

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MOMBASA
ELCLOS NO. E004 OF 2023

ASSAD NIAZ
APPLICANT

VERSUS

MOHAMED ZAFFAR NIAZ 1st
RESPONDENT

MOHAMED SAJJAD NIAZ 2nd
RESPONDENT

NAHEED NIAZ 3rd
RESPONDENT

JUDGEMENT

1. The applicant commenced this suit through the originating summons dated 23rd March 2023 and amended on 4th April 2023 seeking for the following prayers against the respondents:

- a) *That a declaration that the Plaintiff is entitled to be registered forthwith as the owner L.R Number MN/1/16839, MN/1/16840, MN/1/16841, MN/1/16842 & MN/1/16843 Mainland North Mombasa, which the Plaintiff has been in adverse possession as against the defendants since 2009 being more than twelve (12) years occupation preceding the presentation of this suit*

and on which he used openly and continuously as of right and in adverse possession and without any interruption from the Defendants and the Defendants' title to the said L.R Number MN/1/16839, MN/1/16840, MN/1/16841, MN/1/16842 & MN/1/16843 Mainland North Mombasa has been extinguished in favor of the Plaintiff under Section 37 of 38 of the Limitations of Actions Act Chapter 22 Laws of Kenya.

b) That in the alternative, an order be issued forthwith declaring the plaintiff as the sole owner of the suit properties known as L.R Number MN/1/16839, MN/1/16840, MN/1/16841, MN/1/16842 & MN/1/16843 Mainland North, Mombasa being the sole remaining properties bequeathed to the Plaintiff by his late grandfather, NIAZ MOHAMED JANMOHAMED, through his will dated the 14th September, 1995 proved and confirmed in this Honorable Court vide Nairobi Succession Petition No. 49 of 1997, which were unlawfully transferred and sold by the Defendants herein, and the Chief Land Registrar do hereby transfer

the said parcels to the Plaintiff to be the registered owner.

c) That an order for permanent injunction be issued restraining the Defendants, their employees, agent or any other person claiming through them from evicting the Plaintiff herein from the parcel of land known as L.R Number MN/1/16839, MN/1/16840, MN/1/16841, MN/1/16842 & MN/1/16843 Mainland, North Mombasa and from interfering with the Plaintiff's possession thereof or alienating, disposing off, transferring and or dealing with the suit land in any manner whatsoever which may negatively affect the Plaintiff's claim.

d) General Damages.

e) Special damages of Kshs. 18,934,716 being the cost of maintenance at Kshs 6,907,916 and the pounds 75,000/= duly owing to the Plaintiff at current market rate.

f) That an order for costs and interest thereon on this Application.

From the grounds on the originating summons, and the affidavit in support, the applicant stated that he was the

grandson of Niaz Mohamed Janmohamed, deceased, while the 1st and 2nd respondents were the deceased's sons, and 3rd respondent was the wife of the 2nd respondent, and registered proprietor of the suit properties. That the deceased died on or about 13th September 1996 and left a will dated 14th November 1995, distributing his properties and he appointing the 1st and 2nd respondents to be the executors and trustees of the estate. The applicant claimed that though he was then 20 years old, the 1st and 2nd respondents petitioned for probate without his knowledge. That the properties bequeathed to him under the will to be held in trust for him until he reached 30 years in age. That when he become 30 years old on 13th October 2006, he approached the 1st and 2nd respondents to release the properties to him but they did not do so despite the promises. That after carrying out investigations, he found out that the properties bequeathed to him had been transferred to the respondents, third parties and or lost through breach of the terms of the will, long before he attained the age of 30 years. He listed some of properties bequeathed to him to include MN/1/3699 (MN/1/32/3), MN/1/3700 (MN/1/32/4), MN/1/3701 (MN/1/32/5), MN/1/3702

