



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT KWALE**

**CIVIL SUIT NO. 58 OF 2012**

**IN THE MATTER OF: CR 38961/44701/44702/44703/44704/44705/44706/44707**

**AND**

**IN THE MATTER OF: SECTION 7, 17, 37 & 38 OF THE LIMITATION OF ACTIONS ACT  
(CAP 22) LAWS OF KENYA**

**BETWEEN**

**IBRAHIM ALISAU MBELA.....PLAINTIFF**

**-VERSUS-**

**ASMUHAR DEVELOPERS LTD.....1<sup>ST</sup> DEFENDANT**

**JOSEPH KARIUKI NGUGI.....2<sup>ND</sup> DEFENDANT**

**RIPHAA CAHRLES & BUNDI MICHAEL MUREITH.....3<sup>RD</sup> DEFENDANT**

**MOHAMED SHEIKH BIN SHEIKH.....4<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

1. The plaintiff brought this claim vide his Originating Summons dated 3<sup>rd</sup> April 2012 seeking for orders that:

**1. Whether the Plaintiff has acquired title by adverse possession to the suit properties? If so, that it be declared and decreed that the Applicant/Plaintiff has by adverse possession acquired title to all those parcels of land known as and comprised in CR Nos. 38961,44701,44702,44703,44704,44705,44706,44707.**

**2. Whether the Defendants title to the suit properties has been extinguished by operation of the law? If so, that it be declared and decreed that pursuant to Section 17 of the Limitation of Actions Act, the Defendants title to all those parcels of land known and comprised in LR Nos 38961,44701,44702,44703,44704,44705,44706,44707.**

**3. Whether the Plaintiff is entitled to be registered as owner of the suit properties? If so, that**

**the Plaintiff herein be registered as the owner of all those parcels of land known as and comprised in LR Nos. 38961,44701,44702,44703,44704,44705,44706,44707.**

**4. That the costs be in the cause.**

2. The originating summons is supported by the affidavit of Ibrahim Alisan Mbela where he deposed that he has been in open & continuous, exclusive and uninterrupted occupation of part of that piece of land originally known as LR 4826 measuring 1 ½ acres from the year 1956 and has since sold some plots emanating therefrom while retaining a part of it. The plaintiff stated that he started living on the land working as a farmer for Salim Mwana Kutani (now deceased). That the said SALIM was not registered as the owner until 8<sup>th</sup> February 1989 when Salim's grandson Masoud Mohamed obtained registration and later sold the land to ASMUHAR DEVELOPERS LTD – the 1<sup>st</sup> defendant.

3. The plaintiff deposed further that the company having acquired the land proceeded to subdivide it and unlawfully sell some of the plots. That in the year 2003, the company moved to Court to evict him. He was later informed that the Court file went missing and the matter has not been concluded to date. He annexed a copy of a letter dated 28.6.2011 written to the chief magistrate concerning the file CMCC 5612 of 2003 as *IAM – 2*.

4. The plaintiff continued that in the year 2005 he sold a plot 40 by 50 to Charles Ngatia Gathii as he was unaware Masoud Mohamed had obtained registration of the suit land. This same portion was also sold to Joseph Ngugi (2<sup>nd</sup> defendant) by Asmuhar Developers in 2010. Consequently Joseph Ngugi sued Charles Gathii in HCC 445 of 2010 stopping him from constructing on the plot and for vacant possession. He concluded by stating that he has lived on the land for 56 years, 22 of which from when the land had title. He therefore seek to be registered as the lawful and legal owner by way of adverse possession.

5. The suit is defended. The 2<sup>nd</sup> defendant Joseph Kariuki filed a replying affidavit on 30.4.2012. He deposed that he is the registered owner of plot No 9056/1/MN CR No 38961 which he bought from 1<sup>st</sup> defendant in 2005. That he is a stranger to the allegations of the plaintiff since when he bought the land it was vacant & there was no developments on it. He has never seen the plaintiff use the plot to his detriment since 2005 until 2010 when Charles Gathii attempted to develop the plot and he promptly stopped him by obtaining injunctive orders obtained in case No. HCCC 445 of 2010. The 2<sup>nd</sup> defendant continued that the plaintiff having sold the plot to 3<sup>rd</sup> parties cannot now claim adverse possession over it. That the plaintiff has not been in exclusive and continuous possession over this plot. The 2<sup>nd</sup> defendant also claimed that he is a purchaser for value without notice. He urged the Court to dismiss the claim as against him.

