



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**ELC CIVIL CASE NO.159 OF 2014**

**FAUZIA TARIQ ABUBAKAR ZUBEDI.....PLAINTIFF**

**=VERSUS=**

**1. ATHMAN HASSAN AWADH**

**2. SWALEH ATHMAN HASSAN**

**3. SAID ATHMAN HASSAN**

**4. HASSAN ATHMAN HASSAN.....DEFENDANTS**

**J U D G M E N T**

1. This suit was commenced by way of a Plaint. In the Plaint, the Plaintiff is praying for a declaration that he is the registered proprietor of sub-division Number 517 (Original number 483/3) of Section IV Mainland North (the suit property) and that the Defendants have no right to remain on the suit property.

2. In the alternative, the Plaintiff is seeking for a mandatory injunction requiring the Defendants or their agents to demolish the structures and any other developments made by the Defendants on the suit property and for vacant possession.

3. In their Defence and Counterclaim, the Defendants averred that they learnt that the suit property was registered in favour of the Plaintiff after she filed Petition NO. 6 of 2011; that the Plaintiff has never taken possession of the suit property and that having been born and brought up on the suit property, they are entitled to the land by adverse possession.

4. On 6<sup>th</sup> October, 2015, the advocates for the Plaintiff and the Defendants entered into a rather strange consent. The advocates agreed to have the suit determined by the court by relying on the filed written witness statements and the affidavits without calling the makers for cross-examination.

**The Plaintiff's case:**

5. In her sworn witness statement dated 11<sup>th</sup> August, 2014, the Plaintiff deponed that she is the registered proprietor of Certificate of Title NO. CR 25075/3 (CR.5634/22) situated at Takaungu and being subdivision number 517/IV/MN.

6. It is the evidence of the Plaintiff that she purchased the suit property from Basheikh Abdulhafidh

Basheikh Stambuli for a sum of Kshs.200,000 in 1988 and that the Land Control Board consented to the transfer of the land to her.

7. According to the Plaintiff, when she purchased the land, the late Abdalla Hassan claimed an acre of the land having planted coconuts, mangoes and cashew nut trees; that the late Abdalla Hassan was charged for trespass in Kilifi Criminal Case Number 519 of 1991 and was ordered to vacate the land and that when the deceased died, his house collapsed in due course.

8. It is the evidence of the Plaintiff that the Defendants are a father and his three sons; that they have developed some houses that they are letting out to tenants on Plot number 516 and that the said land was designated as Wakf of the local mosque by Basheikh before he died.

9. According to the Plaintiff's statement, the 1<sup>st</sup> Defendant took proceedings against her husband in Kilifi Land Disputes Tribunal Case No. 7 of 2004; that he acknowledged in those proceedings that he was not the registered owner of the suit property and that the findings of the Tribunal were declared null and void by this court.

10. When the 1<sup>st</sup> Defendant sued the Plaintiff in HCCC No. 28 of 2008 (OS) claiming the land by adverse possession, it was the evidence of the Plaintiff that the said suit was dismissed by the court suo moto; that the occupation by the Defendants of a section of the suit land is unlawful; that the actions that the 1<sup>st</sup> Defendant has taken to try and extinguish her rights to the suit property have been terminated and that the threats of eviction and acknowledgement by the Defendants of her title to the land have negated the presumption that the Defendant or their predecessors have acquired the land by way of adverse possession.

11. It is the Plaintiff's case that the Defendants put up houses on the suit property between the year 2004 and 2011; that the said developments are unlawful; that she offered to sell to the Defendants the portion they are occupying which offer they declined and that an order for vacant possession should issue.

12. The Plaintiff relied on the copy of the Certificate of Title in respect of the suit property, the consent of the Land Control Board, the Judgment in Kilifi Criminal Case NO. 519 of 1991, the Judgment in Petition NO. 6 of 2011, amongst other documents.

### **The Defendant's case:**

13. In his unsworn statement, the 1<sup>st</sup> Defendant stated that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants are his sons; that the said sons were born and brought up on the suit property and that the suit property is a subdivision of plot number 102 which was inherited by Basheikh Abdulhafidh from the late Famau Mohamed Stambuli.

