



REPUBLIC OF KENYA



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**Tangeya & 3 others v Sunderji & another (Enviromental and Land Originating
Summons 93 of 2021) [2024] KEELC 5431 (KLR) (23 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5431 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 93 OF 2021**

NA MATHEKA, J

JULY 23, 2024

BETWEEN

**ELIJAH KIBAGENDI TANGEYA 1ST PLAINTIFF
JENIFER OTIANG'A 2ND PLAINTIFF
TERESIAH NDITI MUCHOKI 3RD PLAINTIFF
PATRICK KIOKO MWIKYA 4TH PLAINTIFF**

AND

**MOHAMED IQBAL SULTANALI SUNDERJI 1ST DEFENDANT
HASSANAIN SULTANALI SUNDERJI 2ND DEFENDANT**

JUDGMENT

1. The plaintiffs vide the originating summons dated 22nd February 2021 sought the following orders
 - a. That the Plaintiffs herein namely Elijah Kibagendi Tengeya, Jenifer Otiang'a, Teresiah Nditi Muchoki and Patrick Kioko Mwikya be registered as the proprietors in common of all that parcel of land known as Title No. Mombasa/Block IX/260.
 - b. That an order of Permanent injunction do issue restraining the Defendants herein by themselves, their agents, servants, employees, legal representatives or assigns from entering the suit property, demolishing any structures thereon , evicting the plaintiffs herein or any tenants thereon, disposing, alienating, selling, offering for security for loan, transferring, wasting or in any manner whatsoever and howsoever from interfering with the plaintiffs' peaceful, quiet possession and enjoyment of the suit property known as Title No. Mombasa/Block IX/260.
 - c. That Costs of these proceedings be provided for.



2. The plaintiffs claim that they have been living on Mombasa/Block IX/260 hereafter the suit property since 1990 and that the suit property is part of a larger parcel of land under the control and management of Jua Kali Mechanics Mombasa. They further allege that the 1st and 2nd plaintiffs were issued with allotment letters or smaller parcels in the suit property dated 11th April 1992 and 14th October 1991 respectively. That all the plaintiffs have lived on the suit property for over 12 years and have developed the same with permanent structures and the 1st, 2nd and 3rd plaintiffs have rented out the flats they built on the suit property.
3. In reply, the 1st defendant filed a replying affidavit sworn on 23rd June 2021 stated and clarified that the suit property is registered in the joint names of the 2nd defendant and himself for a lease of 99 years starting from 1st March 1994. That the suit property was vacant when they bought it from an unnamed original allottee until 2005 when a group called Jua kali Mombasa started invading several properties within the vicinity of the suit property and allocated them to their members on the basis that they were the legitimate owner. That when they realized the plaintiffs had invaded the suit property they made efforts to evict the plaintiffs and even gave a demand notice for demolishing but the plaintiffs were unmoved. That from the start there were 5 individuals claiming ownership whom they sued in HCCC 7 OF 2006, they however failed to give the outcome of the same. That sometime in 2005 the plaintiff through the Jua Kali Mombasa Mechanics Association expressed their interest to purchase the suit property at Kshs. 60 per square foot and when they refused they filed HCCC 193 OF 2005 seeking a declaration that the suit property belongs to Jua Kali Mombasa Association. That the said Jua Kali association coerced owners of properties in 2005 and 2006 to sell at throw away prices or risk invasion by their members which is the reason the defendants filed their suit afore mentioned and that they have been paying the land rates whose payments are up to date.
4. PW1, the 1st plaintiff stated that he moved to the suit property in 1992 and he had been granted an allotment letter by Jua Kali Mombasa Association. That he has put up rental properties and that he has lived there openly and that sometime in 2005 they received letters from the chief stating that the defendants were the owners of the suit properties. That the suit property belonged to Jua Kali Association. That they were sued in 2006 by the defendants.
5. DW1 the 1st defendant testified that the 2nd defendant is his brother; that he bought the plot in 1994 from the defunct Municipal Council of Mombasa and the plot was vacant until 2005 when the plaintiffs invaded the plot under the guise of Jua Kali Association. That he was issued with the certificate of lease in 1994 and that there was no activity until 2005 and that he had permanent buildings on the suit property; that there are other cases between the plaintiffs and themselves.
6. After considering the originating summons application, the replying affidavit and submissions therein, I have found that the issues for determination are as follows;
 - i. Whether the plaintiffs have met the threshold for adverse possession?
 - ii. Who will bear the costs?
7. The provision of law concerned with adverse possession is section 38 (1) and (2) of the [Limitations of Actions Act](#) Cap 22 which states as follows;
 - “(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this [Act](#), 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.



