



**Kadenge & another v Mida Creek Dynamic Limited (Environment & Land Case E002 of 2022) [2024] KEELC 47 (KLR) (18 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 47 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE E002 OF 2022  
MAO ODENY, J  
JANUARY 18, 2024**

**BETWEEN**

**DZAME KAHINDI KADENGE ..... 1<sup>ST</sup> APPLICANT**

**SAMINI KAHINDI KADENGE ..... 2<sup>ND</sup> APPLICANT**

**AND**

**MIDA CREEK DYNAMIC LIMITED ..... RESPONDENT**

**JUDGMENT**

1. By an originating summons dated 22<sup>nd</sup> November 2021, the Plaintiffs moved the court seeking the determination of the following questions;
  - a. Spent
  - b. That the Respondent's interest in all that piece of land known as Kilifi/Mtondia/36 containing by measurement twelve acres (12) or thereabout and situated in Kilifi County has been extinguished.
  - c. That the registrar of titles, Kilifi County do delete entries in favour of the respondent if any on the green card/register and/or register the appropriate discharge in respect thereof without gazettelement.
  - d. That the applicants Dzame Kahindi Kadenge and Samini Kahindi Kadenge be registered as the proprietors of all that piece of land known as Kilifi/Mtondia/36 containing by measurement twelve acres (12) or thereabout in place of Mida Creek Dynamic Limited by reason of the fact that the applicants have become entitled to the said land by adverse possession.
  - e. That the Lands Registrar-Kilifi without gazettelement do proceed and issue a title document for parcel of land known as Kilifi/Mtondia/36 containing by measurement twelve acres (12)



or thereabout in the name of the applicants Dzame Kahindi Kadenge and Samini Kahindi Kadenge.

- f. That the orders referred to in paragraphs 2, 3, 4 and 5 above be registered against the title to property known as Kilifi/Mtondia/36 containing by measurement twelve acres (12) or thereabout in terms of Section 38(2) of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
- g. That the Land Register, Kilifi do dispense with the production of the original title document and all other legal documents to be produced by Dzame Kahindi Kadenge
- h. That the costs of this Originating Summons be provided for.

### **Plaintiff's Case**

2. PW1 Dzame Kahindi Kadenge adopted her Witness Statement dated 22<sup>nd</sup> November 2021 as her evidence and produced as PEX 1-5 the bundle of documents in their list of documents and stated that she was born on 1<sup>st</sup> January 1969.
3. It was PW1's testimony that they took possession of the suit property before independence and have stayed on the land for over thirty years. PW1 also stated that they occupy 15 acres of the property where they have built rental houses and fixed electricity. It was her evidence that the owner of the suit property had not given them permission to stay on the land and had never asked them to leave.
4. PW2 Kahindi Samini Kadenge adopted his Witness Statement dated 22<sup>nd</sup> November 2021 as his evidence and stated that they occupy twelve acres of the suit property where they have built rental houses, keep livestock and farm.
5. It was PW2's testimony that he was born on the suit property and does not know the owner of the suit property. PW2 also stated that no one has ever told them to vacate.
6. Despite service, the Defendant neither entered appearance nor participated in the proceedings.

### **Plaintiffs' Submissions**

7. Counsel for the Plaintiffs reiterated the evidence on record and submitted on the following issues;
  - a. Whether the Plaintiffs have acquired rights over the suit property?
  - b. Whether the Defendant's rights jointly and severally over the suit property has been extinguished.
  - c. Whether the Plaintiffs have any other remedies available to them or not?
8. Counsel cited the case of *Tabitha Waittherero Kimani vs Joshua Ng'ang'a* [2017]eKLR and submitted that the Plaintiffs have been in open, exclusive and notorious use of the suit property for a continuous period of over thirty years without the permission of the registered owner of the suit property.
9. Counsel relied on Articles 40(1) and 60(1) of the *Constitution of Kenya*, Sections 7, 9, 13, 17, 37 and 38 of the *Limitation of Actions Act*, cited the cases of *Kabindi Ngala Mwangandi vs Mtana Lewa* [2014]eKLR, *Titus Kigoro Munyi vs Peter Mburu Kimani* Civil Appeal No. 28 of 2014 and submitted that the Plaintiffs have never seen the Defendant on the suit property and so they concluded that it had left the land unused and unmanned for a period of thirty years.



