



**Dzuya v Mohamed (Environmental and Land Originating Summons
8 of 2023) [2024] KEELC 4629 (KLR) (11 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4629 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 8 OF 2023**

NA MATHEKA, J

JUNE 11, 2024

BETWEEN

FELIX NGALA DZUYA APPLICANT

AND

ABU MOHAMED RESPONDENT

JUDGMENT

1. The application is brought under Sections 7, 13, 17, 37 and 38 of The *Limitation of Actions Act*, Chapter 22, Laws of Kenya, Section IA, 1B, 2, 3 & 3 A of the *Civil Procedure Act*, Chapter 21, Laws of Kenya, under Order 1 Rules 11, 12, 13, 14, Order 5 Rule 17, Order 37 Rules 7, 8, 11, 13, 14, 15, 16, 17, 18 and 19 of the *Civil Procedure Rules* 2010 seeking the following orders;
 1. That this summons be served on by fixing a copy thereof on the court Notice Board or by advertisement once in the Daily Newspaper.
 2. That the Respondent's interest in all that piece of land known as CR.13921 situated in the Coast District containing by measurement Nought Decimal Three Three Five Five (0.3355) Hectares or thereabouts and being subdivision Number 1761 of section I Mainland North and described on Land Survey maps of Kenya.
 3. That the Lands Registration, Mombasa, do delete entry in favor of the Respondent if any on the Green Card/ Register in consideration of paragraph 2 above and/or register the appropriate discharge in respect thereof without gazettelement.
 4. That the Applicant Felix Ngala Dzuya be registered as the proprietor of the parcels of land known CR.13921 situated in the Coast District containing by measurement Nought Decimal Three Three Five Five (0.3355) Hectares or thereabouts and being subdivision Number 1761 of section I Mainland North in place of Abu Mohamed by reasons and facts the Applicant has become entitled to the said land by adverse possession.



5. That the Land Registrar Mombasa without gazettelement do proceed and issue a Title Document for the parcel known as CR13921 situated in the Coast District containing by measurement Nought Decimal Three Three Five Five (003355) Hectares or thereabouts and being subdivision Number 1761 of section I Mainland North in the name of the Applicant Felix Ngala Dzuya,
 6. That the orders above herein be registered against the Title known as CR.13921 situated in the Coast District containing by measurement Nought Decimal Three Three Five Five (003355) Hectares or thereabouts and being subdivision Number 1761 of section I Mainland North at the Mombasa Lands Registry in terms of section 38 (2) of the Limitation Action Act Chapter 22 Laws of Kenya and all other relevant enabling provision of the laws of Kenya.
 7. That costs of this Originating Summons be provided for.
2. The claim is that the Applicant has been in uninterrupted exclusive physical possession of all the parcel of land known as CR.13921 situated in the Coast District containing by measurement Nought Decimal Three Three Five Five (003355) Hectares or thereabouts for a continuous period in excess of 50 years and has used the said parcel of land as his homestead. That the Respondent has shown no interest in this parcel of land and neither has he given any notice to vacate possession of the suit parcel of land to the Plaintiff. The Respondent's rights and/or interest in all that parcel of land known as CR.13921 situated in the Coast District containing by measurement Nought Decimal Three Three Five Five (0.3355) Hectares or thereabouts has been extinguished. That it is fair and just that the Applicant be registered de novo as the owner of all that parcel land known as CRA3921 situated in the Coast District containing by measurement Nought Decimal Three Three Five Five (0.3355) Hectares or thereabouts so that he stop living in fear that they wake up to an eviction one day. That the Applicant has peacefully exercised proprietary rights over the suit property for a period of over 50 years and now claim it by law acquired legal right over the suit property to wit CR.13921 situated in the Coast District containing by measurement Nought Decimal Three Three Five Five (0.3355) Hectares or thereabouts. That the suit property is the only known home for the Applicant.
 3. This court has considered the evidence herein. The Defendant was served by way of newspaper advertisement and failed to attend court and the matter proceeded undefended. PW1 the Plaintiff testified that in 1979 he was employed by one Raskilal Dhanraj Bhimji Shah (deceased) as a caretaker on the suit premises. His employer died in 1995 and he chose to stay on. He was later evicted and told the land was sold to the Defendant. He visited the Land Registry and confirmed that the suit property had been transferred to the Defendant. Section 26 of the Land Registration Act No. 3 of 2012 states as follows:
 1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
 - (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”



4. There is no dispute that one Raskilal Dhanraj Bhimji Shah (deceased) the registered owner of the suit property. Section 108 of the [Evidence Act](#) Cap 80 states that;

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

Section 109 of the [Evidence Act](#) states that;

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

4. In [Mbutia Macharia vs Annab Mutua & Another](#) (2017) eKLR the court of appeal discussed the burden of proof and stated as follows;

The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? In this case, the incidence of both the legal and evidential burden was with the appellant.”

5. The Plaintiff produced documents to show that one Raskilal Dhanraj Bhimji Shah (deceased) was the owner of the suit property. PW2 and PW3 both testified that the Plaintiff was employed at the suit property as a shambaboy. Section 116 of the [Evidence Act](#) which states;

When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.”

6. The plaintiff claims adverse possession. In the case of [Mombasa Teachers Co-operative Savings & Credit Society Limited vs Robert Mubambi Katana & 15 others](#) (2018) eKLR, the Court explained the required elements to prove adverse possession as follows;

Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12years as espoused in the Latin maxim, nec vi nec clam nec precario.”

7. Further in Kisumu Civil Appeal No. 27 of 2013 [Samuel Kihamba vs Mary Mbaisi](#) (2015) eKLR where the court held that;

Strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. There must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land”



8. Paragraph 5 of the supporting affidavit sworn by the Applicant on 4th September 2023 states as follows:

That I have occupied the suit land for more than 50 years and no one has ever come up to claim ownership of the same”

9. The Plaintiff testified that he has been in uninterrupted exclusive physical possession of all the parcel of land known as CR.13921 for a continuous period in excess of 50 years and has used the said parcel of land as his homestead. That the Respondent has shown no interest in this parcel of land and neither has he given any notice to vacate possession of the suit parcel of land to the Plaintiff. That he was employed there as a caretaker and chose to stay on when his employer died in 1995. I find that the Plaintiff entered the suit property with the consent and permission of the registered owner at that time and cannot chose to stay on and now claim adverse possession! It is not clear when his employment ended and when the time started running. Indeed, he states that his stay was interrupted 5 years after 1995 and then two years later when some men came and evicted him claiming to have been sent by the owner. I find that the Plaintiff has failed to establish his case on a balance of probabilities and I dismiss it with no orders as to costs as it was undefended.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 11TH DAY OF JUNE 2024.

N.A. MATHEKA

JUDGE

