



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**  
**ELC CIVL CASE NO. 209 OF 2011**  
**THE PUBLIC TRUSTEE (Suing as the Administrator of he**  
**Estate of GIDEON MGANGA MWANDEMBE).....PLAINTIFF/APPLICANT**  
**-VERSUS-**  
**PIUS M. KATAMBO.....DEFENDANT/RESPONDENT**

**JUDGEMENT**

1. Vide a plaint dated 13<sup>th</sup> July 2011 and filed in Court on 20<sup>th</sup> July 2011, the plaintiff prayed for judgement against the defendant in the following terms:

a. **An eviction order against the defendant, by himself or his servants, agents or any person claiming through the defendant from the suit property, Plot No. L.R 1956/355 situated within Voi Municipality.**

b. **A permanent injunction be issued restraining the defendant by himself, his servants, agents or any person claiming through the defendant permanently from entering the suit land, from any further construction and or developments of any kind whatsoever on the suit property, Plot No. L.R 1956/355 situated within Voi Municipality.**

c. **Costs.**

2. The defendant opposed the suit vide his defence dated 24<sup>th</sup> August 2011 and filed in Court on the same day together with his documents. Once the pleadings closed, parties adduced oral evidence. The plaintiff called two witnesses while the defendant called three witnesses.

3. Colman Nyamba Mganga testified as PW 1. He stated that he is a lecturer at Technical Training Institute Mombasa and also a beneficiary of the estate Gideon Mganga Mwandembe. PW 1 stated that the public Trustee is the administrator of the estate as shown by the certificate of grant produced as Pex 5. PW 1 continued that the deceased saw a gazette notice (Pex 25) and applied for a plot. Upon the application he was given a letter of offer and the deceased paid the requisite amount as shown in Pex 7 & 8. The letter of offer required the deceased to submit building plans which he did. Later he was issued with a grant by the commissioner of lands. PW 1 stated further that he reported to the Public Trustee that the defendant was carrying out illegal activities on the land upon which the public Trustee wrote a demand letter (Pex 14) and the defendant's response as Pex 15.

4. The witness continued that the Public Trustee advised him to conduct a search which he did on 14.2.2011. When the defendant began building a wall, PW 1 again reported to the Public Trustee. That the deceased used to get demand notices for rates from the county government which he paid. (Pex 19 (a) & (b) and also paid rents (Pex 20 (b) & 20 (c)). The witness stated that the commissioner of lands revoked the defendant's offer vide a letter dated 9<sup>th</sup> May 2005 (Pex 24). He continued that the deceased obtained title in 2002. It is PW 1's evidence that they are suffering because they have not made use of the property. His prayer is that the defendant should be evicted as the suit property belongs to the deceased who obtained it through regular allocation following due process.

5. On cross – examination, PW 1 said the deceased was allotted the plot (Pex 6) and made acceptance within 30 days on 19-5-1977 when he paid by a cheque enclosed in acceptance the letter. He was issued with a receipt dated 9-6-1977. That his father visited the plot several times. PW 1 said their lawyer engaged a surveyor in 2003 who visited the site. That the first documentary evidence of the deceased attempt to remove the defendant was the letter of Macharia Kimani dated 26.2.2003 (Pex 18 (a)). PW 1 said the defendant was also issued with a letter of allotment on 1.7.1992 (DMF 13) which was revoked because the plot was already committed elsewhere. The witness did not know whether the defendant received this letter or contested the revocation. He was not aware that the lands office was tasked with preparing a formal report as shown in (DMF 1 – 6 (a) of (23-2-2009) or whether such a report was prepared as per DMF 1 – 6 (b) of 20.3.2009.

6. PW 1 said he was unaware the issue of this plot went to Voi Municipal council physical planning committee nor was he aware of Voi Municipality decision of 2005 stating that the defendant should be given priority as shown in minutes Dex 1 – 7. That his father was given a grant in 2002 pursuant to the allotment of 1977. He admitted that they have never taken possession of the suit plot. Further that the report of Kigum (Pex 21) confirms the plot is developed with structures on it. That the deceased started the process of taking the defendant to Court in 2003. PW 1 said they have not paid land rates to the council. He was unaware of the report dated 29.4.2005 nor has he received such communication. That he was not taking advantage but only furthering what his father started. He did not know the defendant was on the land as early as 1975. He has a plan approved by the council (Pex 11). His intention is to have the defendant removed.

7. In re – examination PW 1 stated that the deceased was allocated land on 23.4.1977 and he issued a cheque on 19.5.1977 which was within 30 days. That the duty to issue a receipt was on the commissioner of lands. That the deceased asked the defendant to move out orally in 2000. He asked the Court to rely on the letter Pex 24 revoking the allotment reference No 86045/26. Further no one has challenged the title issued to his father. That the defendant's document dated 23.2.2009 recognised the deceased as the registered owner. His father died on 4.5.2004 and DMF 1 6 (a) was never copied to him or the administrator. That DMF 1 – 1 the business is registered on plot No 16 Baza street which has no relationship with the suit plot. He is unable to develop the plot because the defendant is in possession.

