



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO.214 OF 2014**

**SURJIT SINGH.....1<sup>ST</sup> APPLICANT**

**MALKIAT SINGH.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**NOOR MOHAMMED VALJI.....RESPONDENT**

**JUDGMENT**

1. **Surjit Singh** and **Markiat Singh**, the Applicants, filed the originating summons dated 11<sup>th</sup> July 2014 seeking to be declared the registered owners of land parcel **L.R. 654/18** through adverse possession and an order directing **Noor Mohammed Valji**, the Respondent, to transfer the said land to them be issued and in default the Deputy Registrar be authorized to effect the transfer. The originating summons is based on six grounds marked (a) to (f) on its face and supported by the Applicants joint affidavit sworn on 16<sup>th</sup> July 2014 to the effect that they took physical possession of the suit land in 1970 and have been using it for farming and operating a jaggery factory on it without any interruption for the last 44 years.

2. The originating summons was served through the press vide Standard Newspaper of 11<sup>th</sup> May 2015 and an affidavit on service sworn by Mitchell J.B. Menezes on 24<sup>th</sup> May 2016 has been filed.

3. The Respondent did not enter appearance and the matter was listed for formal proof on the 27<sup>th</sup> July 2016 when counsel for the Applicants indicated that they will rely on the affidavit evidence filed. The learned counsel then filed written submission dated 23<sup>rd</sup> August 2016. The learned counsel referred the court to the case of **Mtana Lewa Kahidi Ngala –V- Mwangandi Malindi** C.A. No.56 of 2014, **Virginia Wanjiku Mwangi –V- Virginia Wanjiku Mwangi** ELC No. 86 of 2014, **Article 64 and 40 of the Constitution, Sections 13, 37 and 38 of the Limitation of Actions Act Chapter 22 of Laws of Kenya** and asked that the land be registered in the names of the Applicants.

4. That the following are the issues for the court's determination;

- a) Whether the Respondent is the registered proprietor of the land parcel L.R. 654/18.
- b) Whether the Applicants have been in adverse possession of the said land for more than 12 years continuously.
- c) Whether the Respondent's title to the land has been extinguished through prescription.
- d) Whether the Applicants should be declared the owners of the said land and be registered as

proprietors.

e) Who pays the costs.

5. The court has considered the grounds on the originating summons, the affidavit evidence by both Applicants, submissions by their counsel and come to the following determinations;

a) That the provisions of **Order 37 Rule 7 of Civil Procedure Rules** requires the Applicant of a suit of this nature to file an extract of the register for the land subject matter of the originating summons with the supporting affidavit. The Applicants have in an effort to comply with this requirement attached a copy of an indenture made on the 28<sup>th</sup> April 1959, between Avalbhai wife of Alibhai Haji as vendor, and Noor Mohamed Valji as purchaser over premise described as Plot number **654/18**. They have also annexed another indenture of the same date between Alibhai Haji as mortgagee, and Alibhai Haji and Fatmabai Widow of Jiwa Walji as administrators over the said parcel of land.

b) That the copies of the indentures referred to in (a) above dated 28<sup>th</sup> April 1959, which is about 55 years to the date this originating summons was filed does not suffice for the purposes of **Order 37 Rule 7 (2) of Civil Procedure Rules** which states;

“7.....

(2) the summons shall be supported by an affidavit to which a *certified extract of the title* to the land in question has been annexed.”

c) That further to the findings above, the requirement of a certified extract of the title is in the opinion of the court primarily meant to confirm to the court that the land subject matter of the originating summons is at the time of filing of the suit, in the name of the Respondent. The copies of the indentures herein provided, not being certified extracts of the suit land from the Land registry, cannot be taken to be evidence that the person named as the proprietor on the documents dated 1959 was still the registered proprietor as of the time of filing of the suit.

d) That the court finds that the Applicants have failed to comply with the mandatory requirements of **Order 37 Rule 7 (2) of Civil Procedure Rules** as no certified extract of the suit land has been annexed to the supporting affidavit filed in support of the originating summons.

6. That flowing from the foregoing, the court finds that the Applicants have failed to prove their case against the Respondent on a balance of probabilities and their suit, commenced through the originating summons dated 11<sup>th</sup> July 2014, is dismissed.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 21<sup>ST</sup> DAY OF JUNE 2017**

**In presence of;**

**Applicants Absent**

**Respondent Absent**

**Counsel**

**Mr Maganga for the Plaintiff**

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**21/6/2017**

**21/6/2016**

**S.M. Kibunja Judge**

**Oyugi court assistant**

**Parties absent**

**Mr. Maganga for the Plaintiff**

**Order: Judgment dated and delivered in open court in presence of Mr. Maganga for the Plaintiffs/Applicants.**

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**21/6/2017**