



REPUBLIC OF KENYA



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**Hamisi v Maina & 2 others; Nyamawi & 5 others (Interested Parties) (Environment & Land Case 585 of 2005) [2024] KEELC 4677 (KLR) (11 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4677 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**  
**ENVIRONMENT & LAND CASE 585 OF 2005**  
**NA MATHEKA, J**  
**JUNE 11, 2024**

**BETWEEN**

**ALI MWINYI HAMISI ..... PLAINTIFF**

**AND**

**MIKE MAINA ..... 1<sup>ST</sup> DEFENDANT**

**FLYOVER INVESTMENTS LTD ..... 2<sup>ND</sup> DEFENDANT**

**CAUSEWAY ENTERPRISES LTD ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**GLADYS RIZIKI NYAMAWI ..... INTERESTED PARTY**

**MOHAMED KARISA MWISHO ..... INTERESTED PARTY**

**CHENGO NGUMA BENGUMA ..... INTERESTED PARTY**

**PARTISON KAHINGI NYUNGI ..... INTERESTED PARTY**

**NGALA CHIGUNDA JIRA ..... INTERESTED PARTY**

**MBODJE JILANI (ON BEHALF OF 399 OTHERS) ..... INTERESTED PARTY**

**JUDGMENT**

1. This is the application of the plaintiff/ applicant who claim to be entitled to the parcel of land known as plot Nos. Mombasa/MN/III/1112 and Mombasa MN/III/1111 by virtue of adverse possession for the determination of the following questions:
  1. Whether the applicant is entitled to plots Nos. Mombasa/MN/III/1112
  2. Leave be granted to join the Hon. Attorney General as the 4<sup>th</sup> respondent herein.



3. Whether the occupant of Mombasa/MN/III/112 and Mombasa/MN/III/1111 is registered as the proprietor of the allocation of the allocated portions of land.
  4. Whether and if so declare that, the applicant was discriminated against by the 4<sup>th</sup> respondent for failure to be allocated plot Nos. MN/III/1111 and MN/III/1112 which were allocated to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents.
  5. Whether and if so the court can and/ or issue orders of certiorari cancelling the Title Deeds over plot LR Nos. MN / 111/1112 and MN/III/1111, issue an order of mandamus compelling the 4<sup>th</sup> respondents to issue title deeds of plot LR. MN/III/111 and MN/III/1112 in the name of the applicant.
2. It is based on the grounds that the applicant has been in occupation/ possession of plots Nos. 1112/ III/MN and MN/III/1111 situated in Kilifi, Mombasa for over forty years. That the respondents are the registered proprietors of the said parcels of land known as plot Nos. Mombasa/MN/III/1112 and Mombasa MN/III/1111 comprised of about 10 acres. That the applicant has duly developed the said parcels land by building his residential house and carrying on farming activities on the said land including livestock keeping and crop cultivation. That the applicant is thus duly and legally entitled to the said land by virtue of adverse possession. The applicant met all conditions necessary for being allocated the suit plots.
  3. That unlike the applicant, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents did not then have any developments on the suit plots when they applied to be allocated the suit plots nor were they residing on the suit plots. There never existed any special circumstance to justify why the applicant was denied these lots. That the only development on the suit plots is that of the applicants. Taking all factors into consideration, the 4<sup>th</sup> respondent should have allocated the suit lots to the applicant and in the end discriminated against the applicant. There are enough reasons to quash the title and direct the 4<sup>th</sup> respondent to issue fresh title deeds to the applicant.
  4. This is an old suit filed almost two decades ago and has undergone several events and hence it is bound to have had amendments during its pendency. It was first filed on 4<sup>th</sup> August 2005 and amended thrice with the last amendment being on 27<sup>th</sup> December 2006. The question to be determined by this court were as follows:
    1. Whether the Applicant is entitled to Plots Nos. Mombasa/MN/III/1112 and Mombasa/MN/III/1111 by virtue of adverse possession.
    2. Whether the occupant of Mombasa/MN/III/1112 and Mombasa/MN/ III/1111 is entitled to be duly registered as the proprietor of the allocated portions of land.
    3. Whether the Applicant is entitled to the costs of this summons.
  5. The grounds relied on are that the applicant has been in possession of plot Nos MN/III/1111 and 1112 hereafter known as the suit properties for 16 years before the suit was filed and that the respondents are the registered proprietors of the suit properties which totals to around 10 acres. It is the Applicant's allegation that he solely developed the land and conducted farming activities on both suit properties.
  6. Default judgment was entered against the 1<sup>st</sup> respondent on 27<sup>th</sup> September 2005 and the 2<sup>nd</sup> respondent put its replying affidavit via Ho Kwong Sam; a director of the same on 25<sup>th</sup> February 2009. The 2<sup>nd</sup> respondent averred that the applicant and the interested parties have never been in occupation of MN/III/1112 but rather are trespassers who invaded a portion of the same in 2007. Mr. Hong Kwo



