



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO NO. 243 OF 2014**

**IN THE MATTER OF : PLOT NO. KWALE/GUNDUNI/398**

**AND**

**IN THE MATTER OF : AN APPLICATION FOR DECLARATION THAT THE APPLICANT/PLAINTIFF HAS OBTAINED OWNERSHIP OF 10.48 HA OF THE ABOVE MENTIONED LAND BY WAY OF ADVERSE POSSESSION**

**BETWEEN**

**NYANJE MWANBODZE MWANJIRANI.....APPLICANT/PLAINTIFF**

**-AND-**

**ANASTACIA WANJIKU KAMAU.....RESPONDENT/DEFENDANTS**

**JUDGMENT**

1. Originating Summons under Order 37 Rule 1, 214 and 15 of the Civil Procedure Rules 2010, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law.
2. LET ANASTACIA WANJIKU KAMAU within fifteen (15) days from the service of this summons to enter appearance to this summons which is issued on the application of:
  - a) NYANJE MWANBODZE MWANJIRANI of Lunga Lunga within Kwale County who claims to be proprietor of 10.48 hectares of land LR. No Kwale/Gunduni/398 by adverse possession for determining the following;
  - b) Is the Plaintiff/Applicant entitled to be declared as the proprietor of parcel of land being L.R. No Kwale/Gunduni/398 which he has acquired by adverse possession after him staying and/or occupying, residing on the parcel of land for over 12 years?
  - c) Is the Plaintiff/Applicant entitled to be registered as the owner of LR. No Kwale/Gunduni/398 and be issued with a title deed?
  - d) Is the Plaintiff/Applicant entitled to the costs of this suit?
3. The Originating Summons is dated 23<sup>rd</sup> September 2014. The application is supported by the affidavit of Nyanje Mwambodze Mwanjirani sworn on the 23/9/2014 and filed in court on the 24/9/2014.
4. There is a replying affidavit sworn by Anastacia Wanjiku Kamau, the Respondent herein on the 10/4/2015 and filed in court on the 13/4/2015.
5. On the 22/6/2016, directions were taken to the effect that the matter do proceed by way of viva voce evidence. That the originating summons be treated as the plaint and the Replying Affidavit as the defence. On the 12/6/2017 the matter proceeded to hearing.
6. P.W.1 Nyanje Mwanbodze Mwanjirani told the court that he bought the parcel of land from one Mzee Jumaa Mwamtunda. He told the court that he would not recall the year but it was a long time ago. That the agreement was not reduced into writing but he paid Kshs3000/=. He further told the court that he resides on the said land.

7. At one time he was called to area chief and given money. His children later told him the money was for the sale of the house. He then refunded the money. He produced the note (letter) showing he had refunded the money as exhibit P1. He told the court that he has lived on the land for over sixty (60) years and prays that he be declared to have acquired the land through adverse possession and be issued with a title deed.

P.W.2 Chaka Shobo told the court that he has known P.W.1. since 1971 to be living on the said land. That he had constructed houses and did some developments. The witness statement of Martin Ngabu was adopted as part of the Plaintiff/Applicants evidence. In his witness statement dated 7/9/2014, Martin Nyabu told the court that he settled in the area in 1974 and found P.W.1 living on the suit property. That it is only in 2014 when somebody claimed ownership of the suit property.

8. The Respondent Anastacia Wanjiku Kamau told the court that her husband Micheal Kihura bought the parcel of land from Mohammed Abdalla Pongwe in 1988. That she is the administrator of the estate of her late husband. She produced a copy of title as exhibit – D1.

She further told the court that the land was sold to Francis Waiganjo who agreed to pay the Applicant kshs 100,000/= so that he could vacate the suit land. The Applicant received the money which he has not refunded.

9. I have considered the originating summons and the annexures, the replying affidavit and the annexures. I have considered the evidence, the written submissions and the provisions of the law. Both parties have cited case law which I have had occasion to read.

10. The Applicant cited;

a) Sections 7, 9, 13 and 38 of the Limitation of Actions Act.

