



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**  
**ELC CIVIL CASE NO.402 OF 2008 (OS)**

**IN THE MATTER OF: AN APPLICATION FOR AN ORDER THAT THE APPLICANTS HAVE  
BECOME ENTITLED BY WAY OF AN ADVERSE POSSESSION TO TITLE NUMBER  
KWALE/MNANASIN/719 MAINLAND SOUTH MOMBASA**

**1. STEPHEN MIHAEL NGUMBAO**

**2. GADWELL NYANGE AYUB**

**3. NGOKA MWARUWA NGOKA.....APPLICANT**

**=VERSUS=**

**MOIZ FAZLEABBAS TAYABALI RAJABALI.....RESPONDENT**

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

**Introduction:**

[1] This suit was commenced by way of Originating Summons dated 9<sup>th</sup> September, 2008. The Applicants are seeking for the following orders:

**(a) THAT Stephen Michael Ngumbao, Gadwell Nyange Ayub and Ngoka Mwaruwa Ngoka have become entitled by way of adverse possession to the title in all that parcel of land known as KWALE/MNASINI/719 Mainland South Mombasa.**

**(b) That Stephen Michael Ngumbao, Gadwell Nyange Ayub and Ngoka Mwaruwa Ngoka be registered as proprietors in common of Kwale/Mnasini/719 Mainland South in place of Moiz Fazleabbas Tayabali Rajabali**

**(c) THAT the Commissioner of Land through the Mombasa District Registrar of Titles do register Stephen Michael Ngumbao, Gadwell Nyange Ayub and Ngoka Mwaruwa Ngoka as proprietors in common of Kwale/Mnasini/719 Mainland South Mombasa in place of Moiz Fazleabbas Tayabali Rajabali.**

**(d) THAT cost for this suit be provided for.**

[2] The Originating Summons is premised on THE grounds that the Respondent is the registered proprietor of parcel of land known as Kwale/Mnanasini/719 measuring 9.0 Hectares (the suit property);

that the Applicants have acquired title to the land by way of adverse possession following 12 years of continuous and uninterrupted occupation since the late 1980's and that the Respondent's title to the suit land stood extinguished On or about the year 2002.

[3] The Originating Summons is supported by the Affidavit of the 1<sup>st</sup> Applicant, who has sworn it on his own behalf and on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants.

[4] The Respondent filed a Replying Affidavit in which he opposed the Originating Summons.

[5] The Respondent deponed that the Applicants appeared on the land in the year 2008; that the 1<sup>st</sup> Applicant is not entailed in law to swear an affidavit on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Applicant and that the Applicants have not been on the land since the year 2008 as alleged.

[6] The court directed this matter to proceed by way of viva voce evidence. The evidence of PW1 and PW2 was taken by Mukunya J.

[7] The 1<sup>st</sup> Applicant, PW1, informed the court that he lives on the suit property which is in Mwenze Mwenye village.

[8] PW1 informed the court that he entered the suit property in 1989 after purchasing it from Nyanje Mridhe. It was the evidence of PW1 that when he purchased the land, he believed that Mr. Nyange was the owner of the land. PW1 produced in evidence the agreement that he entered into with the vendor dated 4<sup>th</sup> April, 1990.

[9] It was the evidence of PW1 that after purchasing the land, he engaged into farming. According to PW1, he planted food crops and cash crops on the suit land and also built his residential house.

[10] PW1 stated that he has never seen the Respondent and denied that he entered the suit property in the year 2008.

[11] It was the evidence of PW1 that the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants are his neighbours while the 3<sup>rd</sup> Applicant is his nephew and that he was given his portion of land by Mr. Nyange Mridhe in 1994.

[12] In cross examination, PW1 stated that he purchased a portion of land measuring approximately 3 acres which is part of the suit property for Kshs.84,500.

[13] It was his evidence that the vendor did not have a Title Deed and that he came to realise much later that the land did not belong to the vendor but to the Respondent.