6. Mr Charles Rithaa swore an affidavit in opposition to the plaintiff's claim by the 3<sup>rd</sup> defendants. He deposed that they purchased their plot No. CR 44706 on 28.7.2010. That at the time of purchase, this plot was vacant and he fenced the same. That before receiving the pleadings herein nobody had prevented him from fencing the plot. It is his belief that the plaintiff is mis-advised as they (3<sup>rd</sup> defendant) jointly possess the documents of title as well as occupy the same.

7. Mr Hirji Karsam Patel a director of the 1<sup>st</sup> defendant also swore an affidavit dated 30.4.2012 in opposition to the plaintiff's claim. Mr Hirji deposed that through previous proceedings, he was made aware of the existence of the plaintiff. They sued him vide CMCC 5612 of 2003 and he annexed copies of the pleadings in this suit. That although the Court file is missing, the suit is still open for litigation once the file is reconstructed. It is the 1<sup>st</sup> defendant's case that he was sold vacant land measuring 6.031 acres parts of which he has sold. That the plaintiff has never occupied the land with his complacency as he took steps to protect his land when the squatters invaded it in the late nineties & early 2000. That plot No L. R 4826 has never belonged to the plaintiff in any capacity and a claim for adverse possession need not arise.

8. After the pleadings closed, directions were taken for the matter to be heard by way of viva voce

evidence. Each of the sides adduced evidence in support of their case. The plaintiff opened his case on 15<sup>th</sup> March 2015. He testified that he went to the suit plot on 16<sup>th</sup> March 1956 with his parents. On the land they found 3 people who have all died. The witness said they requested for a place to build. They were shown where to build with understanding that they would plough the land and share the harvest with the owner. He said the owner was SALIM MWANAKUTANI. That this agreement was recorded in 1962 by which they were given 1 ½ acres and they have lived in peace until today. In 2000, a dispute began that he was living on plot No 17. That the 1<sup>st</sup> defendant's representatives came and said he was living on someone's land.

9. The plaintiff said he was informed that the 1<sup>st</sup> defendant had purchased the land. He did not know how Masoud sold the land. That when the 1<sup>st</sup> defendant came, he found the witness' house on the land. In 2003 he was served with Court Documents that he had been sued by the 1<sup>st</sup> defendant. He continued that the case went on until 2006 when he was told to go home there was no problem. He does not know how the case ended. He states that he lives alone on the land openly & continuously. He relied on documents filed alongside his pleadings and asked the Court to grant his prayers.

10. In cross – examination, the witness said he met Hirji Patel in Court in CMCC 5612 of 2003. That the case has not been concluded. He was born in vipingo estate which is 20 kilometers from the suit plot. He found people on the plot who were like guards, guarding the property of Salim. The next of kin of Salim was Masoud Mohamed. When the land was sold, he was on the land. They were given permission to live on the land by Salim. They would share the harvest on 50:50 basis. He is unaware that the 1<sup>st</sup> defendant subdivided the land but only know his portion of 1 ½ acres. He sold portions of his share based on the land he was given. He was aware that Salim's land later changed to Masoud who later sold the entire land to the 1<sup>st</sup> defendant. His children live in his house. That he has not been pushed to file this suit.

11. In cross – examination by Mr Kaburu counsel for the 3<sup>rd</sup> defendant, he said plot 44706 is inside his 1 ½ acres. He does not know the two persons sued as the 3<sup>rd</sup> defendant. He knew 2<sup>nd</sup> defendant because he sued Ngatia who is one of the people he had sold the land to. He did not enter the suit land by force. He wants the 1<sup>st</sup> defendant to give him title for his 1 ½ acres. In re – examination, the plaintiff stated that his land was not beacons. He is claiming 12 plots comprising 1 ½ acres within plot No 4826. That he is not claiming the whole land.

12. PW 2 ANASTAS NGUZA NKANAMA of ID 8397 testified on 21.6.2016. He said he knew the plaintiff from 1966. The plaintiff is his neighbour at Bamburi – Mwembelegeza. That the plaintiff lives on the suit plot. That the place was unoccupied. He does not know the defendants. That the plaintiff is occupying all the plots that have been sold. In re – examination, the witness said the houses were built a while ago. Before then, the land had not been subdivided PW 2 did not know the original plot number of the suit plot.