8. DANIEL MWIRIGI NGERA testified as PW 2. He is the senior legal management officer in the Public Trustee office Mombasa. PW 2 said he keeps records of documents in regard to estate of deceased persons. That the estate of Gideon Mganga Mwadembe was reported to the Public Trustee and he was given several documents inter alia title deed for plot No 1956/355 in Voi Municipality. He also received a building plan dated 19.9.1979 approved by the county council of Taita Taveta & the commissioner of lands which plan he produced as Pex 25. PW 2 continued that the Public Trustee obtained letters of administration which were subsequently confirmed and produced as Pex 26. That the deceased assets are listed in the certificate.

9. In cross – examination, he said he is conversant with the process of obtaining letters of administration. That the estate has not been distributed. The grant has list of beneficiaries, list of properties and the values of the properties. The grant was confirmed on 13.8.2013 but has not been distributed because of this dispute. He did a search over the suit property but did not go to the ground to ascertain who is in possession. PW 2 said he does not know the defendant nor that he was in occupation since 1975. That they administer estates until disputes are resolved and estate distributed. With this evidence, the plaintiff closed his case.

10. The defendant testified as DW 1. He adopted his statement signed on 24.8.2011. The suit plot is in Voi Municipality where he has been doing his activities since 1975. His documents filed on 25.8.2011 was produced as a bundle A 1 – 7 and the supplementary list filed in Court on 5.8.2012 as exhibits B 8 – 11.

11. On cross – examination, DW 1 said reference to plot No 1960/355 was a typographical error. That he has not produced Kenya Revenue Returns to show he has been paying tax. That he discovered the land was government land in 1992. He admitted the business is indicated to be on plot No. 16. That he has structures on the suit plot but he did not have council approvals for the same. That he was given the plot by government as per Dex 3. He was aware his allotment was revoked but he complained. He also knows the title was issued in the name of the deceased but he has not sued for the title to be cancelled. He did not have notice of Pex – 25. DW 1 denied living on the plot illegally as he was given the same by the county council. He said his structures are semi – permanent. On re – examination he said he is on the plot. That Dex – 2 the trade licensing authority issued a licence for plot No 1956/355. He said he has never been served with demand notice to vacate and he has been on the plot from 1975 – 2011 without any disturbance. That the letter of 2001 (Pex 240 is what made him know about the title and it confirmed he was on the suit plot. He urged the Court to dismiss the case.

12. Richard Mwangala testified as DW 2. He adopted his statement which he signed on 27<sup>th</sup> September 2012. He said he has known the defendant since 1975 doing business on the suit plot. DW 2 said he previously served as a councilor for the area where the plot is between 1984 – 1992. He did not know the deceased owned the plot. During cross – examination. DW 2 said he does not know the plot number. That it is the government who issues plots. That the record of the council can confirm who the owner of the plot is. DW 2 continued that he knew the defendant as a businessman in the 70s. He also learnt that the defendant had an allotment. That the defendant applied for a plot. He was aware of the gazette notice. That they were regularising how plots were being allocated. He did not have the minutes he referred to in his statement. He remembers attending sittings to hear complaints on plot allocations.

13. James Job Mkaya testified as DW 3. He also adopted his statement filed in Court on 5.10.12. DW 3 stated that he knows the suit plot belongs to the defendant. That they are peers and he knows the defendant has been doing business of hard ware and timber sales on the suit plot. Further that the defendant has structures on the suit plot which he has occupied from 1975 to date. In cross – examination he said they were separated when he began working in Mombasa. That the defendant began business on rental premises in 1972 before he got this plot. He would be surprised that the deceased is registered as the owner of the plot. DW 3 said that he also applied for a plot and was given which he occupies. The defendant then closed his case.

14. After both parties closed their case, they filed written submission which I wish to make references to in the body of this judgement. It is not in dispute that plot number 1956/355 is registered in the name of Gideon Mganga Mwadembe – deceased since 2002 as shown in Pex 25. It is also not in dispute that the defendant is in physical possession of the land. Further it is not denied that the deceased and or his beneficiaries have never taken possession. Consequently I do frame the following issues raised by the parties as forming questions for my determination:

**i) Whether the Public Trustee lacks locus to bring this suit.**

**ii) Whether the plaintiff's suit is time – barred.**

**iii) Whether the defendant is entitled to the land by virtue of the provisions of limitation of actions (adverse possession).**

**iv) Whether if (i) – (iii) above is in the negative, the plaintiff is entitled to the prayers in his plaint.**

15. The defendant submitted that the Public Trustee having confirmed the estate, it had no locus to file a suit on behalf of the estate i.e. that an administrator has no role as soon as the grant is confirmed. When

this suit was filed in 2011, the letters of administration issued on 30.9.2010 had not been confirmed. The grant was confirmed during the pendency of the suit on August 2013. According to the defendant, the plaintiff should have been amended to bring on board the beneficiaries. The defendant in effect is admitting that the Public Trustee had locus when the suit was commenced and only lost the locus after the grant was confirmed in 2013. First they did not cite any law to support this averment. Secondly the beneficiaries taking over would apply as an option and only after distribution. The plaintiff's case is that distribution has not been done. I find that there is no clear basis for pleading and submitting that the Public Trustee did not have locus when it brought the suit as duly appointed administrator of the deceased estate.

