



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MOMBASA**

**CIVIL SUIT NO.316 OF 2017 (O.S)**

**KABUNDA KARISA.....1<sup>ST</sup> PLAINTIFF**  
**MBARAK WATO NZAKA.....2<sup>ND</sup> PLAINTIFF**  
**CHARO KARISA JEFWA.....3<sup>RD</sup> PLAINTIFF**  
**DELVIN CHARLES.....4<sup>TH</sup> PLAINTIFF**  
**RIZIKI MWALIMU DAGO.....5<sup>TH</sup> PLAINTIFF**

**VERSUS**

**KARMALLI NATHU AHMED.....1<sup>ST</sup> DEFENDANT**  
**HASHAM ABDULLA SULEMAN.....2<sup>ND</sup> DEFENDANT**  
**SHAHBUDIN KARMALY NATHU.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. By way of Originating Summons dated 23<sup>rd</sup> August, 2017 brought under Order 37 Rule 7 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, Sections 37 and 38 of the Limitation of Actions Act and Section 28 of the Land Registration Act, the Plaintiffs seek the following orders:

- a) A permanent injunction do issue restraining the defendants jointly and severally by themselves or their agents, representatives, employees and or servants and or any person claiming through and or from them from evicting or in any manner whatsoever interfering with the Plaintiffs' occupation, use, possession and or quiet and peaceful enjoyment of all that piece and or parcel of land known and described as Plot Number 381 Section II Mainland North situate at Port Tudor Mombasa District more particularly delineated and described on Plan No. 15068 attached to the certified of ownership No. 3121 and registered at the Coast Registry as Cr. 1922/1.
- b) A declaration that the Plaintiffs have acquired ownership of all that piece and or parcel of land known and described as Plot Number 381 Section II Mainland North situate at Port Tudor Mombasa District more particularly delineated and described on Plan No. 15068 attached to the certified of ownership No. 3121 and registered at the Coast Registry as Cr. 1922/1 by adverse possession and that the defendants hold it in trust for the plaintiffs.
- c) The Registrar of Titles do cancel the title to the suit property being title CR. No. 1922 and register the Plaintiffs as the proprietors thereof of all that piece and or parcel of land known and

described as Plot Number 381 Section II Mainland North situate at Port Tudor Mombasa District more particularly delineated and described on Plan No. 15068 attached to the certified of ownership No. 3121 and registered at the Coast Registry as Cr. 1922/1.

d) Costs be provided for.

The application is supported by the grounds therein and those in the supporting affidavits sworn by each of the Plaintiffs on 23<sup>rd</sup> August, 2017.

2. The Plaintiffs claim that the Defendants are the registered owners of land parcel known as Plot Number 381 Section II Mainland North situate at Port Tudor, Mombasa (hereinafter to be referred to as the "suit land"). However, the plaintiffs contend that they have occupied and possessed the suit land for over twenty (20) years without any interruption or dispossession by the Defendants. For this reason, the Plaintiffs lay claim on the suit land by way of adverse possession.

3. The Plaintiffs allege that they have adversely possessed the Defendants' title to the land as they have exercised all rights of an owner on the suit land without the approval or permission of the Defendants and without any disruption or action by the Defendants. The Plaintiffs, therefore, pray that the Defendants' title to the suit land being title No. CR. No. 1922 be cancelled and the Plaintiffs be registered as the proprietors to the suit land.

4. It is the Plaintiffs' case that the suit land is their sole home from which they earn their income thus if the orders sought are not granted the Plaintiffs will suffer irreparable loss and damage.

5. Despite service by way of advertisement in the newspaper, the Defendants neither entered appearance nor responded to the application.

#### Submissions

6. The Plaintiff filed its submissions on 13<sup>th</sup> July, 2018. Mr. Onyango, learned Counsel for the Plaintiffs submitted that 1<sup>st</sup> Plaintiff entered the suit land in the year 1990 followed by the 2<sup>nd</sup> Plaintiff in 1992, the 3<sup>rd</sup> Plaintiff in 1997, the 4<sup>th</sup> Plaintiff in 1998 and the 5<sup>th</sup> Plaintiff in 2000. Counsel argued that since the Plaintiffs entered the suit land they have openly occupied, used, possessed and controlled the suit land without any challenge.

7. Mr. Onyango stated that the Plaintiffs did not seek the consent or permission of the owners of the suit land (the Defendants) before occupying the suit land. Counsel thus opined that the activities of the plaintiffs were adverse to the interests of the registered proprietors of the suit land.

