



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO 173 OF 2012 (O.S)

IN THE MATTER OF: THE REGISTERED LAND ACT CAP 300

THE REGISTRATION OF TITLES ACT CAP 281 LAWS OF KENYA

AND

IN THE MATTER OF: ORDER 37 RULE 7 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF: SECTION 38 OF THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA

BETWEEN

JOYCE MALEMBA MWASARU & 35 OTHERSPLAINTIFFS

VERSUS

EDWARD MWASI.....DEFENDANT

JUDGEMENT

1. Originating Summons under Section 38 of the Limitation of Actions Act Chapter 22 Laws of Kenya, Order 37 Rule 7 of the Civil Procedure Rules.

2. LET the Respondent herein Edward Mwasi being the owner of Plot No. 3717/Section V/Mainland North(the suit property) in Mombasa county of the Republic of Kenya within fifteen (15) days from the date of service of this Summons which is issued on application of the Plaintiffs herein residing in Miritini Vikobani area Plot No. 3717/Section V/Mainland North within Mombasa county who claim to be the proprietors of the whole of 0.8 hectares of that piece of land described as Plot No 3717 Section V Mainland North Miritini Vikobani by adverse possession for determination of the following questions;

1. Have the Applicants become entitled by way of adverse possession to be registered as the owners of the property known as Plot No. 3717/Section V/Mainland North Miritini Vikobani?

2. Have the ownership rights of Edward Mwasi been extinguished by virtue of the accrued right of adverse possession by the Applicants/Plaintiffs, hence he is holding the title in trust for the Applicants?

3. Are the Applicants therefore entitled to be registered as the proprietors of the property Plot No. 3717/Section V/Mainland North Miritini Vikobani?

4. Can a permanent injunction be issued against the Respondent/Defendant by themselves or through their servants, agents or authorized independent contractors NOT to demolish or destroy the Applicants' houses built on the suit property or evict the Applicants from the suit property?

5. Are the Applicants entitled to an order for costs?

3. The Originating Summons is dated 20th August 2012. The application is supported by the affidavit of Joyce Malemba Mwasaru sworn on

the 21st August, 2012 and filed in court on the 23rd August, 2012.

4. The Respondent who was duly served by way of advertisement in The Standard Newspaper of 22nd November, 2012 did not enter appearance and/or file any response.

5. On the 3rd of April, 2014 the court directed that the matter do proceed by way of viva voce evidence. The Originating Summons was treated as a plaint.

6. P.W.1 Joyce Malemba Mwasaru testified on behalf of 36 other Applicants. She urged the court to adopt her supporting affidavit sworn on the 21st August, 2012 as part of her evidence.

She told the court that they reside on Plot No. 3717/Section V/Mainland North situated in Miritini Vikobani.

7. That the registered owner is Edward Mwasi. The certificate of official search was annexed. She further told the court that she and her co-Applicants have been on the land for over twelve (12) years.

Their respective boundaries have been defined, they have constructed permanent houses, planted crops such as mangoes, oranges, guavas etc.

8. They also undertake livestock and poultry farming and that they have buried the remains of their departed family members on the said land. She produced photographs showing the situation prevailing on the ground.

She prays that they be registered as owners of the suit land through adverse possession.

9. P.W.2 Ali Ramadhan Hamisi and P.W.3 Grace Mkawagona Mwalozi confirmed what P.W.1 told the court.

10. I have considered the Originating Summons, the supporting affidavit and the annexures. I have considered the evidence tendered.

The issues for determination are;

i) Whether the Applicants are entitled to be declared as proprietors of Plot No 3717/Section V/Mainland North which they have acquired by way of adverse possession.

ii) Whether they are entitled to be registered as owners of the suit property.

iii) Who should bear costs?

11. In the case of Kasuve –Versus- Mwaani Investments Limited And 4 Others (2004) KLR 184 at page 188, it was held,

“In order to be entitled to land by adverse possession the claimant must prove that he has been in exclusive possession of land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by discontinuation of possession by the owner on his own volition.”

12. P.W.1 told the court that they have been on the land for over 12 years. They have constructed permanent houses planted crops and undertake other farming activities. Her evidence was confirmed by that of P.W.2 and P.W.3. They have exhibited photographs showing they are in occupation.

P.W.1 told the court that they have never used force to occupy the land neither have they used force to continually remain in possession to the date of filing the Originating Summons.

13. I find that the Applicants have proved that they have been on the land *nec vi, nec clam, nec precario*. I am guided by the authority of Francis Gichara Kariri –versus- Peter Njoroge Mairu, Nairobi Civil Appeal No. 293 of 2002 which approved the decision of the high court in the case of Kimani Ruchere –versus- Swift Rutherfords And Company Limited (1980) KLR at Page 16 where Kneller J. held that,

“The Plaintiffs have to prove that they have used this land which they claim as of right *nec vi, nec clam, nec precario* (no force, no secrecy, no persuasion). So the Plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to attempt it by way of recurrent consideration.”

14. I have considered the evidence in totality. I find that the Applicants have satisfied the conditions set out above for the court to approve their claim for adverse possession. The Applicants’ case has not been challenged.

15. I enter judgement in their favour as follows;

a) That a declaration is hereby issued that the Plaintiff/Applicants are entitled by way of adverse possession to be registered as the respective owners of the property known as Plot No 3717/Section V/Mainland North situated in Miritini Vikobani.

b) That the ownership rights of Edward Mwasi are hereby extinguished by virtue of the accrued right of adverse possession by the Plaintiff/Applicants.

c) That the Plaintiff/Applicants are entitled to be registered as the proprietors of Plot No 3717/Section V/Mainland North situated in Miritini Vikobani.

d) That an order of permanent injunction be and is hereby issued against the Respondent by himself or through his servants, agents or authorized independent contractors from demolishing or destroying the Plaintiffs/Applicants houses built on the suit property and/or from evicting the Plaintiff/Applicants from the suit property.

e) I make no orders as to costs.

It is ordered.

Dated, Signed and Delivered at *Mombasa* on the *17th* day of *April* 2018.

L. KOMINGOI

JUDGE

17/4/2018