



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUNGOMA.**

**CIVIL SUIT NO. 26 OF 2011 (O.S.)**

**IN THE MATTER OF LAND REFERENCE NO. NDIVISI/NDIVISI/1640**

**AND.**

**IN THE MATTER OF SECTIONS 7, 17 AND 38 OF THE LIMITATIONS OF ACTIONS ACT.**

**AND.**

**IN THE MATTER OF ADVERSE POSSESSION**

**BETWEEN**

**JOSEPH MUMERO WANYAMA.....PLAINTIFF**

**VERSUS.**

**JARED WANJALA LYANI.....1<sup>ST</sup> DEFENDANT**

**HESBORN MURULE LUSWETI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT.**

[1]. The applicant plaintiff in this case filed an Originating Summons which was amended on 19<sup>th</sup> May, 2002 asking the court to determine the following questions;

1. *Whether or not the Applicant herein has been in occupation of Land Parcel Number NDIVISI/NDIVISI/1640 measuring 0.8 Hectares, openly, continuously, adversely and peacefully for a period exceeding 12 years.*
2. *Whether or not the Respondent's title over the said parcel of land has been extinguished by operation of the law.*
  - 2.(a) *Whether or not the 1<sup>st</sup> Respondent's title over the said parcel of land has been extinguished by operation of the law.*
3. *Whether or not the court should order the Applicant to be registered as the proprietor of the said Land Parcel Number NDIVISI/NDIVISI/1640 in the place of the Respondent herein.*
  - 3.(a) *Whether or not the court should order the Applicant to be registered as the proprietor of the said land parcel number NDIVISI/NDIVISI/1640 in the place of the 1<sup>st</sup> Respondent herein.*

4. Whether or not the Applicant has become entitled to all that land known as NDIVISI/NDIVISI/1640 by the concept of adverse possession.

4.(a) Whether the 1<sup>st</sup> Respondent has no good title to transfer to the 2<sup>nd</sup> Respondent.

4.(b) Whether the 2<sup>nd</sup> Respondent's entry on the suit land is unlawful.

4.(c) Whether the 2<sup>nd</sup> Respondent should be evicted from the suit land.

[2]. The applicant gave evidence and stated that she entered into land sale agreement on 22/05/1996 for two acres out of land parcel number Ndivisi/Ndivisi/1522. The land was sold at a consideration of 120,000 which was duly paid in full.

The agreement of sale said that, what was sold is the two acres but the costs of the trees and bananas therein was to be agreed on later. In 1996 the vendor subdivided the land into three portions. The land with trees and bananas negotiated by the applicant was resold to someone else one Joseph Barasa Matinyo. So the Plaintiff took up the portion that had no trees and bananas. This was Ndivisi/Ndivisi/1640. However, the respondent never transferred this piece of land to the applicant. The respondent was left with the rest of the land. The applicant continued to occupy Ndivisi/Ndivisi/1640 since 1996 to 20<sup>th</sup> March, 2011 when they discovered that this land had been sold to the 2<sup>nd</sup> defendant.

[3]. During the hearing the applicant relied on his written statement and produced various exhibits including agreement for sale search certificate green card of Ndivisi/Ndivisi 1552 and its Subdivisions No.1641 and 1642.

[4]. The applicant called Simiyu Sitima who relied on his written statement dated 26/6/2014. He said that the plaintiff bought his land in 1996 and that an agreement was done on 22/5/1996. The witness said that the applicant had used the land for 14 years up to 2011.

[5]. The defendants herein offered no evidence since they did not attend the hearing.

[6]. There is no doubt that land parcel Ndivisi/Ndivisi/1552 was an agribultural land. Its subdivision to 1640 1641 and 1642 was subject to land Control Act. The sale agreement for sale of 2 acres out of Ndivisi/Ndivisi/1552 between Jared Wanjala Lyani and Joseph Mumelo Wanyama the applicant herein was equally subject to the land Control Act.

[7]. The agreement of sale of the said land was dated 22<sup>nd</sup> day of May 1996. Land Control was to be obtained within 6 months. By November 22<sup>nd</sup> 1996 the said sale had become void for lack of land control Consent.

[8]. The plaintiff said that in 1996, he had been shown the resultant Subdivision Ndivisi/Ndivisi/1640. That he occupied the same in 1996. He said that there has been no Notice to him to move and vacate out of the said land until 2011 when he saw the 1<sup>st</sup> defendant trying to sell the said portion he occupied to the 2<sup>nd</sup> defendant. The applicant states that by this time he had been on the land for fourteen years. That he had acquired this land by adverse possession.

[9]. The applicant states that he had completely disposed the possession of the 1<sup>st</sup> respondent and had continued in his possession of the same. That this is the dicta stated in the case of Wambugu versus Njuguna in Civil Appeal No. 10 of 1982.

[10]. Having heard the evidence of the applicant and his witnesses and that evidence not having been controverted in any way, the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> question is answered in the affirmative.

As a consequence thereof the plaintiff Originating Summons succeeds with costs to the applicant.

Judgment read in Open Court in the presence of Mr. Tsimonjero.

**Dated at Bungoma this 20<sup>th</sup> day of December, 2017.**

**S. MUKUNYA**

**JUDGE**

**In the presence of:**

Hon. S. Mukunya (Judge)

Joy: Court Assistant

Mr. Tsimonjero for the Plaintiff

Defendant is represented by the Firm of Kiveu - Absent