



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO. 202 OF 2015(OS)

1. ISMAIL OMAR BWANAKALI
2. ABDALLA HAMISI BWANAKALI
3. ALI AMRAN NWAGAYA
4. MWANATUMU MWINYIHAMIS BWANAKALI
5. BILULU MBARUK NASORO
6. SAID HAMIS BWANAKALI
7. MWANAHARUS OMAR BWANAKALI
8. FATUMA OMAR BWANAKALI
9. SULEIMAN OMAR BWANAKALI
10. SAID OMAR BWANAKALI
11. MARIAM OMAR BWANAKALI
12. MWARI OMAR BWANAKALI.....PLAINTIFFS

VERSUS

1. MWALIMU SAID BOYE Alias MWALIMU SAID MWABOYE
2. MOHAMED ASHUR ABEID.....DEFENDANTS

JUDGMENT

1. The plaintiffs commenced this suit by way of an Originating Summons dated 31st August, 2015. They seek to be declared to be proprietors and to be registered as owners of 3.6 hectares of the parcel of land known as SUBDIVISION NO.KWALE/NG'OMBENI/2397 and KWALE/NG'OMBENI/2398 (ORIGINAL PLOT NO.KWALE/NG'OMBENI/301) which they have acquired by adverse possession after staying and/or occupying and/or residing on it for a period of over 12 years.

2. In support of their claim, the 1st Plaintiff Ismael Omar Bwanakali swore an affidavit on 31st August 2015 in which he deposed that the Plaintiffs, together with their families have been in physical occupation and possession of a portion measuring approximately 3.6 hectares of the suit land for over 12 years and have houses and developments thereon. They have annexed photographs of the said houses and buildings. They aver that the registered owners of the suit properties are unknown to them and have never interfered with the plaintiffs occupation and possession for over 15 years that the plaintiffs have stayed on the land. In the circumstances the defendants interests in the suit property have been extinguished and the plaintiffs have acquired title to it by adverse possession. They therefore prayed to be registered as the owners of the suit property.

3. The defendants herein were served with copies of the Originating Summons on 10th October 2015 and on 19th October 2015 the firm of

Kiume Kioko & Company Advocates filed a notice of Appointment of Advocates and Replying affidavit sworn by the 1st defendant.

4. On 20th July 2016, the court gave directions that the originating summons and the affidavit in support be turned into a plaint, the replying affidavit into a defence and the case to proceed by adducing oral evidence.

5. The 1st Plaintiff testified as PW1 and stated that the other plaintiffs are his brothers. He testified that the defendants are the registered owners of the suit land, though the plaintiffs have never seen them despite living on the land for over 30 years. The 1st Plaintiff adopted his witness statement dated 27th October 2016 and filed in court on 28th October 2016 which basically reiterates the contents of the affidavit in support of the originating summons. The 1st Plaintiff urged the court to grant them the reliefs sought herein.

6. Though the defendants were duly served, neither the defendants nor their advocates attended court during the hearing.

7. After the close of the plaintiffs case, their advocates filed written submissions which followed the pattern of the pleadings, the evidence and the law, in particular Section 38 of the Limitation of Actions Act and the principles of adverse possession to the effect that with the plaintiffs having lived on the subject land for over 12 years openly and without interference, they are entitled to the orders of this court to be registered as the owners of the suit property by virtue of the law governing adverse possession. That the known owners (the defendants) had lost the right to the land as they had been dispossessed. Relying on the case of **Jeffwa Nyale Kiti –vs- Sugrabhai Mulla Mohamed Ali, Mombasa HCCC No.151 of 2003 (OS); Christine Nyamalwa –v- Syad Walayatsha & Another, Mombasa HCCC No. 134 of 2004(OS); Fatuma Ahmed & 3 Others –v- Hassan Teje & 2 Others, Mombasa HCCC No. 96 of 2005(OS); Laleine Mirjangi Suleiman –v- Abdullahusein Mohamed Ali Norbhai, Mombasa HCCC No. 237 of 2011 (OS); and, Salim –v- Boyd & Another (1971)EA 552**, counsel for the plaintiffs urged the court to find that the plaintiffs have proved their case and are entitled to the Orders sought.

8. I have considered the plaintiffs' uncontroverted evidence. I have no reason to disbelief them. They have lived on the suit piece of land for over 12 years without interruption. The plaintiffs produced photographs showing the extensive developments, including permanent buildings. I have no doubt in my mind that such developments must have been undertaken over time and openly. Considering the evidence availed in this case, and applying the legal principles of adverse possession, it is clear that the plaintiffs have proved their case on a balance of probabilities and have brought themselves within the limits of the doctrine of adverse possession.

9. In the result, the suit by way of originating summons dated 31st August 2015 is allowed and I enter judgment as follows:

1. That the plaintiffs are entitled to be registered as tenants in common in equal undivided shares of the parcels of land known as KWALE/NG'OMBENI/2397 and KWALE/NG'OMBENI/2398.

2. Costs of the suit is awarded to the plaintiffs.

DATED, SIGNED and DELIVERED at MOMBASA this 20th day of November, 2019.

C. K. YANO

JUDGE

IN THE PRESENCE OF:

Ngonze holding brief for Asige for Plaintiffs

No appearance for defendants

Esther Court Assistant

C.K. YANO

JUDGE