**b) Peter Mbiru Michuki –versus- Samuel Mugo Michuki(2014) eKLR.**

**C) Virginia Wanjiku Mwangi –verses- David Mwangi Jotham Kamu (2013) eKLR**

The Respondent cited the following authorities:

**i) Kasuve –Versus- Mwaani Investment Limited And 4 Others (2004) KLR 184.**

**ii) Mbira –Versus- Gichuhi (2002) IEA Pg 138.**

**iii) Sophie Wanjiku John –Versus- Jane Mwihi Kimani, Nairobi ELC No. 490 of 2010.**

11. The issues of determination are;

a) Whether the Applicant is entitled to be declared as the proprietor of LR. No Kwale/Gunduni/398 which he has acquired by adverse possession.

b) Whether he is entitled to be registered as the owner of the suit property.

c) Who should bear costs of the suit

In the case of **Kasuve –versus- Mwaani Investments Limited And 4 Others (2004) KLR 184**, at page 188 it was held “**in order to be entitled to land by adverse possession the claimant must prove that he has been in exclusive possession of land openly and as of right and without interruption for a period of 12 years either after disposing the owner or by discontinuation of possession by the owner on his own volition.**”

12. It is the Plaintiff/Applicants case that he bought the suit property from Jumaa Mwamtunda. That he has never used force to occupy the suit property neither has he used force to continually remain in possession to the date of filing the originating summons.

He appears not to recall the date he bought the suit property. He was unable to call any witness to confirm the transaction.

He failed to prove that there was an agreement between him and the late Mzee Jumaa Mwamtunda in respect of the suit property. He further told the court that he was on the land when the adjudication process was undertaken. He does not explain why he was not registered then.

13. He admits to having had a dispute with Mohammed Abdalla Pongwe over the suit property. He said he took the dispute before the adjudication committee. The committee ordered Mr. Mohammed Abdalla Pongwe to pay him for the crops and other developments on the suit property. The said Mohammed later disposed the suit property to Michael Kihura, the Respondent’s late husband. This means the elders came up with the decision that the Plaintiff/Applicant ought to have vacated the suit property hence his stay on the land cannot be said to be uninterrupted. The proceedings of the case before the adjudication committee were annexed to the Replying affidavit. The Plaintiff/Applicant did not appeal against the decision.

14. In paragraph 13 of his supporting affidavit he admits there exists Kwale ELC Case No. 30 of 2014 in which the Plaintiff in that suit seeks that he be evicted from the suit land.

I find that his admission, that there are several disputes arising out of his stay at the suit land shows that he has not had peaceful possession. As things stand now the suit property is registered in the names of the Respondent. The said title was issued on 6/6/2012.

As per section 24, 25 of the Land Registration Act 2012 the Respondent is the absolute proprietor of the suit property. When does time start running? The title was issued to the Respondent on 6/6/2012. For the Plaintiff/Applicant to claim adverse possession he ought to have been on the land for a period of twelve (12) years. I find that the 12 years have not expired yet.

From 6<sup>th</sup> June 2012 it is only two (2) years. Indeed the Plaintiff/Applicant depends on this title deed which was issued on 6/6/2012 to advance his claim. He has annexed it to the originating summons. Time therefore starts running from 6/6/2012 hence the claim has not crystallized.

15. The evidence of Chaka Shobo (P.W.2) and Martin Nguba who claim they have been seeing the Applicant on the land for many years does not change the above position. They did not appear to know under what circumstances the Plaintiff/Applicant entered the said land.

16. All in all, I find that the Plaintiff/Applicant has failed to prove that he has been in the suit land *nee vi, nec clam, nec precario*. I am guided by the authority of **Francis Gicharu Kariri –versus- Peter Njoroge Mairu Nairobi Civil Appel No. 293 of 2002**, which approved the decision of high court in the case of **Kimani Ruchere –versus- Swift Rutherfords And Compnay Limited (1980) KLR** Pg 16 where Kneller J held that;

**“The Plaintiffs have to prove that they have used this land which, they claim as of right, *nec vi, nec clam, nec precario* (no force, no secrecy, no persuasion) so the Plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavors to attempt it by way of recurrent consideration”**

17. I have considered the evidence in totality. I find that the Plaintiff/Applicant has not satisfied the conditions set out above for the court to approve his claim for adverse possession. I would say that there have been interruptions and the stay has not been peaceful. He failed to rebutt the Respondents claim that he accepted Kshs.100,000/= from Francis Waiganjo in order to vacate the suit property.

18. I find that the Plaintiff/Applicant claim for adverse possession fails. It therefore follows that his prayer to be registered as the owner as the owner of L.R. No Kwale/Gunduni/398 and be issued with a title deed also fails.

The Plaintiffs/Applicant’s suit is hereby dismissed. Each party to bear his/her own costs.

**It is so ordered.**

**Dated, signed and delivered at Mombasa on the 17<sup>th</sup> day of October 2017.**

**L. KOMINGOI**

**JUDGE**

**17/10/2017**

**Mr. Muyala – I apply for certified copies of proceedings and judgment.**

**L. KOMINGOI**

**JUDGE**

**17/10/2017**