13. PW 3 HARRISON ALBERT KALUME also lives in Kazangani – Bamburi. He has known the plaintiff for fifteen years and they live ½ kilometer apart. They go to the same church. When he knew the plaintiff, only his home was on the plot surrounded by mangoes. He also knows the plaintiff buried his younger brother on the land. He does not know who owns this land. That currently there are several houses on the land but the plaintiff still lives on the same portion of the land.

14. In cross – examination by counsel Akanga for the 1<sup>st</sup> defendant, PW 3 stated that when he visited the plaintiff in 2000, it was only the plaintiff's house who was on the land. He did not know whether it was the plaintiff who built the house. That the land was subdivided and all the plots built up. He did not know how many plots the plaintiff was claiming but he knows the plaintiff lives on one plot. On cross – examination by Mr Kaburu advocate for 3<sup>rd</sup> defendant, PW 3 stated he has known the plaintiff since 2000. That the plaintiff lives on the land cultivating to his capacity. He does not know how the plaintiff got into the land. He does not know the size of the plaintiff's land. In re – examination, PW 3 said that the plaintiff told him he was given the land but he does not know by who. That the plaintiff has a house on the land.

15. The statement of PW 4 Omar S Shee was admitted in evidence by consent as it was said he was sick. His brief statement said he came on the land in 1982 whereby he met the plaintiff. They lived together as a family and got involved in many activities like farming. That the initial owner constructed a kibanda for chicken and PW 4 was the one engaged to construct the kibanda. That the plaintiff is the owner of the land. With these evidence the plaintiff closed his case.

16. The defence opened their case on 13.12.2017. Mr ARIF SHAMULA MUHASHAMY testified as DW 1. He is one of the directors of the plaintiff. He knew Hirji Patel who is one of the co – founders of the 1<sup>st</sup> defendant. He also knew the 1<sup>st</sup> defendant sold a plot to the 2<sup>nd</sup> – 4<sup>th</sup> defendants. In CMCC 5612 of 2003, the 1<sup>st</sup> defendant sued the plaintiff seeking for orders of eviction and demolition. In CMCC 3600 of 2004 the 1<sup>st</sup> defendant sued the plaintiff & 51 others for vacant possession of land parcel No 4826/1/MN. Another case was number HCC 249 of 2006 against Issa Ali Ngawawa seeking eviction orders & orders of permanent injunction.

17. DW 1 continued that his father got this land in 1990 and later subdivided it. That the plaintiff has not indicated which portion of the subdivisions he is occupying. DW 1 said subdivision No 44706 was sold to the 3<sup>rd</sup> defendant and they have title. No 44702 was sold to the 4<sup>th</sup> defendant but the witness did not know whether the 4<sup>th</sup> defendant is in physical occupation. He also stated that subdivision No. 38961 was sold to the 2<sup>nd</sup> defendant. He relied on the bundles of documents contained in his list which he produced as Dex 1.

18. In cross – examination by Mutiso advocate for plaintiff, DW 1 said he did not produce any document showing he is a director of the 1<sup>st</sup> defendant or that he is related to the directors. The land was purchased in 1990. That paragraph 4 of the defence (CMCC 5612/03) says the defendant was in occupation of 1.5 acres since 1959. That there is no evidence to show the plaintiff has been in occupation since 1959. That Hirji's affidavit at paragraph 9 said the plaintiff invaded the land in the eighties and nineties after they obtained title. Paragraph 10 – that there were no squatters on the land thus contradicting paragraph 9. In CMCC 3600/04, the present plaintiff was not a party. That the number of land parcel given in case No. 5612 is different to the present suit. That the transfers from 1<sup>st</sup> defendant took place from 31<sup>st</sup> January 2001. The witness has visited the suit property and saw a number of developments. That the 1<sup>st</sup> defendant has been aware of the plaintiff's occupation. In cross – examination by Kaburu, the witness said the 1<sup>st</sup> defendant did not sell any plots occupied by the plaintiff. That the purchasers inspected the properties before buying them.

19. In re – examination, DW 1 said the whole plot was CR 19180 measuring 6.031 ha. That before subdivision, the L. R No is 4826/1/MN. It was subdivided to 8845 – 9078 (all inclusive). That in CMCC 5612/03 plot Nos. 9046 – 9160 was among the subdivisions and it refers to the same piece of land. That in the originating summons, “*annex 1*” is a subdivision from plot No 9056 CR 38961. That DW 1's father owned the land before it was transferred to the company. This marked the close of 1<sup>st</sup> & 4<sup>th</sup> defendants' case.