## Analysis and Determination

10. The issue for determination is whether the Plaintiffs have proved that they have acquired the suit property by way of adverse possession.
11. Section 7 of the *Limitation of Actions Act* Provides as follows;

“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.”
12. Section 13 of the *Limitation of Actions Act* also provides as follows;

“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes adverse possession of the land.

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be adverse possession of the land.”
13. The Court in the case of *Bedan Maina Njoroge v Patrick Ngaruiya & another* [2021] eKLR held as follows:

“33. The *Limitation of Actions Act* does not expressly define adverse possession. Nevertheless, case law is awash with what adverse possession entails and generally it 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. See Court of Appeal decision in *Mtana Lewa –v Kahindi Ngala Mwangandi* (2005) eKLR. It is also a well settled principle that a party claiming Adverse Possession ought to prove that this Possession was “nec vi, nec clam, nec precario,” that is, peaceful, open and continuous. The Possession should not have been through force, no in secrecy and without the authority or permission of the owner. These doctrines are internationally accepted and were specifically reiterated by the South Africa Supreme Court in the case of *Z F Stoffberg NO & others v City of Cape Town* (1325/2017) [2019] ZASCA.”
14. In the present matter, the Plaintiffs allege that they took possession of land parcel No. Kilifi/Mtondia/36 without the permission of the registered owner and have been in occupation for a period of over thirty years. They also allege that their occupation of the suit property has been peaceful and



- they therefore seek to be declared to have acquired it by way of adverse possession. As noted before, despite service the Defendant neither entered appearance nor filed any pleadings.
15. The Plaintiffs have annexed a copy of a certificate of search for land parcel No. Kilifi/Mtondia/36 which showed that on 22<sup>nd</sup> October 2014, the defendant Mida Creek Dynamic Limited was registered as the owner and a title deed was issued on the same date.
  16. The court in the case of *Gabriel Mbu v Mukindia Maranya* [1993] eKLR held as follows;

“In the case of registered land, adverse possession dates from the granting of the certificate of title, for that is when the title holder is prima facie entitled to possession and, therefore, entitled to take action against any intruder to the land (Sir Joseph Sheridan, CJ, in *Alibhai v Alibhai* [1938] 5 E A C A 1 at 3, 4; Miles, J, in *Gathure v Beverly* [1965] E A 514; and Hancox, J (as he then was) in *Wandera and another v Attorney – General* [1976] Kenya L R 275, at 276).” (emphasis mine).
  17. The Court of Appeal in the case of *Titus Kigoro Munyi v Peter Mburu Kimani* [2015] eKLR also held as follows;

“In the case of Francis Gitonga Macharia – v- Muiruri Waithaka, - Civil Appeal No. 110 of 1997 this Court stated that the limitation period for purposes of adverse possession only starts running after registration of the land in the name of the respondent. It follows that in the instant case; time for adverse possession could not run against the respondent prior to the year 1978 as he had no proprietary interest in the suit property. Time for adversity cannot run against a person who has no interest in the property.”
  18. Even though the Plaintiffs allege that they have been in possession of the suit property for a period of over thirty years, the Defendant was registered as the owner of the suit property on 22<sup>nd</sup> October 2014. As at the time the Plaintiffs were filing the present suit 2022, the Defendant had only been registered as the owner of the suit property for a period of eight years. As was held in *Titus Kigoro Munyi v Peter Mburu Kimani* (supra) cited above, the limitation period for purposes of adverse possession begins to run from the date of registration of the land in the name of the Defendant. In the present case the mandatory period of twelve years is yet to lapse and therefore the orders sought by the Plaintiffs in their Originating Summons cannot be granted as they are premature.
  19. Consequently, the Plaintiffs Originating Summons dated 22<sup>nd</sup> November 2021 lacks merit and is therefore dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 18<sup>TH</sup> DAY OF JANUARY 2024.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