also stated that the suit is fatally defective as it has sought adverse possession with regards to 2 separate titles in one suit and that they are a group of non-descript individuals and cannot seek orders against the 2<sup>nd</sup> respondent.

7. The 3<sup>rd</sup> respondent never filed a replying affidavit while only the 1<sup>st</sup> and 3<sup>rd</sup> interested parties filed their replying affidavit both on 31<sup>st</sup> May 2006. The 1<sup>st</sup> interested party denies that the suit properties do not exist but rather are known as MN/III/324 AND 334. She claimed that the late Mwinyi Hamisi resided alongside them in MN/III/324 and the same did not validly obtain titles to the above plots. She claimed that if the title was issued to the late Mwinyi Hamisi alone, the other interested parties and their families would be affected. The 3<sup>rd</sup> interested party reiterated the same position.
8. The Applicant was the only witness to testify in court as counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondent and counsel for the interested parties decided to close their cases without availing witnesses. PW1, the applicant testified that the suit properties are subdivisions of MN/III/ 324 and 334 and that his father, the late Mwinyi Hamisi Ali Kombo was in possession of the suit properties from 1970. He alleged that his late father tried seeking allocation of the land from the government and produced PEx3 to PEx6 letters explaining the same. He also produced responses from various officials he wrote to as PEx7 to PEx12.
9. Furthermore, PW1 claimed that the government ignored his father's request for allocation and instead allocated to inter alia the 1<sup>st</sup> and 3<sup>rd</sup> respondent. In pursuit of specificity, PW1 testified that MN/III/1111 went to the 1<sup>st</sup> respondent while MN/III/1112 went to the 3<sup>rd</sup> respondent who have never developed the suit properties to date. PW1 stated that the above prompted his late father to file Mombasa HCCC 732 of 1991 and later an appeal C.A 125 of 1997 which were dismissed. During cross examination, PW1 alleged that title MN/III/1112 was vested upon his late father through 732 of 1991 above but title was never issued to the same. PW1 admitted that his late father resided on MN/1112 where he had a house and cows. In re-examination, the PW1 stated that the court of appeal in C.A 125 of 2017 ruled that his late father should have been considered in allocation of the suit properties.
10. Counsel for the applicant in their submissions narrated the history of the suit properties and all the attempts by the applicant's late father to receive allocation of the suit properties. They submitted that the court in 732 of 1991 only awarded MN/III/1112 to the applicant's late father and he appealed so as to be awarded MN/III/1111 which the court of appeal as aforementioned dismissed. Counsel argues that it was wrong for the court in 732 of 1991 to only award MN/III/1112 and leave out MN/III/1111 yet the applicant's late father was also residing on the same. In support of the claim for adverse possession for MN/III/1111, counsel relied on several cases such as C.A No. 16 of 2016 *Mtana Lewa v Kabindi Ngala Mwangandi*, *Mbira v Gachuki* (2002) IEALR 137, C.A No. 283 of 1990 *Gabriel Mbui v Mukindia Maranya* (1993) eKLR and submitted that the applicant's late father was in *de facto* possession of the suit properties and after his death, the applicant took over possession until the present. As evidence, counsel referred to the letters (no specific reference to dates) by the Commissioner of Lands and the respondents as registered proprietors. Counsel also argued in the negative that the respondents did not file a defence and hence the applicant's case is uncontroverted and referred to a ruling by Maraga J. (as he then was) on 17<sup>th</sup> May 2006.
11. I have considered all the pleadings, replies and the submissions in this suit and I have ascertained that the issues for consideration are as follows:
  - a. Whether the applicant has proved adverse possession of MN/III/1111?
  - b. Whether the court can grant question 2 of the suit?