14. According to the 1<sup>st</sup> Defendant's statement, when the suit property was sub-divided by Mr. Basheikh, he was in occupation of the land and that ever since the Plaintiff is alleged to have purchased the suit land, she has never set foot on the said land.

15. It is the 1<sup>st</sup> Defendant's case that the only person who claimed to be the owner of the suit property is Twalik Zubedi who claimed to have purchased it from Mr. Basheikh and that in the Judgment of this court delivered on 8<sup>th</sup> November, 2013, the court ordered that the claim for adverse possession should proceed for hearing.

16. According to the Defendant, from the date of the approval of the consent of the Land Control Board up to the time the Plaintiff purchased the suit property, three years had lapsed and that the Plaintiff could not have purchased the suit land after obtaining the consent of the Board.

17. The 1<sup>st</sup> Defendant finally stated that they have been living on the suit property for over 40 years and that his claim to the land should be allowed and the Plaintiff's Plaint be dismissed.

18. In his statement, the 2<sup>nd</sup> Defendant stated that he has been living on the suit land without interference since 1976 and that he has never heard anyone claiming the land until when the Plaintiff filed this suit.

19. The 3<sup>rd</sup> Defendant on the other hand stated that he has been on the land since 1986 without any interruptions; that he has a house on the land and that since he was born, he has not seen or heard anyone claiming the land.

20. The 4<sup>th</sup> Defendant stated in his statement that he has been on the land peacefully and without any interference from anybody including the Plaintiff for 30 years.

21. The elder son of Mr. Basheikh Abdulhafidh Stambuli (deceased) filed a statement in which he stated that the Defendants are his neighbours; that his father died when he was seven (7) years old and that when his father died, he came across an agreement between his father and Fauzia Abdubakar Zubedi dated 31<sup>st</sup> May, 1988.

22. According to the witness, the five acres that his father sold in 1988 is not where the Defendants occupy and that the Defendants were on the land even before his father came to Kenya to inherit the land.

### **Submissions:**

23. The Plaintiff's counsel submitted that having refused to vacate the suit premises, the Defendants became trespassers; that the Defendants filed a suit claiming for the suit property in 2008, which suit was dismissed; that there is no evidence to show that the Defendants were born on the suit property and that time can only run against the Plaintiff from the year 2004 when she discovered the presence of the Defendants on the suit property.

24. Counsel submitted that there is no evidence that the Defendants saw the Plaintiff any any time before the year 2004 and that as admitted by the 1<sup>st</sup> Defendant, he did not know the owner of the suit property until the year 2008. Therefore, it was submitted, a period of twelve years had not lapsed by the time this suit was filed.

25. On the quantum of damages, counsel submitted that an award of Kshs.3,000 per month as mesne profits as sought in the letter of 22<sup>nd</sup> August, 2013 will suffice.

26. According to the Plaintiff's advocate, the Defendant should pay a reasonable sum of Kshs.5,000,000 as general damages for trespass.

27. The Defendants advocate submitted that when the late Basheikh subdivided plot number 102 to create the suit property, the Defendants were already living on the land; that the Defendants have been living on the land peacefully and without any interruptions until the year 2004 when the Plaintiff threatened to evict them from the land and that by the time this suit was instituted, 12 years had lapsed.

28. It is the Defendant's advocates submissions that it is only until December 2012 that the Plaintiff started putting up a fence enclosing the suit property and that adverse possession is a fact to be observed upon the land.

### **Analysis and findings:**

29. The issues that arise from the pleadings and the evidence in this matter are as follows:-

**(a) Whether the Plaintiff is the owner of the suit property;**

**(b) Whether the Defendants have acquired prescriptive rights over the suit property, and if so the extent of their occupation.**

30. It is not in dispute that the Plaintiff is the registered proprietor of land known as subdivision number 517 (original number 483/3) of Section IV Mainland North (the suit property).

