



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 31 OF 2018 (O.S)

IN THE MATTER OF: AN APPLICATION FOR ORDERS

DECLARING THE APPLICANTS ENTITLED TO BY

VIRTUE OF ADVERSE POSSESSION OF 25 YEARS

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NO. MN/II/5612 REGISTERED AS CR. 58960

IN THE MATTER OF: SECTION 38 OF THE LIMITATIONS

OF ACTIONS ACT CAP 22 LAWS OF KENYA.

BETWEEN

HUSSEIN SULAIMAN MASILA

LILIAN KAVUTI MUSYOKA

IBRAHIM LUGUSA ALUDA.....APPLICANTS

AND

KROTONITE ENTERPRISES LIMITED....RESPONDENT

JUDGMENT

1 Hussein Suleiman Masila, Lilian Kabuti Musyoka and Ibrahim Lugusa Aluda, the Applicants took out an originating summons pursuant to the provisions of Section 37 and 38 of the Limitation of Actions Act Cap 22 Laws and Order 37 of the Civil Procedure Rules against the Respondent, Krotonite Enterprises Limited in which they are seeking to be declared the owners of all that parcel of land known as L.R No. MN/111/5612 registered as Cr.58960 situate in South Takangu Township in Kilifi County by reason of the doctrine of adverse possession.

2 The originating summons is based on the grounds that the Applicants have since 1993 been in peaceful, uninterrupted and open occupation of the property which is a period exceeding 12 years, and have therefore acquired prescriptive rights over it. The summons is supported by the affidavit of Hussein Suleiman Masila sworn on 9th February 2018. The Applicants case is that they have been residing on the suit property since 1993 and have even built permanent houses thereon. The Applicants have exhibited a copy of the title document showing the Respondent as the registered owner of the suit property. The Applicants aver that they have been having quiet enjoyment of the property without interruption and without the respondent's permission.

3 Pursuant to leave granted by the court on 19th March 2018, the Respondent was served through advertisement in the newspaper on 28th March 2018. The Respondent did not enter appearance within the stipulated time or at all, and the case proceeded ex-parte.

4 PW1 Hussein Suleiman Masila, the 1st Applicant reiterated the contents of the affidavit in support of the originating summons and stated that he has lived on the suit property for about 25 years together with the 2nd and 3rd Applicants. He produced a copy of the title in the respondent's name and photographs showing the houses that they built and are residing in and urged the court to grant them the reliefs sought

in the originating summons.

5 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 –vs- 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.

6 The requirements for adverse possession in Kenya has also been set out in the Case of *Mbira-vs- Gachuhi [2002] I EALR 13*, in which the court held:

“...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...”

7 Likewise, in *Jundu –vs- 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.”

8 The ingredients were recently discussed by the court of Appeal in the case of *Mtana Lewa –vs- 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 action against such person in assertion of his title for a certain period, in Kenya 12 years.”

9 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.

10 This being a claim for adverse possession, the applicants 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.

11 The applicants have stated that they have been in occupation of the suit property for a period of over 25 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 applicants averments. The applicants produced a copy of the title confirming that the property is registered in the respondent’s name. They also produced photographs showing extensive developments, including permanent buildings. I have no doubt in my mind that such developments must have been undertaken over time and openly.

12 Considering the evidence availed in this case, and applying the legal principles as outlined above, it is clear that the applicants 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 Amended originating summons dated 18th April 2018 and filed on 19th April 2018 is allowed and I enter judgement as follows:

I. That the Applicants are entitled to be registered as the owners of L.R. No. MN/111/5612.

II. Costs of the suit is awarded to the Applicants.

Delivered dated and signed at Mombasa this 11th May 2018.

C. YANO

JUDGE