20. Michael Mureithi Bundi testified as DW 2. They jointly own plot No subdivision No 9055 & CR No 44706 with Charles Rithaa. He knew the plaintiff after this case was filed. They purchased the plot from the 1<sup>st</sup> defendant who handed to them transfer of ownership documents. He produced these documents as a bundle as *Dex 2*. DW 2 said they visited the plot before buying it and it was vacant. That if he saw even a hut they would not have bought the plot. That there are between 10 – 15 plots between their plot and the plaintiff's home. There is a 5 storey building that blocks his view of the plaintiff's home and he wonders why the plaintiff chose to sue them. DW 1 stated further that when he fenced the plot, no one stopped them. That he is in possession of the plot No 44706.

21. In cross – examination, he said they purchased the plot on 28.7.2010 and there is no unresolved issue between them and the 1<sup>st</sup> defendant. He could not ascertain if the plaintiff is in possession of the 10 plots between theirs and the plaintiff's home. Plot No 9055 is not listed in CMCC 5612/03 and that none of the plots listed in that suit neighbours his. That their plot is still vacant upto today. DW 2 said he had no

evidence of fencing. In re – examination, he said the plaintiff is not occupying their plot. This also marked the close of their case.

22. The parties' advocates all filed written submissions which I have read and considered. A claim for adverse possession is premised on proof of facts on:

- i) Whether the plaintiff is in occupation and use of the claimed land.**
- ii) The occupation & use is proved to be open, exclusive & continuous for a minimum period of 12 years uninterrupted.**
- iii) The occupation has dispossessed the registered owner of the intentions he/they intended to put the land to use and**
- iv) The occupation is without the consent of the landowner.**

23. In this case, the plaintiff is claiming 1.5 acres said to be comprised in the following pieces of land:

- (a) CR No.44701 in the name of Mohamed Sheikh (4<sup>th</sup> defendant) measuring 0.0108 ha**
- (b) CR No. 44702 in the name of Mohamed Sheikh – 4<sup>th</sup> defendant measuring 0.0108 ha.**
- (c) CR No. 44703 in the name of 1<sup>st</sup> defendant measuring 0.0098 ha**
- (d) CR No. 44704 in the name of 1<sup>st</sup> defendant measuring 0.0108 ha.**
- (e) CR No. 44705 in the name of 1<sup>st</sup> defendant measuring 0.0108 ha.**
- (f) CR No. 44706 in joint the names of 3<sup>rd</sup> defendants measuring 0.0428 ha.**
- (g) CR No. 44707 in the name of 1<sup>st</sup> defendant measuring 0.0108 ha.**
- (h) Cr No. 38961 in the name of 2<sup>nd</sup> defendant and measuring 0.0098 ha. All the pieces claimed added together gives total of 0.1164 ha.**

24. From the plaintiff's own evidence, he stated that he went to the land with his parents in 1956, the land did not have a title. They were given a place to build on condition that they will farm the land and share the proceeds on a 50:50 basis with the land owner whom he referred to as Salim. He stated that he was later given 1.5 acres vide an agreement reduced into writing in 1962. The said letter dated 26 – 1 – 1962 was produced by the plaintiff. It is recorded in the Kiswahili language. It records *thus* "**Salim Mwanakutani says he gives "a portion measuring 1 ½ acres to Bwana Sabiku Nchite" who is described as an employee of Salim.**"

25. The plaintiff did not disclose the relationship between him and the person named as Bwana Sabiku Nchite. Although he said they went to the land with his parents, he has not given the name of his father. Secondly the evidence is that the land was given to him Ibrahim A. Mbela yet the document does not mention his name. But of more importance is that the number of the parcel of land from which this 1.5 acres was to be carved out of is also not given. The plaintiff has also not joined Masoud Mohamed Muhashamy who was the first to be issued with the title to create a link between him and the said Salim Mwanakutani. In light of this analysis, the evidence of the plaintiff that he was gifted a portion of the suit land measuring 1.5 acres is wanting.

