



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA

ELC CASE NO.259 (O.S) OF 2012

- 1. ANZWAN M SALIM**
- 2. KHASIM OMAR CHUMA**
- 3. JUMA NGALA MWAGANDI**
- 4. KARANI CHARD JILO & OTHERS.....PLANTIIF**

VERSUS

- 1. AHMED ALI SAID AND OTHERES**
- 2. SALIM ALI SAID (*as trustee of Abdurrahim Bin Ali and their children*)**
- 3. BENJAMIN ODERA ONGOLADEFENDANTS**

JUDGEMENT

INTRODUCTION

1. The plaintiffs took out an Originating Summons claiming adverse possession against the defendants in relation to all that piece of land situate in Mombasa Municipality measuring 14.6 acres or thereabouts and being sub-division number 244 of section II Mainland North which said piece of land is comprised in a certificate of Title dated 10th October 1921 registered in the Land Titles Registry at Mombasa as Number CR 1218/1. They sought orders that the defendants' title to the suit property be extinguished by virtue of adverse possession and the same be registered in their favour as proprietors.

2. In support of the Originating Summons, the plaintiffs filed four affidavits sworn by the 1st, 2nd, 3rd and the 4th plaintiffs. In his affidavit sworn on 12th November 2012, Anzwan M. Salim, the 1st plaintiff states that the plaintiffs and their families have been in occupation of the suit land for over 25 years and have developed it openly by constructing both permanent and temporary houses, shops, schools and play grounds and that they have also cultivated some part of it and planted food and cash crops. It was the plaintiff's case that for the entire period that they have been in occupation of the suit property, no one has ever come forward to claim ownership of the same.

3. It was further deponed that the plaintiffs did not know the registered owner of the said property and only came to know about them when they heard an announcement over the radio by the then Mombasa Municipal Council who were threatening to auction some plots due to default in the payment of rates by

property owners. It was then that the plaintiffs obtained the outstanding rates invoice for the suit property and conducted a search at the Lands Registry which revealed that the property belonged to the defendants in this case.

The plaintiffs state that they have known the suit property as their only home and have been in uninterrupted exclusive physical occupation for a continued period of over 25 years. The plaintiffs in their supporting affidavit have attached photographs of some permanent and temporary houses and crops said to be on the property and belonging to the plaintiffs. The plaintiffs therefore believe that they have a valid claim of adverse possession against the defendant. They have annexed a copy of the certificate of ownership in their affidavit as required.

4. Service of pleadings was done by way of an advertisement in the Standard Newspaper. No appearance was made by the defendants and therefore the case was not defended. The suit proceeded by way of affidavit evidence and the plaintiffs also filed written submissions in which they reiterated the grounds on the Originating Summons as well as the contents of their supporting affidavits. The plaintiffs' counsel also relied on decided cases.

5. The law on adverse possession is now well settled. In **WAMBUGU –VS- NJUGUNA 1983 (KLR)173**, the Court of Appeal held that adverse possession contemplates two concepts: dispossession and discontinuance of possession. The Court of Appeal further held that the proper way of assessing proof of adverse possession would then 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.

6. The requirements for adverse possession in the Kenyan situation has also been set out in the case of **Mbira vs- Gachuhi (2002) IEALR 137** in which the court held that: "...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..."

Likewise, in **JANDU -VS- KIRPLAL AND ANTOHER (1975)EA 225** it was held: "...to prove title by adverse possession, it is not sufficient to show that some acts of adverse possession have been committed. The 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."

7. In the recent case of **MTANA LEWA -VS-KAHINDI NGALA MWAGANDI(2015) eKLR**, the court of Appeal 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." 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 use of force, not in secrecy and without the authority or permission of the owner.

8. This being a claim for adverse possession, the plaintiffs must show the following:

- i. THAT they have been in continuous and uninterrupted possession of the land for 12 years or more.**
- ii. THAT such possession has been open and notorious to the knowledge of the owner.**
- iii. THAT such possession was without the permission of the owner.**
- iv. THAT the plaintiffs have asserted a hostile title to the owner of the property.**

9. In the case of **PARKLANDS PROPERTIES LTD VS-PATEL (1981) KLR 52**, it was held that:

“the issue whether a party’s possession of a piece of land is adverse is a matter of evidence, and a decision thereon depends upon whether the party alleging adverse possession successfully established the particulars of adverse possession pleaded.”

10. In their evidence, the plaintiffs stated that they have been in occupation of the suit property for over 25 years. They also state that they have been in occupation and possession of the suit property openly and continuously and without interruption for all that period. The plaintiffs produced photographs showing vast developments of both permanent and temporary structures. The said buildings were said to comprise the plaintiffs’ homes, shops and schools among other. Such vast developments must have been undertaken openly and over a period of time. There was no evidence available to contradict the plaintiffs’ averments.

11. Considering the totality of the available evidence in this case, and applying the legal principles as outlined above, it is clear that the plaintiffs have proved their case on a balance of probability and have brought themselves within the limits of the doctrine of adverse possession. In the result, the suit by way of originating summons filed herein on 13th November 2012 is allowed in terms of prayers 2,3,4,5 and 6 thereof with costs.

Judgment delivered, signed and dated at Mombasa this 4th of April 2017

C. YANO

JUDGE