



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
LAND CASE NO. (O.S) NO. 78 OF 2015

MUPA MALACHO NYUNDO.....PLAINTIFF

-VERSUS-

HADIJA BINTI ABOUD.....DEFENDANT

JUDGEMENT

1. The plaintiff commenced this suit by way of an originating summons dated 1st April 2015 against the defendant seeking the following questions to be resolved:

- 1. Whether the applicant is entitled to the property known as the Plot Number 36/ JUNDA herein after referred to as the suit property.**
- 2. Whether the applicant is entitled to be duly registered as the proprietor of the said suit property by virtue of adverse possession.**
- 3. Whether the applicant is entitled to the cost of the summons to be paid by the respondent.**

2. The summons was premised on the grounds inter alia that the applicant has been openly, peacefully and as of right been in possession and occupation of the suit land since 1964. Secondly this has been uninterrupted and the same has been adverse to the rights of the respondent. That it is in the interests of justice and equity that the orders be granted. The applicant annexed the area map to the affidavit in support of the summons and service of the summons was effected upon the defendant by way of advertisement in the standard newspaper of 27th August 2015. The advertisement read thus

*“Substituted service by **advertisement** under Order 5 rule 17 of **the Civil Procedure Rules***

TAKE NOTICE that pursuant to a Court Order dated 13th March 2015, service of summons to enter appearance has been ordered by way of this advertisement. The Court process can be obtained from the applicant’s advocates offices or at the Environment and Land Division registry of the High Court of Mombasa. Take further notice that you are required to enter appearance in person or through a person authorized by law to act for yourself within 15 days of the date hereof, failure of which the case shall proceed and orders made your absence notwithstanding.”

3. There was no appearance made by the defendant pursuant to this advertisement or any defence made at all. The plaintiff proceeded to list the matter for formal proof. The hearing proceeded on 23.1.2017. The plaintiff testified that she has lived on the suit land from colonial times. That she got the land with her

husband who died after one month. She said that she was blessed with two daughters who have both died. The plaintiff continued that they built houses on the suit plot and only moved out about six months ago (as at the date of her testimony) to go live in Mariakani with her grandchildren. She stated that she bought this land from Hadija whom she met while she was working as a driver at the harbour. That two of her grandchildren still live on this land. She testified that she has planted cashew nuts, coconuts and mangoes on the land and it is the only place she knows as home. She urged the Court to award her the land.

4. Upon being prompted by the Court, Mrs Kipsang advocate then sought a mention date to avail to the Court a document proving registration and ownership of the suit parcel since no certified copy of the register was filed alongside the pleadings. After several mention dates, a certificate of official search was produced on 19th September 2017 and with that the plaintiff closed her case and sought time to file written submissions.

5. The written submissions were filed on 4th October 2017. Although the suit is not defended, the obligation placed on the plaintiff by law to prove her case must be discharged. In this suit, the person sued is **HADIJA BINTI ABOUD**. The certificate of postal search for the suit title 36/II/MN produced shows the registered owner as **“WAKF BY MOHAMED BIN ABUD CONSECRATING ABOVE PLOT AS WAKF Subject to the terms & Conditions set out in the WAKF DEED and approving himself as the first trustee.”**

The Wakf deed was not attached. The Wakf Commissioners were not sued and the pleadings as filed did not state any nexus between the defendant herein and the said Mohamed Bin Abud mentioned in the Wakf as a trustee. In fact the originating summons does not even describe the defendant as the owner of the suit property.

6. In her submissions counsel for the plaintiff quoted section 38 of the Limitation of Actions Act Cap 22 which provides thus;

“Where a person claim to be entitled to a property by virtue of adverse possession they can apply to the High Court for an order that they be registered as the proprietor of the land or lease in place of the person then registered as the proprietor” (underline mine for emphasis).

The law bestowing the right of adverse possession therefore imposes proof on the person claiming to enjoy such a right to show that the land is indeed owned by the person sued. This principle is also emphasized by the cases of **Adnam vs Earl of Sandwich (1877) 2 QBD 485** and **Kahindi Ngala Mwangandi vs Mtana Lewa (2014) eKLR** cited by the plaintiffs that the owners title to the land would be extinguished by virtue of the provisions of Sections 7, 9, 13, 37 and 38 of the Limitation of Actions Act.

7. Given in this case that there is no nexus placed before the Court between the defendant as sued and the registered owner of the suit land as the certificate of official search reveals, I am unable to make any finding against a party who has not been accorded an opportunity to be heard. This Court is alive to the fact that the plaintiff is very old having seen her during her Court appearance but her age cannot be used to cause an injustice to an innocent party. Although the service was advertisement, the manner in which the advert was worded as quoted in paragraph 2 supra would not enable the registered owner or any person interested in this land that it was their title that constituted the subject of the dispute.

8. Consequently I make a finding that this suit must fail on account of non-joinder/misjoinder of parties as envisaged under order 1 rule 1 & 9 of the Civil Procedure Rules. Rule 9 states **thus “...so far as regards the rights and interests of the parties actually before it”** (underline mine for emphasis) and on the basis that the plaintiff has not proved that this defendant did have any registered interest or otherwise over the suit property. In the result I do hereby strike out the suit with no order as to costs as not proved within the standards required in civil cases.

Dated, signed and delivered at Mombasa this 13th December 2017.

A. OMOLLO

JUDGE