 2. KAKALA NGALA HINZANO**
- 3. UMAZI KEA**
- 4. JUSTUS BUSHUTI MKONGO**
- 5. JOEL OGEMBO**
- 6. MRS. REGINA WANJIRU NDUNGU**
- 7. LEA DICKSON MUSHAMBA**
- 8. SAGINA KISHANGA WANAZA**
- 9. MRS KHADIJA NYAE ..... PLAINTIFFS**

**VERSUS**

- 1. ATHUMAN MZEE SHAFI**
- 2. SITI MZEE SHAFI**
- 3. MKASI MZEE SHAFI (*Suing as Personal Representative of the Estate of Mzee Shafi Mwachima*) ..... DEFENDANTS**

**AND**

**AHMED KIARIE NJONGE & 31 OTHERS .. INTERESTED PARTIES**

**JUDGMENT**

1. This suit was instituted by way of an Originating Summons dated 23<sup>rd</sup> March 2015 before it was amended on 13<sup>th</sup> April 2018. By their suit herein, the nine (9) Plaintiffs suing on their own behalf and on behalf of those described as squatters of Vikwatani Estate and as members of Hakikisha Development Group pray for orders as follows:

- a) That the Plaintiffs be registered as proprietors in common of the land in Title No. 180/II/MN CR 613 measuring 16.819 acres or thereabouts in place of the Defendants;**
- b) That the Defendants, their agents, servants and any other authorized person or independent contractor be restrained by a permanent injunction from 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; and**
- c) That cost of this suit be provided for.**
2. Upon hearing the initial suit and in a judgment delivered on 19<sup>th</sup> May 2021, the Honourable Justice C.K. Yano allowed the suit and issued orders allowing the Plaintiffs prayers.
3. It was apparent that following the issuance of the said orders, the Plaintiffs extracted a decree and had it served upon the Land Registrar for execution. The Land Registrar did not however effect the decree and the Plaintiffs caused him to be summoned to court. On 4<sup>th</sup> July 2022, Hon. Justice Naikuni

directed the Land Registrar Samuel Mwangi to swear an Affidavit in regard to the matter.

4. In his Affidavit sworn on 8<sup>th</sup> August 2022 the Land Registrar deponed that Land Reference No. MN/II/180 no longer existed as the same had been sub-divided and the title register was closed on sub-division. It was the Registrar's position that the decree could not be executed as it was affecting third parties who were not parties to the suit.
5. On 20<sup>th</sup> March 2024, Justice Naikuni delivered a Ruling herein setting aside the judgment delivered on 19<sup>th</sup> May 2021 with directions that the suit do commence '*de novo*' in order to re-establish the actual facts. In addition, the Learned Judge issued an order that the proprietors of the suit premises following the sub-division be enjoined as Interested Parties in the suit. On 22<sup>nd</sup> February 2024, an order was issued that the Defendant and the Interested Parties be served by way of substituted service.
6. Subsequently and by a Re-amended Originating Summons dated 21<sup>st</sup> June 2024, the 9 Plaintiffs representing the same groups sought for orders as follows:

**(i) The Plaintiffs be registered as the proprietors in common of the land comprised in title No.CR. No. 29910, CR No. 29905, CR No. 22906, CR No. 22907, CR No. 22908, CR No. 22909, CR No. 22911, CR No.22913, CR No. 22914, CR No. 22915, CR No. 22916, CR No. 22917, CR No. 22920, CR No. 22921, CR No. 29674, CR No. 29670, CR No. 29675, CR No. 29677, CR No. 29680, CR No. 29684, CR No. 29682, CR No. 29683, CR No. 29673, CR No. 29671, CR No. 29672, CR No. 29679, CR No. 29678, CR No.29922, CR No. 29912, CR No. 30778/1;**

**(ii) That the Defendants, their agents, servants (or) any other authorized persons 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;**

**(iii) That costs of this suit be provided for.**

7. The Originating Summons is supported by a Re-amended Supporting Affidavit sworn on 15<sup>th</sup> June 2024 by Mwanzala Nyae Kidunga (the 1<sup>st</sup> Plaintiff) on behalf of the other Plaintiffs.
8. From the record the Defendants and the Interested parties were served by Substituted Service through the Standard Newspaper published on 21<sup>st</sup> June 2024. Neither the Defendants nor the Interested Parties entered appearance.

