



Makokha v Makokha (Sued as Personal Representative and Administrator of the Estate of Makokha Cheloti Lukhubi alias Makokha Cheloti) (Environment & Land Case E003 of 2023) [2023] KEELC 20311 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20311 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE E003 OF 2023
EC CHERONO, J
SEPTEMBER 28, 2023**

BETWEEN

**BONFACE SIMIYU MAKOKHA ALIAS BONFACE NYONGESA KORNEL
WAFULA APPLICANT**

AND

**BENEDICT SIMIYU MAKOKHA (SUED AS PERSONAL REPRESENTATIVE
AND ADMINISTRATOR OF THE ESTATE OF MAKOKHA CHELOTI
LUKHUBI ALIAS MAKOKHA CHELOTI) RESPONDENT**

JUDGMENT

1. The Applicant/Plaintiff commenced these proceedings against the Respondent/Defendant *vide* an Originating Summons dated February 3, 2023 seeking determination of the following questions;
 1. Whether the said Makokha Cheloti Lukhubi alias Makokha Cheloti (now deceased) is the registered owner of W Bukusu/S Mateka /31 Measuring approximately 6.2 Ha.
 2. Whether the said Benedict Simiyu Makokha is the personal representative as administrator of the estate of Makokha Cheloti Lukhubi alias Makokha Cheloti wherein W Bukusu/S Mateka/31 Measuring approximately 6.2 Ha. forms part of the estate
 3. Whether the Applicant has been in open, notorious, peaceful and exclusive possession of 6.2 acres of W.Bukusu/S.Mateka/31 Measuring approximately 6.2 Ha for a period exceeding twelve (12) years from the time the Applicant went into occupation and possession of the land.
 4. Whether the Respondent's title to 6.3 acres contained in W.Bukusu/S.Mateka/31 Measuring approximately 6.2 Ha of W.Bukusu/S.Mateka/31 measuring approximately 6.2 Ha. have been extinguished upon the expiry of twelve (12) years from the time the Applicant went into occupation and possession of the parcel of land.



5. Whether the Applicant has now acquired title to the 6.3 Acres contained in W.Bukusu/S.Mateka/31 Measuring approximately 6.2Ha by virtue of adverse possession and that the applicant is to be registered as the absolute owner of the 6.3 acres forming part of W.Bukusu/S.Mateka/31 Measuring approximately 6.2Ha.
6. Whether the Respondent is holding in trust the 6.3 acres of land parcel W.Bukusu/S.Mateka/31 Measuring approximately 6.2Ha.
7. Whether the respondent should subdivide W.Bukusu/S.Mateka/31 Measuring approximately 6.2Ha and transfer 6.3 acres to the applicant herein.
8. Whether in default of the Respondent subdividing the land and executing relevant transfer vesting 6.3 acres to the applicant herein, the Executive Officer and or other duly appointed officer of this Court should do so on the Respondent's behalf.
9. Whether the costs of this summons should be borne by the respondent
2. The Originating Summons is supported by grounds apparent on the face of the said summons, supporting affidavit, verifying affidavit and annexures to the supporting affidavit.
3. The Respondent having failed to enter Appearance and file defence and having satisfied itself that the Respondent was duly served with Summons and hearing Notices, this Court directed the matter to proceed for hearing as undefended suit under Order 10 Rule 9 CPR.

Plaintiff/Applicant's Summary of Facts

4. This matter came up for hearing on June 14, 2023 when the plaintiff was sworn and stated that he was a resident of Lukusi area within Bungoma County. He recalled that sometime in the year 1972, he bought a portion of land from one Makokha Cheloti(now deceased) Measuring approximately 6.3acres which was to be excised from the main title being Land parcel NO W.Bukusu/S.Mateka/31. The plaintiff further stated that they entered into a Sale Agreement with the said Makokha Cheloti but he lost the Agreement. He testified that when he bought the land in 1972, he was given possession and that he has been utilizing the same to date. He stated that he has constructed his house on the 6.3 acre portion of land and has even put life fence comprising sisal and trees on the boundaries. He produced a copy of the green card, limited grant of letters of Administration issued in favour of Benedict Simiyu Nyongesa, an application for consent and the consent itself issued by Kavuchai land control Board during its sitting on May 12, 1978, a letter from the Chief, Kabula Location dated March 12, 2021 and assorted photographs.

Legal Analysis and Decision

5. I have considered the Originating Summons dated February 3, 2025, the verifying affidavit, Supporting affidavit and the annexures thereto also produced as Exhibits by the plaintiff/Applicant. I have also considered testimony given by the Applicant *Ex-parte*. Though this suit proceeded *Ex-parte*, the duty of the plaintiff to prove his claim remains constant. The one and only issue for determination in this case is whether the Applicant/Plaintiff has acquired prescriptive rights over the suit land by adverse



possession. The law on adverse possession is settled as anchored under Sections 7, 13, 17 and 38 of the Limitation of Actions Act. Section 7 provides inter alia;

“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 or, if it first accrued to some person through whom he claims, to that person.”

