



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 232 OF 2017 (O.S)

IN THE MATTER OF: LAND PARCEL NO. 12889/127-KILIFI (CR 20118)

AND

IN THE MATTER OF: AN APPLICATION FOR DECLARATION THAT THE PLAINTIFFS/APPLICANTS HAVE OBTAINED OWNERSHIP OF TWO DECIMAL ZERO TWO EIGHT (2.028) HECTARES OF THE ABOVE SAID LAND BY WAY OF ADVERSE POSSESSION

BETWEEN

MOSES MASIVAI BARASA

STEPHEN NDAYIYA BUHASIA.....PLAINTIFFS

AND

MOHAMED AKRAM KADERDINA.....DEFENDANT

JUDGMENT

1. By an Originating Summons dated 23rd November 2017 as filed herein on 24th November 2017, Moses Masivai Barasa and Stephen Ndayiya Buhasia(the applicants) have asked this Court to determine three questions framed as follows:

1. Are the Plaintiffs/Applicants entitled to be declared as the proprietors of 2.028 Hectares of land on Plot No. 12889/127 Kilifi, which they have acquired by adverse possession after staying and/or occupying and/or residing on the Plot for 12 years?;

2. Are the Plaintiffs/Applicants entitled to be registered as the owners of Plot No. 12889/127-Kilifi and be issued with Certificate of Title?;

3. Are the Plaintiffs/Applicants entitled to the costs of this suit?.

2. The Originating Summons which is supported by an Affidavit sworn by Moses Masivai Barasa on behalf of himself and the 2nd Applicant was served by way of advertisement placed in the Standard Newspaper on 18th April 2018 following an application made to this Court in which the Applicants averred that they were unable to trace Mohamed Akram Kaderdina (the Respondent) herein). The said Respondent however never entered appearance.

3. On 11th June 2018, directions were taken herein in which the Applicants opted to proceed with the matter by way of Affidavit evidence. The Applicants were subsequently granted leave to file submissions in support of their Affidavit filed in support of the Originating Summons. I have considered the said Summons and the Affidavit in support thereof. I have equally considered the Written Submissions as filed by the Learned Advocates for the parties.

4. Section 38(1) of the Limitation of Actions Act (Cap 22) provides that:-

“Where a person claims to have been 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.”

5. In the Supporting Affidavit to the Originating Summons, the two Applicants before me aver that they respectively entered the suit premises in the years 2003 and 1994 and that they have resided thereon ever since together with their families without any threat of eviction. It is their case that the parcel of land comprising the suit premises was registered in the name of the Respondent-Mohamed Akram Kaderdina and that their entry thereon was without his authority or consent.

6. The Applicants further assert that their stay on the land has been open and continuous and that the same has been adverse to the title of the registered owner who has never occupied and/or utilized the land ever since. It is thus their contention that they have since dispossessed the parcel of land from its registered owner and that they are therefore entitled thereto under the doctrine of adverse possession.

7. As was stated in *Mtana Lewa –vs- Kahindi Ngala Mwamgandi(2005)eKLR:-*

“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 a person in assertion of his title for a certain period, in Kenya 12 years.”

8. From an extract of a Certificate of Title annexed to the Applicants Affidavit (Annexure MMB 2(b), it is evident that the suit property measuring 2.028 Ha was transferred to the Respondent herein on 1st September 1994. From the Certificate of Postal Search dated 18th April 2016(Annexure MMB-2a), he was still the owner of the property on the said date when the Applicants conducted a search to establish the ownership of the suit premises.

9. The Applicants have also annexed photos of various homesteads, structures and crops in support of their claim to ownership and possession of the suit premises. In light of their contention that they entered the suit premises between 1994 and the year 2003, and in the absence of any evidence in the contrary contradicting the Applicants claims, I am satisfied that they have proved their case upon a balance of probability.

10. Accordingly, I hereby answer the Applicants questions as posed in the Originating Summons in the affirmative and make the following orders:-

(i) That the Plaintiffs/Applicants are entitled to be declared as the proprietors of 2.028 Ha of all that parcel of land known as Plot No. 12889/127-Kilifi by way of adverse possession.

(ii) That the Plaintiffs/Applicants are entitled to be registered as the owners of the said Plot No. 12889/127-Kilifi and to be issued with a Certificate of Title thereto.

Dated, signed and delivered at Malindi this 26th day of June, 2019.

J.O. OLOLA

JUDGE