[14] PW1 identified on the photographs annexed on the Originating Summons his permanent house, his son's house, a concrete water tank, a toilet and a store.

[15] The 3<sup>rd</sup> Applicant, PW2, stated that he lives on a portion of the suit land with his family; that he is a pilot by profession working with Rwanda Air and that he has owned a portion of the suit property since 1994.

[16] According to PW2, the 1<sup>st</sup> Applicant is his uncle and he is the one who told him that Mr. Nyange was selling the suit property.

[17] PW2 stated that he bought 5.5 hectares for Kshs.79,000 from the vendor although the agreement for sale was never reduced in writing.

[18] According to PW2, after purchasing the land, he put it in possession of his mother and brother and that when his mother passed on, she was buried on the portion of the suit property that he had purchased.

[19] PW2 stated that he does not know the registered proprietor of the land and that although he stays in Rwanda, his rural home is on the suit land.

[20] It was the evidence of PW2 that he came to know that the land he purchased belonged to the Respondent in the year 2008.

[21] The 2<sup>nd</sup> Applicant, PW3, stated that he has stayed on the suit property for more than 12 years; that he entered the suit property in the year 1994 and that he bought the suit property from one Nyange Mridhe who purported to be the owner.

[22] It was the evidence of PW3 that he has never seen the Respondent; that he does not know him and that he only knew the Respondent when he conducted an official search in the year 2008.

[23] According to PW3, since he settled on the suit land, his stay has never been interrupted by the Respondent or at all; that the Co-Applicants are his neighbours; that the vendor never showed them the copy of the Title Deed and that it is not true that they invaded the suit property during the post election violence in the year 2007/2008.

[24] In cross-examination, PW3 stated that he purchased the suit property for Kshs.70,000 and that he did not have a sale agreement; that they only knew that the Respondent was the registered owner of the suit land when they conducted a search and that he hails from Taita.

[25] PW4 was the village elder when the Applicants purchased the suit property from one Nyange.

[26] According to PW4, he does not know the Respondent. PW4 informed the court that Mr. Njange died in the year 2000.

[27] In cross-examination, PW4 stated that he all along knew that the suit property belonged to Mr. Nyange.

#### **The Respondent's case:**

[28] The Respondent, DW1, informed the court that he purchased the suit property from Mr. Kigen in 1988 and the same was transferred to him in the year 1989.

[29] After purchasing the land, it was the evidence of DW1 that he identified the boundaries of the land and had the land cleared, and that at that particular time, there was no one on the land.

[30] DW1 stated that he had a farm hand by the name of Mr. Eric who put up a small structure on the suit property.

[31] DW1 informed the court that when he went to the farm in the year 1997, he found Eric had left the farm; that in 1997, the Ministry of Fisheries was interested in using the farm for fish farming; that when he visited the land in 1997, he saw two small structures with small children and that he did not see the need of moving them out of the suit land.

[32] However, when he went back to the land in the year 2008, he found the 2<sup>nd</sup> Applicant had built a wooden hut and a pen for the dogs and chicken.

[33] According to DW1, he gave the 2<sup>nd</sup> Applicant time to harvest the maize that he had planted on a portion of the suit land and that the 2<sup>nd</sup> Applicant informed him that he had bought his portion of land from the Chief.

[34] It was the evidence of DW1 that when he visited the land in the year 2008, the squatters had occupied less than 1 acre of the suit land.

[35] In cross-examination, DW1 admitted that he has never lived on the land. According to him, it was his caretaker who used to live on the land and that he visited the land in 1997, 2008 and 2009.

### **Submissions:**

[36] The Applicants' counsel submitted that the Applicants are in actual possession of the suit premises where they have their homes and are doing farming; that they have been in continuous possession of the land for more than 12 years and that each of the Applicant's has a dwelling house on the land.

[37] Counsel submitted that although the Applicants purchased the suit property from someone who was not the land owner, their entry on the land was adverse to the interests of the Respondent.