8. Mr. Onyango admitted that the Defendants or their representatives have visited the suit land twice; in 1997 and 2003 and in each visited they found the Plaintiffs settled on the suit land. However, Counsel claimed that the Defendants did not take any action to remove or interfere with the Plaintiffs' possession, occupation, control and use of the suit land.

9. Mr. Onyango submitted that the Plaintiffs have settled on the suit land for a period exceeding twelve (12) years therefore they have dispossessed the Defendants of ownership of the suit land in light of Section 7 of the Limitation of Actions Act.

#### Analysis and Determination

10. The Plaintiffs admit that the suit land is owned by the Defendants. However, the Plaintiffs claim to have openly occupied and possessed the suit land for over 12 years with the knowledge of the Defendants but without any action by the Defendants to evict the Defendants.

11. Section 7 of the Limitations of Actions Act provides that an action may not be brought by any person

to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person. The Plaintiffs in this instant, claim to have entered the suit on diverse with the first entrance being in 1990 by the 1<sup>st</sup> Plaintiff and the last entry in 2000 by the 5<sup>th</sup> Plaintiff. Evidently, all the Plaintiffs have been on the suit land for over 12 years.

12. The Plaintiffs claim to have openly and continuously occupied and possessed the suit land adversely against the Defendant's title. From the affidavits on record by the Plaintiffs, the court notes this assertion to be true. The Plaintiffs have built permanent structures on the land and have started some income generating activities on the land such as farming. In my view, the Plaintiffs activities on the suit land prove that they dealt with the land as if it was exclusively theirs. The Plaintiffs basically claimed the owners' (Defendants) rights to the land.

13. Did the Plaintiffs then adversely possess the land? In the case of *Kweyu v. Omutut* [1990] KLR 709, the court discussed the principle of adverse possession as follows:

“By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years), it confers an indefeasible title upon the possessor. (Colour of title is that which is a title in appearance, but in reality). Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford Colour, and, second such possession under it as will be adverse to the right of a true owner. The adverse character of the possession must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And the proof must be clear that the party held under a claim of right and with intent to hold adversely. These terms (“claim or colour of title”) mean nothing more than the intention of the dispossessor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land or the period required to form the bar is not sufficient. In other words, adverse possession must rest on de facto use and occupation. To make a possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premises to the occupant's use done publicly and notoriously.”

I do believe that the Plaintiffs entry and possession of the suit land was hostile to the Defendants title. Additionally, the said entry was done publicly. The court notes from the affidavit evidence that the Defendants seemed to be aware of the Plaintiffs occupation of the land. The Plaintiffs admitted that in 1997 and later in 2003, some people who they believed were the Defendants' representatives visited the suit land. However, there is no evidence to show that during the visits the said representatives demanded that the Plaintiffs vacate the suit land. Further, there is no evidence to show that the Defendants have taken any legal steps or action to evict or reclaim their land from the Plaintiffs.

14. Section 17 of the Limitation of Action Act provides that at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished. In this case, the Defendants needed to have brought an action to recover the suit land within twelve years (12) from the entry of each Plaintiff into the suit land. The Defendants failed to do so. Consequently, the Defendants' title to the suit land has been extinguished by law.

15. The Plaintiffs, therefore, succeed in their claim. Orders are issued as follows:

a) A declaration is issued that the Plaintiffs have acquired ownership of all that piece and or parcel of land known and described as Plot Number 381 Section II Mainland North situate at Port Tudor Mombasa District more particularly delineated and described on Plan No. 15068 attached to the certified of ownership No. 3121 and registered at the Coast Registry as Cr. 1922/1 by adverse possession and that the defendants hold it in trust for the plaintiffs.

b) An order be and is hereby issued that the Registrar of Titles do cancel the title to the suit property being title CR. No. 1922 and register the Plaintiffs as the proprietors thereof of all that piece and or parcel of land known and described as Plot Number 381 Section II Mainland North situate at Port Tudor Mombasa District more particularly delineated and described on Plan No. 15068 attached to the certified of ownership No. 3121 and registered at the Coast Registry as Cr. 1922/1.

c) Costs of the suit to be borne by the Defendants.

**Dated, Signed and Delivered in Mombasa this 31<sup>st</sup> October, 2018**

**A. OMOLLO**

**JUDGE**