### **Analysis and Determination**

9. I have carefully perused and considered the Re-amended Originating Summons, the testimony of the sole witness who testified on behalf of the Plaintiffs as well as the evidence adduced at the trial. I have similarly perused and considered the submissions placed before the court by the Learned Advocate representing the parties.
10. By their Originating Summons as re-amended the Plaintiffs pray for orders that they be registered as owners in common of the suit premises and that the Defendants, their agents and servants be restrained by a permanent order of injunction from entering the suit property, demolishing their structures and/or evicting them therefrom. It is the Plaintiff's case that they have been in occupation of the suit land for more than 27 years

and that they are now entitled thereto by virtue of adverse possession.

11. Section 38 of the Limitation of Actions Act, Cap 22 of the Laws of Kenya provides as follows:

**“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.**

**(2) An order made under subsection (1) of this section shall by registration take effect subject to any entry on the register which has not been extinguished under this Act.”**

12. As the Court of Appeal asserted in ***Mtana Lewa -vs- Kahindi Ngala Mwangandi (2015) eKLR***:

**“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 neglects 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 owners, the essential prerequisite 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.”

13. Similarly, the Court Appeal in ***Mombasa Teachers Co-operative Savings & Credit Society Limited -vs- Robert Muhambi Katana & 15 Others (2018) eKLR*** stated as follows:

“....., it is settled that a person seeking to acquire title to land by way of adverse possession must prove non-permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the ***Latin maxim, nec vi nec clam nec precario.***”

14. In the matter herein, the Plaintiffs testified through Justus Bushuti Mkongo (PW1). The witness who is the 4<sup>th</sup> Plaintiff herein told the court they have been in possession and

occupation of the suit land for a period in excess of 27 years and that in the course of time they have built permanent houses and installed electricity and water in their individual premises. PW1 further told the court that they had carried out a survey of the suit premises and that each of the Plaintiffs occupied known portions of the property.

15. In support of their case, the Plaintiffs produced a Survey Report prepared by Edward Kiguru Land Surveyors dated 23<sup>rd</sup> June 2025. In the said Report, the Surveyor observes that the original parcel No. 180/II/MN was subdivided in the year 1990 and new numbers being MN/II/4067-4160 were given and title deeds issued. The Surveyor further notes that the entire parcel of land is occupied by the Plaintiffs who have built permanent houses thereon. In particular, the Surveyor observed that the occupants of the land have not respected the planning and subdivision that was done.
16. The Defendants and the Interested Parties neither filed any pleadings nor did they participate at the trial. The testimony of the Plaintiffs that they have been in occupation of the suit premises for over twelve (12) years was therefore not controverted. There was no doubt that by building permanent

houses on the suit premises, the Plaintiffs have evinced a clear intention to dispossess the registered proprietors of the suit premises who could not have failed to have taken notice of the buildings.

17. In the premises, I am satisfied that the Plaintiffs have on a balance of probabilities proved their claim of adverse possession over the suit premises.

18. Accordingly, I find merit in the Re-amended Originating Summons dated 21<sup>st</sup> June 2024 and hereby enter judgment as sought under prayers (i) and (ii) thereof.

19. I make no order as to costs.

**Judgment dated, signed and delivered in open court and virtually at Mombasa this 11<sup>th</sup> day of December, 2025**

.....  
**J.O. OLOLA**  
**JUDGE**

In the presence of:

- a) Ms. Firdaus Court Assistant.
- b) Mr. Otieno holding brief for Obonyo Advocate for the Plaintiffs
- c) No appearance for the Defendant