12. There are several cases that have discussed adverse possession such as *Samuel Miki Waweru v. Jane Njeru Richu*, Civil Appeal No. 122 of 2001, the Court of Appeal delivered the following dictum;

“...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in *Jandu v Kirpal* [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted.”

13. The Applicant has claimed that the suit properties arise out of two mother titles that is 324 and 334/III/MN and has severally referred to Mombasa HCCC 732 of 1991. The documents provided as evidence by the Applicant paint a picture of consistent struggles which started with the Applicant's late father until when the suit properties were registered.

14. The brief history vide the documents provided is that the late Mwinyi Hamisi commenced writing various letters requesting allocation of the suit properties sometime in 1970. The suit properties had belonged to one P.D Townsend who had given permission to the late Applicant's father sometime in 1965 to occupy the suit properties. Further details have been properly given in the judgment of Wambilyangah J. in 732 of 1991. MN/III/324 was surrendered to the government on 12<sup>th</sup> January 1970 and hence the late Mwinyi Hamisi prescriptive rights terminated on that date as provided by section 41 of the Limitations of Actions Act. Wambilyangah J. in the said HCCC 732 of 1991 held that that 324 and 334 were subdivided into several subdivisions which included MN/III/1112 and declared that the late Mwinyi Hamisi was in adverse possession and ought to be registered as proprietor of the same. The court of appeal in CA 125 of 2017 set aside the orders of Adverse possession since MN/III/1112 which had been registered to the 1<sup>st</sup> respondent had already passed to the 2<sup>nd</sup> respondent and were not part of the proceedings. As at 2<sup>nd</sup> April 1985, through a letter to the Commissioner of lands, the late Mwinyi Hamisi claimed he had made developments of almost Kshs. 2,000,000.

15. In *Kirutu v Kabura* C.A. No.20 of 1993 (unreported) where the Court observed that;

“The passage from Cheshire Modern Law of Real Property which Potter J.A. made reference in *Githu v Ndeete* is important and deserves to be read in full. It is at page 894 section VI under the rubric the methods by which time may be prevented from running and the learned Author says:-

“Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him ... He must either make a peaceable and effective entry or sue for the recovery of the land. Again in the case of *Githu v Ndeete* [1984] KLR 776 at page 780 this Court held that time ceases to run when the owner asserts his right by taking legal proceedings or by an effective entry into the land or when his right is admitted by the adverse possessor.”

16. It is clear that the adverse possession never started running until after the property was registered in the name of the 1<sup>st</sup> respondent which was on 23<sup>rd</sup> June 1989 and was later transferred to the 2<sup>nd</sup> respondent on 5<sup>th</sup> October 1991. As per the above two cases, time for adverse possession started running in on 23<sup>rd</sup> June 1989 but that time was interrupted when the 732 of 1991 was filed. The late Mwinyi Hamisi was demanding that he be vested with title owing to his possession adverse to the title of Philemon



Mwaisaka. It is my view that HCCC 732 of 1991 had no effect on the running of time as the true owners of the suit properties were never joined in the suit. The period of limitation would have lapsed sometime in 2001 as provided by section 7 of the Limitation of Actions Act.

17. In *Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya) Kisumu* HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in *Edward Muriga Through Stanley Muriga v Nathaniel D. Schulter* Civil Appeal No. 23 of 1997 held that;

“In this matter, apart from filing its statement of defence the respondent did not adduce any evidence in support of assertions made therein. The evidence of the 1st Applicant and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence”.

18. The allegations by the interested parties are that they reside together with the applicant while the 2<sup>nd</sup> respondent filed denials of the applicant’s and interested parties’ claims. PW1 states that he is not in possession of the whole of the suit properties. I find that therefore find that the applicant is in possession of MN/III/1112 only to the extent that he occupies and not the whole of MN/III/1112 and MN/III/1111. I find that the applicant occupies a portion in MN/III/1112 only through adverse possession and make the following orders;

1. That the plaintiff be declared the owner of a portion in MN/III/1112 which he occupies and to which he is entitled to by virtue of adverse possession and which the defendants/respondents be ordered to transfer the said suit land to the plaintiff/applicant within the next 90 (ninety) days from the date of this judgement and in default the Deputy Registrar to sign the transfer documents.
2. No orders as to Costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 11<sup>TH</sup> DAY OF JUNE 2024.**

**N.A. MATHEKA**

**JUDGE**

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