



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC. CASE NO. 1522 OF 2013**

**DANIEL OTIENO MIGANGA.....1<sup>ST</sup> PLAINTIFF**  
**DAVID J. KOLLAL.....2<sup>ND</sup> PLAINTIFF**  
**JUMA RAMATHAN MEO.....3<sup>RD</sup> PLAINTIFF**  
**ROYSA COMMUNITY SELF HELP GROUP.....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**KASARANI MALL LIMITED .....1<sup>ST</sup> DEFENDANT**  
**UCHUMI SUPERMARKETS LTD.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The Plaintiffs commenced this suit by way of Originating Summons dated 6<sup>th</sup> November 2013 seeking for the following orders:

1. That members of the Plaintiff/Applicant be declared to have become entitled to the parcel of land known as Land Reference No. 5875/2 situated in Roysambu in Kasarani (hereinafter referred to as the “suit property”) by way of adverse possession;
2. That vesting orders do issue vesting the suit property to the Plaintiffs free from all encumbrances; and,
3. That the costs of this suit be provided for.

The Originating Summons is premised on the Supporting Affidavit of Juma Ramathan Meo, sworn on 17<sup>th</sup> December 2013, in which he averred that by a conveyance dated 5<sup>th</sup> March 1990, a copy of which he availed, one Meshumor Jacob Samuel granted and conveyed the suit property to Roysa Community Self Help Group (hereinafter referred to as the “Group”). He further averred that since 1990, the Group, of which he is the Treasurer, has been in uninterrupted occupation of the suit property. He further averred that they have set up offices on the suit property from where they serve their members. He further averred that the Defendants have come up with grants which are not genuine as the same were registered in the

year 2009 long after the conveyance between them and Meshumor Jacob Samuel had been registered.

In response thereto, the Defendants filed the Replying Affidavit of Pauline Kimotho, their Company Secretary, sworn on 19<sup>th</sup> May 2014 in which she averred that the Plaintiffs had made material misrepresentations to the court as regards the suit property in particular that the Conveyance dated 5<sup>th</sup> March 1990 has never been confirmed to exist and that the suit property has never been owned by the said Meshumor Jacob Samuel. She further averred that the Group is not an entity recognized in law and would not have received the purported conveyance in any event and further that the Group has never occupied that suit property at all. She added that the parcel of land is owned by the 1<sup>st</sup> Defendant, Kasarani Mall Limited. She further stated that the Plaintiffs failed to disclose to the court that there is further litigation between other plaintiffs and the Defendants in court namely:

1. **HCCC No. 495 of 2011** Kasarani Mall Limited versus Daniel Otieno Miganga, David J. Kollal, Gilbert Thou Macharia and Roysa Community Self Help Group.
2. **HCCC No. 47 of 2011** Richard Ochilla, David Ochieng, Kennedy Otieno Onyango (suing as officials of Roysambu Shell Youth Self Help Group) versus Uchumi Supermarkets Limited, Jacob Meshamur Samuel, Raphael Jacob Samuel and Kasarani Mall Limited.

She further indicated that in all three cases, the Plaintiffs allege to be officials of either Roysa Community Self Help Group or Roysambu Shell Youth Self Help Group. She added that the Plaintiffs are not entitled to any orders of adverse possession as they do not occupy and have never occupied the suit property as alleged or at all as the same is currently fenced off and vacant. She also stated that the Plaintiffs and others did attempt to invade the suit property but were repulsed and an injunction order issued against them by Ougo, J. She concluded by stating that the Plaintiffs are mere busybodies who are laying an invalid claim to the suit property which does not belong to them.

The court allowed parties to proceed by way of written submissions. However, only the Defendants filed their written submissions dated 7<sup>th</sup> August 2014.

The Plaintiffs case is that they entered into the suit property in the year 1990 after entering into a Conveyance Agreement dated 5<sup>th</sup> March 1990 with one Meshumor Jacob Samuel. They claim that from the year 1990, they have been in uninterrupted occupation of the suit property and have become entitled to be registered as the legal owners thereof in place of the Defendants, whom they admit are the title holders of the suit property. Against this background, the issue that arises for my determination is whether or not the Plaintiffs have acquired the suit property by way of adverse possession.

**Section 7 of the Limitation of Actions Act** provides as follows:

**“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him...”**

Further, **section 38 of the Limitation of Actions Act** provides as follows:-

**“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”**

The suit property is registered under the now repealed Registration of Titles Act which is one of the Acts listed under **section 37 of the Limitation of Actions Act**. A claim by adverse possession may therefore be made on the suit property as the Plaintiffs have done herein.

To prove a claim under adverse possession, all that the Plaintiffs have to do is to establish that they came

into occupation and took possession exclusively and have lived on the suit property continuously without interruption for a period of over 12 years. Have the Plaintiffs been able to establish this? In the case of **WAMBUGU VS NJUGUNA (1983) KLR 173**, the Court of Appeal held that,

***“For an order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his rights to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”***

From the above precedent, it is quite clear that the issue of possession of the suit property is key in determining whether or not the Plaintiffs have proved their case of having acquired the suit property by way of adverse possession. From the affidavit evidence supplied by the Plaintiffs, there is little or no support to their assertion that they have dispossessed the Defendants of the suit property or that the Defendants have discontinued their possession of the suit property for the statutory period. In fact, the only assertion the Plaintiffs made is that they have put up structures on the suit property which they use as an office from which they run the affairs of the Group. A photo showing an incomplete mabati structure was produced but there was no proof that this structure is on the suit property and it is doubtful that any activities are indeed carried out in that structure. And even if it was on the suit property, there was no proof to indicate the length of time that the Plaintiffs could have been in possession thereof. On the other hand, the Defendants asserted that the suit property is actually fenced and vacant. The Defendants asserted that when the Plaintiffs sought to take possession of the suit property, they were repulsed by the Defendants and an injunction order was issued by Justice Ougo on 24<sup>th</sup> February 2012 preventing the Plaintiffs from gaining entry into the suit property. In light of this, my overall impression is that the Plaintiffs have not been able to demonstrate having dispossessed the Defendants of the suit property for the statutory period of 12 years. On that count, the Plaintiffs claim for adverse possession of the suit property must fail.

In light of the foregoing, this suit is hereby dismissed with costs to the Defendants.

**DELIVERED AND SIGNED AT NAIROBI THIS 5<sup>TH</sup> DAY OF JUNE 2015.**

**MARY M. GITUMBI**

**JUDGE**