



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC NO. 1 OF 2018 (O.S)

HASSAN LUKU AL-AMIN.....APPLICANT

-VERSUS-

JMARYAM MOHAMED MATANO

(AS TRUSTEE OF MOHAMMAD ABDALLAHABDURABI KHALIL ½ SHARE

AND RUKIYA ABDALLAH SHARE.....RESPONDENT

JUDGMENT

1. Hassan Luku Al-Amin, the Applicant took out an originating summons pursuant to Sections 37 and 38 of the Actions Act Cap 22 Laws of Kenya and Order 37 of the Civil Procedure Rules against the Respondent Maryam Mohamed Matano (as Trustee of Muhammad Abdallah Abdurabi Khalil and Rukiya Abdallah Abdurabi Khalil) in which he is seeking to be declared the owner of the land known as Title No. MOMBASA/BLOCK X1/674 in Tudor, Mombasa.
2. The originating summons dated 12th January 2018 was amended on 6th February 2018 and further amended on 18th April 2018 and is based on the grounds that the applicant has since 2003 been in peaceful, uninterrupted and open occupation of the suit property which is a period of over 12 years and that having lived on the suit property for the foregoing period of time, he has acquired prescriptive rights over it and the defendant has never upset that status.
3. The summons is supported by the affidavit of Hassan Luku Al-Amin, the applicant, sworn on 12th January 2018 and a further affidavit sworn on 18th April 2018. The applicant's case is that he has been residing on Title No. Mombasa/BLOCK XI/674 in Tudor, Mombasa from 2003 and has built a permanent residential house thereon. The applicant has exhibited a copy of the Title Deed and a certificate of official search showing that the suit property is registered in the respondent's name. It is further the Applicant's case that during his livelihood, he has been having quiet enjoyment of the property without any interruption and at no time as he ever required permission of the respondent to carry out the activities of poultry farming that he undertakes on the suit property. The applicant states that since 2003, he has been having continuous, open, peaceful and uninterrupted occupation of the suit property by way of adverse possession.
4. Pursuant to leave granted by the court on 14th February 2018, the Respondent was served through advertisement in the standard newspaper on 19th February 2018. The Respondent did not enter appearance within the stipulated time or at all and the case proceeded ex-parte.
5. PW1, Hassan Luku Al-Amin, the applicant reiterated the contents of the affidavits in support of the originating summons and stated that he has lived in the suit property where he has built a permanent house since 2003. He stated that he carries on poultry farming on the property. The applicant produced a copy of the Title Deed and certificate of official search showing that the property is in the name of the respondent. He also produced photographs showing the permanent houses he has built on the land and urged court to grant the reliefs sought in the further amended originating summons.
6. 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.
7. The requirements for adverse possession in Kenya has also been set out in the Case of *Mbira-vs- Gachuhi [2002] 1 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...”

8. 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.”

9. 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.”

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.

11. 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.

12. The applicant has stated that he has been in occupation of the suit property since the year 2003, which is a period of over 12 years. He also states that he has been in occupation peacefully, openly and without interruption for all that period. The applicant produced a Title Deed and a certificate of official search confirming that the Respondent is the registered owner of the suit property. Further the applicant has 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.

13. Considering the totality of the evidence availed in this case, and applying the legal principles as outlined above, it is clear that the applicant has proved his case on a balance of probabilities and has brought himself within the limits of the doctrine of adverse possession.

14. In the result, the suit by way of further Amended originating summons dated 18th April 2018 and filed on 19th April 2018 is allowed and I enter judgment as follows:

i. That the Applicant is entitled to be registered as the owner of all that piece of land known as TITLE NO. MOMBASA/BLOCK XI/674.

ii. Costs of the suit is awarded to the Applicant.

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

C. YANO

JUDGE