[38] The Applicants' counsel submitted that the Respondent has admitted that when he visited the suit property in the year 2007, The Applicants were already on the land.

[39] The Applicant's counsel submitted that having found the Respondents on the suit property, he should have filed a suit for their ejection; that the Applicants were not to be aware of the registered proprietor before time could start running and that the Applicants occupation was open and notorious.

[40] The Respondent's counsel submitted that the Applicants had a burden of proving the element of dispossessing the Respondent of the land or discontinued his possession; that the Applicants believed the suit land was theirs having purchased it from Mr. Nyange Mridhe Masoud and that the Applicants did not have the animus possidendi to acquire the land by way of adverse possession.

[41] Having admitted that they never met the registered owner, the Respondent's counsel submitted that their claim cannot succeed. Counsel relied on the case of **Titus Kigoro Munyi Vs Peter Mburu Kimani (2015) e KLR**.

### **Analysis and findings:**

[42] The Applicants annexed on their Supporting Affidavit an extract of the registered in respect of parcel of land known as Kwale/Mnasini/719 measuring approximately 9.0 Ha.

[43] According to the said extract of the register, the suit property was registered in favour of James Amos Kamu on 7<sup>th</sup> February, 1978 before the same was transferred to the Application 4<sup>th</sup> December, 1989.

[44] According to the Applicants, they purchased the suit property from one Nyange.

[45] PW1 informed the court that he purchased a portion of the suit property from Mr. Nyanje believing that the land belongs to him. PW1 produced the agreement he entered into with Mr. Nyange.

[46] It was the evidence of PW1 that he paid Mr. Nyanje Kshs.84,500 and took possession of the land in 1990.

[47] According to PW1, he did not know that the land never belonged to Mr. Nyanje until March, 2008 when he conducted an official search.

[48] The evidence fo PW2 and PW3 was that they also purchased the suit land from Mr. Nyanje in 1994 and that it was not until the year 2008 that they discovered that the land actually belonged to the Respondent.

[49] The Respondent on the other hand stated that it was not until the year 1997 that he noticed someone had put up two structures on the suit land.

[50] Having admitted that they entered the suit in 1990 and 1994 on the false believe that the suit property

belonged to Mr. Nyanje, the question I should deal with first is whether time started running from the year 1990 when the Applicants purportedly purchased the suit property or from the year 2008 when the Applicant discovered that the suit property was registered in favour of the Respondent, a person that they had never met.

[51] The Applicants' counsel submitted that the Respondent was dispossessed of the suit land in 1990 when the Applicants purchased it. Counsel relied on the English decision of **Reins Vs Buxton (1980) 14 CHD 537** where it was held that a right to land is extinguished, in the absence of fraud, after the statutory period, although the owner is aware that adverse possession has been taken. According to that decision, ignorance on the part of the owner whether his rights have been infringed on does not prevent the operation of the statute.

[52] The Court of Appeal declined to follow the decision of **Reins Vs Buxton (Supra)** in the case of **Titus Kigoro Munyi-Vs Peter Mburu Kimani (250) e KLR**, in which the court held as follows:-

**“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 of the trial court in drawing the inference that the respondent had no actual knowledge tha the appellant was in possession of the suit property prior to 25<sup>th</sup> May, 2010.”**

[53] Having admitted that they purchased the suit property from a person who they believed was the registered owner but who was not, and having admitted that they only realised that the Respondent was the registered owner in the year 2008 when they conducted an official search, it cannot be said their possession of the suit property was adverse to the Respondent's interest since 1990 when they bought the land from Mr. Nyanje (deceased).

[54] In view of the holding in the **Titus Kigaro Munyi case**, time could only have started running from the year 2008 when the Applicants confirmed that the land was after all registered in the name of the Respondents and not in 1990.

[55] For those reasons, I dismiss the Applicants Originating Summons dated 9<sup>th</sup> September, 2008 with costs.

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

**O. A. Angote**

**Judge**