



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 248 OF 2016

CELINA MUTHONI KITHINJI..... PLAINTIFF

[SUING ON HER BEHALF AND ON BEHALF OF 5 OTHERS]

-VS-

1. SAFIYA BINTI SWALEH

2. SHEE KHA BIN MOHAMED

3. ESHA BINTI MOHAMED

4. FATUMA BINTI MOHAMED

5. MANTHURA BINTI MOHAMED

6. BUTHAINA BINTI MOHAMED

7. ATIA BINTI MOHAMED

8. AERAFI BINTI MOHAMED

9. FADHILA BINTI MOHAMED..... DEFENDANTS

JUDGMENT

1. Celina Muthoni Kithinji, Moses Kiplagat Bii, Anne Jebichii Bett, Hassan Nassaro Dindi, Jackline Akinyi Ogada and Joseph Kailo Mwagona, the plaintiffs took out an Originating Summons pursuant to the provisions of Order 37 Rule 7 of the Civil Procedure Rules and Sections 7, 37 and 38 of the Limitations of Actions Act Cap 22 Laws of Kenya against the Defendants, Safiya Binti Swale and 8 others in which they are seeking to be declared the owners of parcel of land known as **PLOT NO.398/II/MN (TITLE NO.CR. 1006)** measuring 2.05 acres registered in the names of the Defendants as tenants in common in equal share by reason of the doctrine of Adverse Possession.

2. The Originating Summons is supported by the Affidavit sworn by Celina Muthoni Kithinji on 31st August 2016. The plaintiffs contend that they have lived continuously and uninterrupted in the Suit Property for various years ranging from 16 to 60 years, a period exceeding 12 years preceding the taking of this summons and have therefore acquired prescriptive rights over it. They aver that they have lived on

the Suit Property together with their families and have constructed permanent houses.

3. Pursuant to leave granted by the court on 23rd November 2016, the Defendants were served through advertisement in the newspaper on 12th January 2017. The Defendants did not enter appearance within the stipulated time or at all. The case therefore proceeded ex-parte and the plaintiffs testified on 17th October, 2017.

4. PW1, Celina Muthoni Kithinji stated that she has lived in the suit land since 1998 and has constructed a house where she lives with her children all of whom were born on the suit land. She stated that she has lived on the suit land, since 1998 without interruption.

5. PW2, Anne Jebichiii Bett stated that she has lived on a portion of the suit land together with her husband and children since the year 2002. She added that she has constructed a home and fenced off the said portion and has connected water and electricity and carrying out small scale farming planting maize, cassava and trees. PW2 also stated that they have put up a structure in which they run a hardware business within the suit plot.

6. PW3, Hassan Nasoro Dindi stated that he was born in the suit land in 1954 and has lived there ever since. He stated that he married while on the suit land and lives there with his family. PW3 stated that he was later joined by the other Plaintiffs whom he showed the portions they are now occupying. He further stated that he has lived on the suit land openly, peacefully and uninterrupted for all the years which is a period of over 12 years preceding the filing of this suit. He says he carried out a search at the lands office and established that the defendants were the registered owners as tenants in common. He asked the court to grant them the reliefs sought in the Originating Summons.

7. PW4, Moses Kiplagat Bii stated that he was invited into the land in the year 2001 and has lived there with his family since then. He further stated that he fenced off a portion of the suit land and constructed a permanent residential house where he lives with his family and that he has connected water and electricity and undertakes poultry farming as well as a posho mill and hardware.

8. The Plaintiffs' advocates filed their submissions dated 14th November 2017.

9. 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: Possession and discontinuance 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.

10. The requirements for Adverse Possession in Kenya has also been set out in the case of **Mbira –v- Gachuhi (2002) IEALR 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 & Another (1975)EA 225**, it was held:

“to prove title by Adverse Possession, it is not sufficient to show that some acts of Adverse 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. ”

11. The ingredients were recently discussed by the court of Appeal in the case of **Mtana Lewa –v-**

Kahindi Ngala Mwangandi (2005)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 a action against such person in assertion of his title for a certain period, in Kenya 12 years.”

12. It is also a well settled principle that a party claiming Adverse Possession ought to prove that this Possession was “*nec vi, nec clam, nec precario*,” that is, peaceful, open and continuous. The Possession should not have been through force, no in secrecy and without the authority or permission of the owner.

13. This being a claim for Adverse Possession, the plaintiffs must show that they have been in continuous Possession of the land for 12 years or more; that such Possession has been open and notorious to the knowledge of the owner and that they have asserted a hostile title to the owner of the property.

14. The plaintiffs have stated that they have been in occupation of the suit property for a period ranging from 16 years to 60 years which is a period of over 12 years. They also stated that they have been in occupation and Possession of the suit property openly and continuously and without interruption for all that period. There was no evidence availed to contradict the plaintiffs’ averments. The plaintiffs produced a copy of the title (exhibit 1) and certificate of official search (exhibit 2) confirming that the property is registered in the Defendants names. They also produced photographs showing extensive developments, including permanent buildings and crops. I have no doubt in my mind that such vast developments must have been undertaken over time and openly.

15. Considering the totality of the evidence availed 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.

16. In the result, the suit by way of originating summons dated 31st August 2016 and filed on the 5th September 2016 is allowed and I enter judgment as follows:

1. THAT the plaintiffs are entitled to be registered as the owners of PLOT NO.398/II/MN (TTILE NO.CR.1006).

2. Costs of the suit to the plaintiffs.

Delivered, signed and dated at Mombasa this 15th March, 2018.

C. YANO

JUDGE