Section 13 of the same Act provides thus;

“(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession---)”

6. Section 17 is to the effect that upon the expiry of the twelve year period, prescribed by the Act for a person to bring an action to recover land, the title of that person to the land is extinguished.

7. Section 38 of the Act stipulates as follows;

“(i) 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 in place of the person then registered as proprietor of the land.”

8. The onus of proof that the title of the person so registered as proprietor has extinguished and that he is entitled to be registered proprietor of the land lies upon the person claiming adverse possession. The main elements of adverse possession include the following;

- I. Actual;
- II. Open;
- III. Exclusive; and
- IV. Hostile possession of the land claimed.

9. In the case of Littledale v Liverpool College(1900) 1 Cha 19,21 it was held;

“In order to acquire by the statute of Limitation a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it—the next question, therefore, is what constitutes dispossession of the proprietor”----acts must be done which are inconsistent with his (the owner’s) enjoyment of the soil for the purpose for which he intended to use it.”

10. The question that begs answers is whether the Applicant/plaintiff herein has demonstrated the said elements?

11. It is not in dispute that the plaintiff is claiming a portion of land measuring 6.3 acres from the parent land parcel NO. W.Bukusu/S.Mateka/31 which he allegedly bought from the registered proprietor namely Makokha Cheloti. The claim is predicated upon the doctrine of Adverse possession. From his supporting affidavit corroborated by his testimony-in-chief, the plaintiff deposed at paragraph 4 thereof as follows;

“4. That I know for a fact that sometime in 1972, I purchased 6.3 acres contained in all that parcel of land known as West Bukusu/South Mateka/31 Measuring 6.2 Ha from Makokha Cheloti Lukhubi alias Makokha Cheloti.”



12. If in his testimony the Applicant/plaintiff admits that he took possession of the portion he is now claiming after he bought it from the then proprietor Makokha Cheloti Lukhubi alias Makokha Cheloti(deceased), then his claim over the land is not hostile but permissive through a contract of Sale.
13. The next issue for determination is whether constructive trust can be construed out of the alleged Sale Agreement? My take on this is that where a person is put into possession of land on the basis of a Sale Agreement and can demonstrate that he/she has complied with the terms of such Agreement but the Vendor/seller has failed to perform his part of the Agreement within six (6) months from the date of such Agreement, a court can be moved to declare the existence of constructive trust where the land is an Agricultural land pursuant to section 6 of the Land control Act, Cap302. The applicant herein has not produced a sale Agreement showing when he allegedly bought the suit property which is also the commencement date. He has not also produce any evidence of payment of the consideration. These are basic elements for a valid sale of land Agreement.
14. If indeed the Applicant/plaintiff bought the portion of the suit property from Makokha Cheloti(deceased) as alleged, why is he reluctant to pursue his claim under the doctrine of constructive trust based on the alleged Sale Agreement? My view is that where it is only the fact a squatter is in possession as a purchaser under a contract which has become inoperative, null and void, or unperformed by him, the position is that although the full period required by the statute has elapsed, the squatter's possession remains consequential and does not found a claim of being in adverse possession. My proposition is in agreement with the decision in the case of Asisto Wambugu v Kamau Njuguna (1982-88)1 KAR, 117 at p.222 where Hancox JA held;

“ The respondents never repudiated the 1958 agreement, but adopted it by remaining in and cultivating the land, until the appellant made it clear that he was no longer going to allow the respondent to stay there--- The respondent, cannot now be heard to say that this occupation was not under the agreement, but was adverse to the registered owner if the necessary period had lapsed.”
15. Again in the case of Samuel Miki v Jane Njeri Richu CA NO 122 of 2001, the Court of Appeal held as follows;

“It is trite law that a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement of sale or lease or otherwise.”
16. I agree with the two decisions of the Court of Appeal which are binding on me.
17. Suffice to say that in his claim, the Applicant is seeking an order that he has become entitled to 6.3 acres out of land parcel No E.bukusu/S.Mateka/31. One of the elements of adverse possession is that the land, or portion of the land, adversely possessed must be identified, defined or at least an identifiable portion, with a clear boundary or identification. It must at least be spotted that if not certain, it can be made certain.
18. The Applicant has not identified the portion he is claiming of 6.3 acres from the main title No E.Bukusu/S.Mateka/31. He has not given any definitive boundary features or a report by a qualified surveyor showing that the portion he is claiming is indeed 6.3 acres. The photographs produced by the Applicant cannot be ascertained as to the person who took them and where they were taken. The said photographs in my opinion have no evidentiary value.



19. The upshot of my finding is that the Applicant/plaintiff has not proved his claim on a balance of probabilities. In the circumstances, I hereby dismiss the Applicant's/Plaintiff's Originating Motion dated February 3, 2023 and since the suit is not defended, I make no order as to Costs.

READ, DELIVERED, DATED AND SIGNED IN THE OPEN COURT/VIRTUALLY AT BUNGOMA THIS 28TH SEPTEMBER, 2023

HON.E.C. CHERONO

ELC JUDGE

In the presence of;

Boniface wafula nyongesa-present

Benedict Simiyu Makokha-present