16. The second issue is whether the plaintiff's suit is time barred. The defendant relied on the provisions of section 7 of the Limitation of Actions Act Cap 22 which bars an action to recover land not to be brought after the end of 12 years from the date on which the right accrued. The defendant did not however address me on when the right accrued in favour of the plaintiff. From the evidence on record, the deceased was given a letter of allotment on 23.4.1977 for which he made payment on 19.5.1977 as his acceptance of the offer. The grant was forwarded to the registrar of titles Mombasa for registration on 22<sup>nd</sup> February 2002. The deceased became the registered owner on 25<sup>th</sup> September 2002 when he was issued with grant No CR 35947.

17. My understanding of the law is that the deceased obtained rights of proprietorship of the suit land upon registration. Before then, the land could be said to belong to the government. Consequently time began running for purposes of section 7 of Cap 22 from 25<sup>th</sup> September 2002. It follows therefore that when this suit was filed on 20<sup>th</sup> July 2011, twelve (12) years had not lapsed and the averment that the same was time barred is not true.

18. Based on the provisions of section 7 of Cap 22, the defendant went further to state that having been on the land from 1975 to 2011, he acquired the rights by way of adverse possession. It is indeed true that the defendant is in possession of the suit property as corroborated by the evidence of PW 1 who said his father attempted to evict the defendant in 2003 by serving him a notice to vacate. The evidence of DW 2 and DW 3 also did confirm that the defendant is carrying on business on the suit premises. Whether the defendant acquired the rights of an adverse possessor would also lie on the question when time began running. Who was the owner of this land before 2002?

19. The defendant in his evidence denied being a trespasser stating that he was given permission by the Voi Municipality. The defendant also stated that when he came to know the plot was government land in 1992 he applied for a plot the same year and was given a letter of offer dated 10<sup>th</sup> July 1992. This means that the defendant was aware from 1975 that the land belonged to the County Council and by 1992 that the same belonged to the government. A claim for adverse possession cannot arise against the government as provided under section 41 (1) of Cap 22. In my opinion and I so hold, the time would therefore not run in favour of the defendant against the plaintiff in view of the circumstances that both appeared to hold letters of allotment from the commissioner of lands. They were having competing interest until the time the deceased secured a title in his name in 2002.

20. It appears from the documents of the plaintiff that the allotment issued to the defendant was later revoked because the land was already committed. This does not help the defendant's case for the claim of adverse possession. In 2005, being aware of the plaintiff's registration of the suit plot, he lodged a complaint with Voi Municipality. This is confirmed by the evidence of DW 2 who said he attended the council meeting which deliberated on the defendant's complaint. The defendant went further to produce minutes of the Voi Municipal physical planning Liaison Committee of 2005. Minute No 7 discussed the plot in dispute between the defendant and the deceased in which the committee stated the deceased should be considered for an alternative plot. The letter dated 29.4.2005 by the district land officer, Taita Taveta also referred to the issue of double allocation and the deliberations by Voi Municipal Council.

21. For a claim of adverse possession to succeed, the claimant must show that he is in open, peaceful & uninterrupted occupation of the suit premises for a period of over 12 years. In the instant case, I find quite a number of interruptions first by the defendant being given letter of allotment he cannot state time would run in his favour from 1977 when he was claiming ownership from the government. Secondly

between 2002 – when the deceased became registered owner to 2011 when the suit was filed is only nine (9) years. It was nine years full of complaints lodged by the defendant. The same cannot be said to have been peaceful and uninterrupted. This line of defence fails. Section 38 (1) of Cap 22 also states: ***“where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of land.”*** Adverse possession thus assumes some registration to have taken place which in this case took place in 2002.

22. The last issue is whether the plaintiff is entitled to the prayers. The plaintiff has submitted in detail on the provisions of rights of a proprietor under section 23 (1) of the Registration of Titles Act (repealed). The provision has been reproduced under section 24 & 25 of the Land Registration Act which gives a registered proprietor to enjoy rights and interest over land unless the title is challenged under the provisions of section 26. The plaintiff adduced evidence through PW 1 that the deceased followed due process in acquiring his title. The defendant did not question the authenticity of the plaintiff’s title in his defence nor did he submit that the same was fraudulently acquired. As things are, the plaintiff holds title that is unchallenged and is valid. PW 2 produced a search certificate confirming the suit plot is registered in the name of Gideon Mganga Mwadembe with no encumbrance. It is therefore fair and just that his estate do obtain possession with all rights appurtenant thereto.

23. In conclusion, I am satisfied that the plaintiff’s case is proved and accordingly I enter judgement for him as prayed in the plaint. The defendant is hereby given 60 days to remove his structures from plot No 1956/355. In default the plaintiff be at liberty to remove them and recover the costs if any from the defendant.

**Dated, signed & delivered at Mombasa this 25<sup>th</sup> day of May 2017**

**A. OMOLLO**

**JUDGE**