(MN/1/32/6), MN/1/3703 (MN/1/32/7), MN/1/3705 (MN/1/32/9), and MN/1/3706 (MN/1/32/10), which he referred as the cinemax properties, that were part of 15 plots subdivided from the mother title, out of which he was bequeathed 7 plots, while the 1st and 2nd respondents were to get 5 and 3 plots respectively. The applicant further stated that while he was studying in London, he had executed a power of attorney in 1994-1999 in favour of the 1st respondent to enable him manage the estate, but unfortunately, the respondents sold and transferred the 15 plots of the cinemax property without his knowledge, or accounting to him for his 7 plots. That the 2nd respondent was bequeathed by the testator L.R 1504/1 to 1505/6, Mainland North Mombasa, which were subsequently subdivided into 16 plots, of which 11 plots were sold and the remaining plots being L.R MN/I/16839 to 16843, which the applicant refers to as the Nyali properties, but which the court refers to as the suit properties, were registered with 3rd respondent, so as to frustrate his attempts to recover his properties and to defeat justice. He alleged that he discovered the cinemax properties bequeathed to him were sold for Kshs.27,375,000, which was less the legal costs and costs of

subdivision amounting to Kshs.14,980,952, but no amount has been received by him. That after several demands, the 2nd and 3rd respondents allowed him to take possession of the suit properties in 2009, and has been maintaining it, paying annual rates and ground rent totalling Kshs.1,190,313; electricity and water bills totalling Kshs.1,784,564; and built a perimeter fence costing Kshs.3,933,039.50. That he has lived on the property for 15 years before filing of the suit and should be declared the sole owner.

2. The suit is opposed by the 1st respondent through his replying affidavit sworn on 26th October 2023, in which he deposed inter alia that the deceased intended to subdivide 1504/I/MN, but he died before the process was completed; that the deceased left a will appointing the 2nd respondent and himself as executors; that they applied for a grant in Nairobi HC Succession Cause No. 49 of 1997, but Arshad Ulhaq Niaz, their eldest brother and father to the applicant, challenged the will, claiming to be given more than he was bequeathed, but the challenge was dismissed; that when the grant was issued MN/1/1504, cinemax property, was duly transferred to applicant, 2nd respondent's wife and his wife; that he is the

one who took care of the applicant including paying for his university education in United Kingdom as his relationship with his father was not good; that when the applicant returned to the country in 1999, he lived with him for some time; that when the applicant was charged with a criminal case, he took care of his legal fees and other incidentals; that he used the power of attorney the applicant had donated for the purposes it was meant for; the 1st respondent gave an account of how they distributed the properties of the deceased, and accused the applicant for attempting to grab the cinemax property at the behest of his father who grabbed the Spring Valley property; that he was the one paying for rates of the suit properties up to 2019, totalling Kshs.1,190,313 and denied any onslaught by himself to force the applicant to vacate the suit properties.

3. The originating summons is also opposed by the 2nd and 3rd respondents through the replying affidavit sworn by the 2nd respondent on 25th June 2023, in which he deposed inter alia that the suit properties are the remaining portions of L.R 1504/I/MN, which was bequeathed to him by the deceased; that he transferred the suit properties to his wife sometime in

1998; that sometime in 2009 he and his wife permitted his elder brother, Arshad Niaz, who is the applicant's father, and the applicant together with their families to occupy the residential house on L.R No. 16842/I/MN; that subsequently they also allowed the said Arshad Niaz to temporarily use the remaining suit properties MN/1/16839, 16840, 16841 and 16843/I/MN for storage of construction materials and equipments, which Arshad Niaz and the applicant were using to carry on business; that they had several correspondences in 2012 with Mr. Arshad Niaz on the use of the said properties, and he had promised to pay rent; that after subsequent conversations with Arshad Niaz and applicant, they promised to vacate from the suit properties in good repair by the middle of August 2015, and pay him Kshs.3,375,000 as rent from 1st January 2010 to 15th August 2015; that Mr. Arshad Niaz and the applicant did not vacate by mid-August 2015, despite him requesting them to vacate; that sometime on 2nd December 2018, Arshad Niaz moved out after a falling out with the applicant, but the applicant did not vacate despite giving promises to move out sometimes in February 2022; that in February 2023 the applicant asked him whether he would be

willing to sell one of the suit properties to him, and introduced to him two prospective buyers.

4. The learned counsel for the applicant, the 1st respondent, 2nd and 3rd respondents filed their submissions dated 11th July 2025, 2nd October 2025 and 8th October 2025 respectively, which the court has considered.