31. The Plaintiff has stated in her statement that when she purchased the land in 1988, one Abdalla Hassan, who has since died, was in possession of a half an acre and that he was charged in Kilifi Criminal Case No. 519 of 1991 for trespass.

32. The Certificate of Title annexed on the Plaintiff's statement shows that the Plaintiff was registered as the proprietor of subdivision number 517/III/MN measuring 5.21 hectares on 16<sup>th</sup> June, 1994.

33. According to the Transfer dated 21<sup>st</sup> February, 1992, the Plaintiff purchased the suit property from Mr. Basheikh, who by then was the registered owner of plot number 102 measuring 140.8 acres.

34. According to the Plaintiff's statement, she acquired the suit property from the late Basheikh Abdulhafidh Busheikh Stambuli for a sum of Kshs.200,000 in 1988.

35. The Judgment that was produced by the Plaintiff in Kilifi Criminal Case NO. 519 of 1991 shows that when the Plaintiff purchased the suit property, there were squatters who owned trees on the suit land. The Magistrate in the said criminal case observed as follows:-

**“It appears there had been some squatters in that land prior to PW1 (the Plaintiff) buying the same who had some trees on the land. PW1 was desirous of compensating them so that they would move out and left him (sic) have quiet possession of his newly acquired property. Accused was however reluctant to move and all efforts made to have him accept compensation and move out were not fruitful.”**

36. The Magistrate proceeded to find the accused person, Abdalla Hassan, guilty for trespass. The court directed the accused person “to remove himself, his family, stock and other property forthwith within a period of six (6) months from the private land of PW1”

37. From the Judgment of the lower court, it would appear that the only squatter who declined to be compensated for the trees and the structures that were on the suit property in 1991 was Abdalla Hassan, who has since died.

38. Indeed, there is no evidence before me to show that the said Abdalla Hassan is related to the Defendants.

39. Considering that the Plaintiff herein went out of her way to have the said Abdalla Hassan prosecuted for trespass on the suit property, it is unlikely that as at 1991, the Defendants were living on the suit property.

40. I say so because if indeed the Defendants were living on the suit property in 1991 as alleged, the Plaintiff would have had them arrested and prosecuted alongside the said Abdalla Hassan.

41. The Plaintiff has produced evidence to show that in the year 2004, the 1<sup>st</sup> Defendant herein sued the Plaintiff's husband, Twalik Zubed in Kikambala Land Tribunal Case No. 7 of 2004.

42. In that matter, the 1<sup>st</sup> Defendant informed the Tribunal that he was claiming for 12 acres at Shariani Junja location in Kilifi District.

43. After hearing the 1<sup>st</sup> Defendant, the members of the Tribunal observed that “the shamba had been developed fully by coconut plantations which looks well over about 70 years old”.

44. When the Panel visited the site on 7<sup>th</sup> December 2004, they observed as follows:-

**“One old house, no one lives in it. Two houses belonging to Athman Hassan Awadh, the Plaintiff”.**

45. The Panel recommended that all the transactions should be canceled and the land be re-allocated to the 1<sup>st</sup> Defendant.

46. Although this court declared the decision of the Tribunal as null and void in Petition number 6 of 2011 for want of service, the observations of the panel when they visited the site on 7<sup>th</sup> December, 2004 does not show that the Defendants were living on the land on the said date.

47. The fact that the Panel found that the 1<sup>st</sup> Defendant had two houses on the land does not mean that indeed the Defendants were living on the said land, or that they had been on the land for more than 40 years as alleged in the Plaintiff.

48. If indeed the 1<sup>st</sup> Defendant, together with the 2<sup>nd</sup> – 4<sup>th</sup> Defendants, who are his sons are aged more than 30 years, were living on the land together with their respective families, then there would have been more than two houses on the land in the year 2004 when the members of the Tribunal visited the land.

49. In view of the observations that were made by the members of the Tribunal, I am not convinced that the 1<sup>st</sup> Defendant, together with the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants were living on the land in the year 2004.

50. The evidence of the son of the vendor, Abdul Hafid Bashe, who was born in 1985, was that the Defendants are his neighbours.

