



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC CASE NO. 254 OF 2017**

**CHARITY WANJIRU JOSEPH.....PLAINTIFF**

**VERSUS**

**HUSENBHAI MULLA AHMED MULLA**

**SAIFUDDIN MULL AHMED MULL A HEPTULLAH.....DEFENDANTS**

**JUDGEMENT**

1. The plaintiff Charity Wanjiru Joseph Muita commenced this suit by taking out the Originating Summons dated 30<sup>th</sup> June 2017 against the defendants. She prayed in the summons for orders that;

**a. That the respondent's interest in property known as Title No. C.R. 8729 measuring approximately 1.48 Acres situated at S. E of Mazaras Township in Mombasa, and registered as C.R. No. 6842/7 have been extinguished.**

**b. That the Applicant herein be registered as the proprietor of all the parcel of land known as C.R. No. 8729 measuring approximately 1.48 Acres situated at S. E. of Mazaras Township in Mombasa, and registered as C.R. No 6842/7 and 6842/7 at Mombasa Land Registry, in place of the Respondent Husenbhai Mulla Ahmed Mulla & Saifuddin Mulla Ahmed Mulla Hedtulla by reason of the fact that the applicant has become entitled to the said parcel by adverse possession.**

**c. That the Registrar of Tiles, Mombasa do issue Certificates of Title for the parcel of land known as C.R. No 8729 measuring approximately 1.48 Acres situated at S. E of Mazaras Township in Mombasa, and registered as C.R No. 6482/5 and 6842/7 at Mombasa in the names of Charity Wanjiru Joseph Muita without gazette ment.**

**d. That the order referred to in paragraph 1, 2 and 3 above be registered against the Title to property known as C. R No 8729 measuring approximately 1.48 Acres situated at S.E Mazaras Township Mombasa, and registered as C.R No 6842/5 and 6842/7; in terms of section 38(2) of The Limitation Actions Act, Chapter 22, Laws of Kenya.**

**e. That the cost of this Originating Summons be provided for.**

2. The plaintiff pleaded that she has been in uninterrupted occupation of the suit premises for a period well over 12 years thus extinguishing the respondents' rights over the property by virtue of the doctrine of adverse possession. The summons is also supported by the applicant's affidavit sworn on 31<sup>st</sup> June 2017. She deposed that she has been living on the suit land together with her family as shown in the photographs (CWJM 1).

3. The applicant deposed that she has developed the suit land openly and without any hindrance for well over 12 years. That the suit land is registered in the name of the defendants and she has never seen the owners come to claim the land. She craved to be given the ownership of the suit property. That she stands to suffer irreparable loss and damage of being rendered homeless if not heard and granted the suit property.

4. The summons is opposed by the defendants via a replying affidavit sworn by Mr Husseinbhai Hebatullah on 12<sup>th</sup> July 2018. Mr Hebatullah admitted that the Plot No. 283/V/MN is registered in their names as executors of the will of the late Mulla Ahmedali Mulla. That they have always been in possession of the suit land, both active and constructive. Mr Hebatullah deposed that the photographs annexed to the supporting affidavit as CWJM 1 belong to Sofia and Omar Athman who had built on the suit land by their (defendants) consent.

5. The defendants deposed further that they constructed a wall back in the year 2012 which started to crumble and annexed receipts for purchases of building materials as proof of construction of the said wall. That they have regularly visited the plot and have never met anyone else living thereon other than Omar and his wife Sofia. They continued that somebody attempted to illegally purchase the land and even

proceeded to replace their (defendants) wall which was broken in some places. Following the illegal purchase, their advocates on record engaged the District Land Office (**annex 4**) and a survey was conducted in 2015 (**annex 1**) which all confirm the plaintiff is not on the land. That the plaintiff deposes to not meeting the defendants because she is not residing on the suit property. The defendants urged the court to dismiss the Originating Summons with costs to them.

6. Parties agreed to prosecute the case by filing of written submissions. The defendants filed theirs on 19<sup>th</sup> February 2019. Time was extended to the plaintiff to file hers but as at the date for writing of this judgment (18<sup>th</sup> June 2019) none had been filed. The court only has her pleadings to use in analysing whether she has made out a case. The Court of Appeal in the case of **Kweyu –versus- Omuto (1990) KLR 709** restated the provisions of Section 107 and 108 of the Evidence Act that the burden is on the person who wishes to have a set of facts decided in his favour. In this case, the burden is on the plaintiff to demonstrate/prove the existence of facts that she has been in uninterrupted occupation of the suit premises for a period of over 12 years.

7. It is not in dispute that the defendants are holding the title of the suit property. In the affidavit in support of the summons, the plaintiff deposed that she has been on the land for over 12 years which fact was rebutted by the defendants. The supporting affidavit does not specify the date of entry of the plaintiff into the land. The defendants have detailed how they are in constructive possession of the land. For instance, the defendants acknowledge the structure annexed by the plaintiff but states that the structure belongs to Omar and his wife who is on the land with the defendants' knowledge and permission.

8. The plaintiff pleaded that she has never seen the defendants come to claim the land. The defendant on their part annexed a survey report which said the property is surrounded with 3 walls and on the 4<sup>th</sup> side, the wall is under construction by a person who was not the defendants. The defendants have explained that the person building the wall had made a claim of purchaser's interest. This is corroborated by the letter addressed to the Registrar of Lands on their behalf and dated 8<sup>th</sup> May 2015. The gist of the defence complaint as contained in the said latter was that the consent to transfer given on 10<sup>th</sup> December 2014 was fraudulently obtained. The defendants also made reference to gazetting of loss of the suit title and asking the Land Registrar to reconstruct the deed file.

9. The plaintiff did not file any document to counter the averment of the existence of the wall on plot or the occupation of the land by Omar Athman and Sofia and the defendants' claim that the house the plaintiff was claiming belonged to the said Omar Athman and his wife. The plaintiff. The plaintiff has thus failed to prove the key ingredients that must be demonstrated for a claim of adverse possession to succeed i.e ;

**a. That her possession if at all was adverse to the interests of the registered owner;**

**b. That the plaintiff is in actual occupation and that such occupation has been open and uninterrupted for well over 12 years.**

10. For the stated reasons, I find that the Originating Summons has not been proved to the standards of probability as required in law. Accordingly I dismiss it with costs to the defendants.

**Dated, Signed and Delivered at Mombasa this 19<sup>th</sup> day of June 2019.**

**A. OMOLLO**

**JUDGE.**