- (2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”

8. And section 37 of the *Limitations of Actions Act* Cap 22 states as follows:

“This Act applies to land registered under the Government Lands Act (Repealed), the Registration of Titles Act (Repealed), the Land Titles Act (Repealed) or the Registered Land Act (Repealed), in the same manner and to the same extent as it applies to land not so registered, except that—

- (a) where, if the land were not so registered, the title of the person registered as proprietor would be extinguished, such title is not extinguished but is held by the person registered as proprietor for the time being in trust for the person who, by virtue of this Act, has acquired title against any person registered as proprietor, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by this Act;”

9. The law in respect to adverse possession is now settled. For a party to succeed in a claim of adverse possession he/she must satisfy the following criteria stated in the case of *Maweu v Liu Ranching and Farming Cooperative Society* 1985 KLR 430 where the Court held;

“Thus, to prove title by adverse possession, it was not sufficient to show that some acts of adverse possession had been committed. It was also to prove that possession claimed was adequate, in continuity, in publicity and in extent and that it was adverse to the registered owner. In law, possession is a matter of fact depending on all circumstances”.

10. I am also guided by *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.”

11. The certificate of title annexed as MISS 2 and produced as Dex 2 shows that the defendants were registered on 13th September 1995. The defendant did not produce any evidence showing that they took open, exclusive and uninterrupted possession save for a letter dated 21st March 2005 to the defunct Commissioner of Lands stating that he had erected a permanent structure. It behooves this court to also register its doubt as to whether the certificate of title produced by the defendants is valid. The reason being that the one Mwaita K.M. a physical planning officer responded vide a letter dated 31st March 2005 to the above letter stating that the suit property has not been ‘committed’ and it would be allocated as soon as a ‘government ban on allocation would be lifted’.

12. There are some correspondences produced by the plaintiffs which show that the defunct Municipal Council of Mombasa agreed to excise a portion of land measuring 4 acres at plot 127 starting from the ocean going inland and had requested the same council to issue allotment letters. Once again, these are all mere statements as no titles or even rim maps were produced for plot 127 and the court is unable to determine whether the suit property originated from the said plot.



13. In *Board of Trustees National Social Security Fund v Michael Mwaloi* (2015) eKLR where the Court of Appeal cited with approval the decision in the Ugandan Court of Appeal in *Makula International Ltd v. His Eminence Cardinal Nsubuga Another* (1982) H.C.B II which had held that;

“ A court of law cannot sanction what is illegal, and illegality once brought to the attention of court overrides all questions of pleading, including any admission made thereon.”

14. This suit has to fail for the reasons that the defendant’s title authenticity has been challenged and no expert witnesses like the land registrar was summoned to give evidence. The plaintiffs failed in proving their open, exclusive and uninterrupted possession as adverse possession is a matter of fact. They did not call witnesses to prove their possession from 1992. Possession can only be proved from the year 2005 and it was interrupted by the court cases of HCCC 193 OF 2005 and HCCC 7 OF 2006. Both parties failed to show the outcome of the above two cases and hence this suit is either sub judice or res judicata owing to the similarity of the parties and the subject matter. I find that the plaintiffs have failed to prove their case on a balance of probabilities and I dismiss it. Cost generally follow the event under Section 27 of the *Civil Procedure Act* and hence the plaintiffs are to bear the costs of this suit.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23RD DAY OF JULY 2024.

N.A. MATHEKA

JUDGE

