



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**HCCC NO. 115 OF 2011**

**DICKSON OTIENO AKENO ..... 1<sup>ST</sup> PLAINTIFF**

**CHRISTINE MUMBI MIANO ..... 2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**AMRI MCHORO MWAMURI ..... DEFENDANTS**

**JUGDMENT**

1. The Plaintiffs have filed this suit against the Defendant seeking;

- a) Vacant possession.**
- b) Costs and incidentals of this suit.**
- c) Any further relief.**

2. It is the Plaintiffs' case that they are the registered owners of the property known as Kwale/Diani Complex/391. The Defendant without any colour of right has encroached onto the Plaintiffs' property and erected a house therein. The Defendants continues in occupation without the Plaintiffs' authority and/or consent.

3. By a statement of defence dated 8<sup>th</sup> June, 2011, the Defendant denies the allegations in the plaint. In paragraph 5 he avers that he entered the premises in 1933 and has actual possession of the suit premises.

That he has filed Mombasa HCCC no 120 of 2007 (O.S) against Matano Mwasina, the original allottee of the suit premises being Kwale/Diani Complex/391 claiming adverse possession. He prays that the Plaintiffs' suit be dismissed with costs.

4. P.W.1 Christine Mumbi Miano, the 2<sup>nd</sup> Plaintiff told the court they entered into an agreement of sale with Matano Mwasina to purchase Plot Number Kwale/Diani Complex/391. A transfer was effected and a title issued in the joint names of herself and her husband.

She produced a copy of title deed issued on 11<sup>th</sup> august, 2010 as exhibit P1. She also produced the sale agreement as exhibit P2. She told the court that they went to fence the property but found the Defendant had encroached by putting up a structure on the portion of the property.

she said they instructed their Advocate who wrote a letter asking the Defendant to vacate. She produced the letter as exhibit P3.

5. P.W.2, Matano Mwasina told the court that he sold the suit property to the Plaintiffs. He further told the court that Amri Abdallah Mchoro, the owner of Kwale/Diani Complex/425 encroached on his plot. He made a report to the Chief after the said Mchoro moved the beacons and encroached. He confirmed that the suit property belongs to the Plaintiffs.

6. P.W.3 Dickson Otieno Akeno, the 1<sup>st</sup> Plaintiff confirmed what P.W.1 told the court. He told the court he took a surveyor to the suit property who confirmed the Defendants house had encroached on Plot No. 391 and on the road reserve. He said they called Defendant who refused to meet them. This is when they decided to file this suit.

7. The defence called one witness. D.W.1 Amri Mchoro Mwamuri told the court that he resides on Plot No. 391. He says he has a house on the plot. That the said house is in the middle of the Plot. He relied on the following documents;

- 1) Certificate of official search.
- 2) Originating summons.
- 3) Return of service.
- 4) Request for judgment.
- 5) Copy of Green card in respect of Kwale/Diani Complex/391.
- 6) Demand letter dated 28<sup>th</sup> September, 2010.
- 7) Order from the court.

He produced them as exhibits D1 to D7 respectively.

He told the court HCCC No. 120 of 2007 (O.S) is still pending. He says he has no other parcel of land.

8. I have considered the pleadings, the evidence on record and the exhibits produced. The issue for determination is whether or not the Plaintiffs have made out a good case against the Defendants.

There is no doubt that Land Parcel Number Kwale/Diani Complex/391 is registered in the names of the Plaintiffs. That before it was transferred to the Plaintiffs it was in the names of Matano Mwasina.

P.W.2 Matano Mwasina has explained how he acquired the suit property. He confirmed that he sold it to the Plaintiffs. It is also not in doubt that HCCC No. 120 of 2007 (O.S) against Matano Mwasina And 5 Others has not been heard and determined.

9. Section 26(i) of the Land Registration Act, 2012 provides that;

**“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence, that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge, except:-**

**a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

I find that the Defendant has not challenged the Plaintiffs’ title on any of the exceptions set out in (a) or (b).

10. The Defendant bases his claim in the suit property on adverse possession. They have relied on the case of *Chevron Kenya Limited (Formerly known as Caltex Oil Kenya Limited) –versus- Harrison Charo Washutu in Malindi CA Civil Appeal No 17 of 2016.*

I have gone through the said authority and find that the facts in that case are different than in the present case.

11. In the case of *Kasuve –versus- Mwaani Investments Limited And 4 Others (2004) KLR 184* 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.”**

I have considered the facts presented herein by the Defendant and I find that the same do not contain the ingredients set out in the above case.

I find that the Defendant has not proved possession.

12. There is evidence that part of his house has encroached on the suit property. He is therefore a trespasser. He is not in exclusive possession and/or occupation of the entire Plot Number Kwale/Diani Complex/391 and the road reserve. Judgement in HCCC No. 120 of 2007 has not been delivered. The Defendants claim for adverse possession has not crystallized.

13. I find the Plaintiffs to be innocent purchasers for value.

All in all I find that the Plaintiffs have proved their case on a balance of probabilities as against the Defendant.

I enter judgment in their favour as against the Defendant for;

a) Vacant possession.

b) Costs of the suit and interest.

It is so ordered.

DATED and SIGNED at MOMBASA on the 28<sup>th</sup> day of June 2018.

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L. KOMINGOI

JUDGE

DATED, SIGNED and DELIVERED at MOMBASA on the 28<sup>th</sup> day of June 2018.

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A. OMOLLO

JUDGE