26. I will again analyse the evidence of the plaintiff whether he has proved that he has been in occupation of the land measuring 1 ½ for over 56 years & 22 years of which from the date the land had a title. The original number of the land before subdivision was L. R 4826/1/MN C. R No 1870/19 and the title was

issued to Masoud Mohamed on 8<sup>th</sup> February 1989. The time in favour of the plaintiff according to the provisions of *Section 38* of the Limitation of Actions Act would start running from this date of 8.2.1989. Has he led evidence on occupation? First, the plaintiff is claiming as per his pleadings eight (8) plots that resulted from the subdivisions of the original number. Out of this number he has sold some of the plots, and he mentioned Nos.38961 to Charles Ngatia Gathii. His sales took place between 2005 – 2007 as evidenced by the copies of sale agreement he produced and this was long before this suit was filed. Consequently it was incumbent for the plaintiff to state which of these plots he is in physical occupation of. Put differently, the plaintiff has not shown this Court how many portions of the land comprised in the titles given in the pleadings he has sold and which ones he is occupying and using.

27. The entire land is measuring 6.031 acres. The same had been sub-divided at the time this suit was filed. Identifying the plots he is occupying is not difficult using survey maps. The witnesses he called have not helped his case much. PW 2 – PW 4 all do not know the plot number or size of land the plaintiff is claiming. They did not even describe the physical location in relation to any nearby features probably using the nearby developments. Physical location in my view is key for a claim for adverse possession where the entire land is not claimed and where we have evidence such as the 3<sup>rd</sup> defendant stating that there are 10 – 15 plots between their plot and the plaintiff's home. Further, the plaintiff did not make a description of what use he has put his portion of the land to that amounts to dispossessing the registered owners.

28. The plaintiff's advocate in cross – examination questioned the 3<sup>rd</sup> defendant on proof that indeed they have fenced off plot 44706. The burden of proof does not shift on the defendant in a claim such as this because it is always the responsibility of the plaintiff to demonstrate that he is the one in possession. The defendants in any event showed the plaintiff was not the only one in possession by producing the pleadings in HCC 445 of 2010, CMCC 5612 of 2003 & CMCC 3600 of 2004 where they sued Charles Gathii & others to stop them from carrying on construction on the land and orders of vacant possession. The inference drawn from the existence of HCC 445/10 is that at the time this suit was filed, it was Charles Gathii claiming possession of plot No 44706. As correctly submitted, the claim for adverse possession if any existed was extinguished as soon as the plaintiff sold some of the portions to 3<sup>rd</sup> parties.

29. The 1<sup>st</sup> defendant in the replying affidavit of Mr Hirji Patel is said to give conflicting evidence as pointed out in paragraph 9 & 10 thereof i.e. whether the invasions began in the eighties or the nineties. If the invasion was in the eighties the time period still would run from 1989 although twelve years had lapsed by 2003 when the case No 5612 of 2003 was filed. If the invasion was in the nineties then probably twelve years had not lapsed by 2003. Whichever of the time that is true, the filing of CMCC 5612 of 2003 for vacant possession and eviction orders in my view stopped time from running. This makes the evidence of PW 3 not useful to the plaintiff's case as he seems to say he only knew the plaintiff from the year 2000 following which period the case of 2003 interrupted time from running .

30. In the defence filed on behalf of the plaintiff herein in CMCC 5612 of 2003 at paragraph 4, it is pleaded that “*the defendant has been on his portion consisting of 1.5 acres since 1959*”. Infact the plaintiff accused the 1<sup>st</sup> defendant of trespassing on his land and also acquiring the title to the suit property fraudulently. The suit is yet to be concluded. Given that paragraph 4 raised a defence equivalent to acquisition of land by adverse claim, it is my considered view that this suit only stopped time from continuing to run but does not necessarily extinguish the plaintiff's claim to the land before 2003.

31. In conclusion, it is my finding that although the plaintiff may have been on the land for a period of time; however he failed to lay evidence in support of his claiming 1.5 acres of the suit land. This is also clear from the numbers which he claimed constitute his portion of the land which when added together as I did in paragraph 23 of this judgement only totals 0.1164 ha which translates to approximately a quarter of an acre. Having failed to prove the nature of activities he is undertaking on the suit plots Nos. 38961, 44701, 44702, 44703, 44704, 44705, 44706, & 44707 that would extinguish the rights of the defendants on the land, it is my finding that the plaintiff has not proved his case on a balance of probability.

32. Further, it is my finding that the plaintiff had no interest to sell any of this portions to 3<sup>rd</sup> parties neither did he have any authority as none was exhibited to the Court to bring this claim on behalf of the people/3<sup>rd</sup> parties he sold to. The result is the entire suit is dismissed with an order that each party bears their costs.

**Dated. Signed & delivered at Mombasa this 22<sup>nd</sup> June 2018**

**A. OMOLLO**

**JUDGE**