51. The said Abdul Hafidh informed the court that when his father died, he was only seven years old and that from the agreement that was entered into between his late father and the Plaintiff, the Plaintiff purchased a piece of land that was free of squatters and that that land cannot be the suit property.

52. Having been born in 1985, Abdul Hafidh cannot be in a position to explain the relationship between his late father, the Plaintiff and the Defendants with certainty.

53. Other than stating that the Defendants are his neighbours, the said Abdul has not stated when the Defendants entered the suit property. His evidence is therefore inconclusive and amounts to hearsay.

54. The totality of my analysis above is that as at 20<sup>th</sup> December, 1991, when the Judgment in Kilifi Criminal Case NO. 519 of 1991 was being delivered and on 21<sup>st</sup> December 2004 when the Tribunal made its award, the Defendants were not in occupation of the suit property.

55. That being the case, between the year 2005 and 2014 when the suit was filed, a period of twelve years had not lapsed for the purpose of claiming the land by adverse possession.

56. The evidence before me shows that the Plaintiff has been continuously vigilant and had the squatter who was on the land in 1991 prosecuted and convicted. There is no evidence before me to show that the Defendants have been living on the suit property peacefully, continuously and without the permission of the Plaintiff for a period of 12 years.

57. In any event, the 1<sup>st</sup> Defendant having admitted in his statement that he only realised that the Plaintiff was registered proprietor of the suit property in the year 2004, which was the same time that the Plaintiff said he noticed the Defendant's encroachment on the land, time could only have started running in the said year.

58. For a long time, the position taken by the English courts and the Court of Appeal has been that a right to land is extinguished, in the absence of fraud, after the statutory period, although the registered proprietor is unaware that adverse possession has been taken (**See Rains Vs Buxton (1980) 14 chD 537, Maweu Vs Liu Ranching & Farming Co-operative Society Ltd, (1985) KLR 430 and Ithongo Vs**

**Thindiu (1981) KLR 197.**

59. However, that jurisprudence has changed. According to the recent decision of the Court of Appeal time only starts to run from the time the true owner of the land learns or knows that indeed a stranger has taken possession of his land. This is what the Court of Appeal said in the case of **Titus Kigoro Munyi Vs Peter Mburu Kimani (2015) e KLR.**

**“Guided by the dicta as stated by Kneller J herein above and as adopted by this Court in Francis Gicharu Kariri vs Peter Njoroge Mairu -Civil Appeal No. 239 of 2002 (Nairobi), we are of the considered view that in a claim for adverse possession, actual or constructive knowledge of adverse possession by a third party on the part of the registered proprietor must be proved. The trial court established as a fact that actual knowledge on the part of the registered proprietor that the appellant was in possession of the suit property was established to exist either from the year 2004 or 2010. We see no reason to interfere with this finding of fact by the trial court. We concur with the dicta by Kneller J in Kimani Ruchire Vs Swift Rutherfords & Co. Ltd (Supra) and hold that the trial court did not err in finding that time for adverse possession should be computed from 2004 or 2010 and not from 1978. From the testimony of the appellant, from the year 1970 and for the 40 years he had been in possession of the suit property, he had never seen the respondent. From this evidence, we find no error on the part fo the trial court in drawing the inference that the respondent had no actual knowledge that the appellant was in possession of the suit property prior to 25<sup>th</sup> May, 2010.”**

60. The above holding by the Court of Appeal reaffirms the fact that for one to succeed in a claim for adverse possession, he must show that he was aware that the land was registered in the name of a third party for time to start running. Time cannot start running in a situation where a person was not aware that the subject property had an owner in the first place.

61. It is for those reasons that I allow the Plaintiff's Plaint dated 11<sup>th</sup> August 2014 as prayed, except the prayer for general damages for trespass, and dismiss the Defendant's counterclaim dated 26<sup>th</sup> September, 2014 with costs.

Dated, signed and delivered in Malindi this **14<sup>th</sup>**day of **October**, 2016.

**O. A. Angote**

**Judge**