5. From the pleadings, affidavit evidence and the submissions filed, the following are the issues for the court's determinations:

a) Whether the applicant has met the threshold to be declared the proprietor of any of the suit properties under adverse possession.

b) Who bears the costs?

6. The court has considered the grounds on the amended originating summons, the affidavit evidence filed by the parties, submissions by the parties' learned counsel, superior court decisions cited thereon, and come to the following determinations:

a) It is evident from the onset to note that the applicant is seeking compensation for what was bequeathed to him under the deceased's will, and which he alleges was

squandered and or sold off by the 1st and 2nd respondents who were the executors, and the best forum of recourse would have been the Probate Court, had the applicant not added a twist by fashioning his main as one under adverse possession. The claim of adverse possession clearly falls under the jurisdiction of this court, and I will therefore focus on the evidence relevant to that claim, and not whether or not the 1st and 2nd respondents passed on to the applicant the whole of his share of the estate.

b) In the case of Mtana Lewa versus Kahindi Ngala Mwangandi [2015] KECA 532 (KLR), the court considered adverse possession and held as follows:

“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 owner. The essential prerequisites being that the possession of

the adverse possessor is neither by force or stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

The court went on to find that *section 7* of the Limitation of Actions Act embodies this doctrine and there are further provision is in *sections 13, 37 and 38* respectively of the same Act. In the case of Richard Wefwafwa Songoi versus Ben Munyifwa Songoi [2020] KECA 942 (KLR) the Court of Appeal cited with approval Mbira versus Gachuhi, (2002) IEALR 137 where the held that:

“..... 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 and adverse use by him or those under whom he claims for the statutory prescribed period without interruption....”

- c) The applicant claims to have been taken possession of the suit properties in 2009 after his persistent demands to the 2nd and 3rd respondents for the release of the

properties bequeathed to him by the deceased. That has been clearly captured in ground 15 of his amended originating summons, which leaves no doubt that his occupation or possession of the suit properties was by virtue of being allowed to stay on the suit properties by the owner, the 2nd and 3rd respondents. That admission or acknowledgement of permission or licence to occupy the suit properties has been confirmed by the respondents through their replying affidavits. The 2nd respondent has in his deposition given details of the communication and correspondences through emails and telephone calls between himself, the applicant and his father about the use of the properties, rent to be paid and vacant possession, and although the applicant denied through his further affidavit any communication about promising to pay rent, the court has observed that he did not change his position that he was permitted onto the suit properties, which is enough to defeat his claim for adverse possession.

d) When it comes to the applicant's prayers for general damages and permanent injunction, the same are

untenable, as the suit properties do not belong to him. He cannot therefore claim for damages or an injunction on suit properties that are not registered in his name and in respect of which he has no verifiable and recognised legal interest over.

e) On special damages, the applicant did not attach any documentary evidence in support to his affidavits. I have perused the affidavit sworn on 23rd March 2023 supporting the applicant's application of even date, and noted the receipts of payments, are actually statements of rate payment on the suit properties, that are in the name of the 3rd respondent. That though that document amounts to proof of payment, it unfortunately is not proof that the applicant made the payment. Similarly, the payments to Kenya Power indicate that the applicant was acting in his capacity as the director even though the invoices were in the name of the 1st respondent. There were no receipts for water payments. If anyone is to claim for the compensation of the electricity payments, it would be Niaz Earthworks Ltd, which is a separate legal entity from the applicant. The prayer for

special damages is therefore, also untenable for the above reasons.

f) The applicant having failed in his suit, the respondents are entitled costs for reasons that under *section 27* of the Civil Procedure Act chapter 21 of Laws of Kenya, costs follow the event unless where the court directs differently on good cause.

7. From the foregoing determinations, the court finds the applicant has failed to establish his claim against the respondents to the standard required of balance of probabilities. The court therefore orders as follows:

a) That the applicant's suit is dismissed.

b) The applicant to pay the respondents' costs.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 10TH DAY OF DECEMBER 2025.

S. M. Kibunja, J.
ELC MOMBASA.

IN THE PRESENCE OF:

APPLICANT : No Appearance

RESPONDENTS : Mr Mungu for 1st Defendant

M/s Oruta for 2nd and 3rd Defendant

KALEKYE-COURT ASSISTANT.

S. M. Kibunja, J.
ELC MOMBASA.