



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC 133 OF 2015**

**ALI MOHAMED MUSA & 6 OTHERS.....PLAINTIFF**

**-VS-**

**MAHMOOD HASSAM & 4 OTHERS.....DEFENDANT**

**JUDGMENT**

1. The Plaintiffs totaling 336 took out an Originating Summons against the defendants pursuant to the provisions of Section 37 and 38 of the Limitation of Actions Act and Order 37 and rule 7 (1) and (2) of the Civil Procedure Rules and all provisions of the law under the Land Act No. 6 of 2012 and the Land Registration Act No. 3 of 2012. In the Originating Summons dated 12<sup>th</sup> June 2015, the plaintiffs sought Orders:

**a. That the Plaintiffs be declared, by virtue of the concept of adverse possession as owners and proprietors of all that parcel of land known as plot Number 324/111/MN-CR 345 measuring 60 acres or thereabouts.**

**b. That the District Land Registrar, Mombasa be ordered to register the Plaintiffs as proprietors in common of all that parcel of land known as plot Number 324/111/MN CR.NO. 345 measuring 60 acres.**

**c. That the defendants, their servants, agents and/or whomsoever be restrained by an order of permanent injunction from accessing, entering, and/or interfering with the suit property and/or in any manner adversely interfering with the interests of the Plaintiffs in so far as their quiet, peaceful occupation and enjoyment of the property is concerned.**

**d. That costs of the suit be provided for.**

2. The Originating Summons was supported by the affidavit of Alex Gwede Masa, the 2<sup>nd</sup> Plaintiff which he swore on 12<sup>th</sup> June 2015 on his own behalf and on behalf of all the other Plaintiffs, and the affidavit of Kalume Kahindi Dzuya sworn on 8<sup>th</sup> March 2017. Pursuant to leave granted by the court on 28<sup>th</sup> October 2015, the defendants were served through advertisement in the newspaper which advertisement was published in the Standard Newspaper on 30<sup>th</sup> December 2015. The defendants did not enter appearance within the stipulated time or at all. The case therefore proceeded ex-parte and plaintiffs' witnesses testified on 24<sup>th</sup> July 2017.

3. PW1, Kalume Kahindi Dzuya stated that he is aged about 66 years old and has lived on the suit property since 1985. That before then, his father had lived on the suit land before his demise in 1967. He stated that neither his father nor himself were given permission by the defendants to enter on the land and

have lived thereon without paying any rent and without any interruption until the year 2014 when some unknown people came to the property claiming ownership. He stated that he has lived on the suit property together with his family and the other plaintiffs for over 12 years without interruption. He asked the court to grant them the prayers sought in the Originating Summons.

4. PW2, Alex Masa Gwede stated that he entered the suit property in 1985 and has lived there continuously since then without any interference. That his father also lived on the said land without permission from the defendants or anyone else. He produced photographs marked as exhibit 1 showing houses constructed and occupied by the plaintiffs. He too asked the court to grant them the prayers sought in the Originating Summons

5. It is a legal requirement that a copy of the title to property being claimed by adverse possession or a certificate of search be annexed to the application. The same were annexed to the affidavit of Alex Masa Gwede and marked as “B” (i) and “B” (ii)” respectively.

6. The Plaintiffs’ through their counsel filed written submissions and relied on decided cases.

7. The law on adverse possession is now well settled and the essential requirements that one has to meet in order to succeed in an application for adverse possession have been discussed by the courts. In *Wambugu -V- Njuguna (1983) KLR 173*, the Court of Appeal held that adverse possession contemplates two concepts: dispossession and discountinuation of possession. It further held that the proper way of assessing proof of adverse possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.

8. The requirements for adverse possession in the Kenya situation has also been set out in the case of *Mbira –V- Gachuhi (2002)1 EALR 137* in which the court 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....”***

Likewise, in *Jandu –V- Kirplal & Anor (1975) EA 225* it was held:

***“...to prove title by adverse possession, it is not sufficient to show that some acts of adverse possession have been committed. The possession must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner. It must be actual, visible, exclusive, open and notorious.”***

9. The ingredients were recently discussed by the Court of Appeal in the case of *Mtana Lewa –V- Kahindi Ngala Mwangandi [2015] eKLR* where it was held that:

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

10. It is also a well settled principle that a party claiming adverse possession ought to prove that his possession was “nec vi, nec clam, nec precario,” that is, peaceful, open and continuous. The possession should not have been through force, not in secrecy and without the authority or permission of the owner. This being a claim for adverse possession, the plaintiffs must show the following:

**i. That they have been in continuous and uninterrupted possession of the land for 12 years or more.**

**ii. That such possession has been open and notorious to the knowledge of the owner.**

**iii. That the plaintiffs have asserted a hostile title to the owner of the property.**

11. In their evidence, the plaintiffs stated that they have been in occupation of the suit property for over 12 years. They also state that they have been in occupation and possession of the suit property openly and continuously and without interruption for all that period. The plaintiffs produced photographs showing various structures and vast developments of the suit property. The structures were said to comprise the Plaintiffs' homes among others. Such vast developments must have been undertaken openly and over a period of time. There was no evidence availed to contradict the plaintiffs' averments.

12. Considering the totality of the availed evidence in this case, and applying the legal principles as outlined above it is clear that the plaintiffs have proved their case on a balance of probability and have brought themselves within the limits of the doctrine of adverse possession.

13. In the result, the suit by way of Originating Summons dated 12<sup>th</sup> June 2015 is allowed in terms of prayers 1, 2 and 3 thereof. Because the defendants did not challenge or participate in these proceedings, I make no order as to costs.

**Judgment signed dated and delivered at Mombasa this 17<sup>th</sup> day of January 2018.**

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**C. YANO**

**JUDGE**