



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**  
**CIVIL CASE NO. 2 OF 2010**

**TOMASI KUTOYI DONALD ALIAS TOM WASIKE.....APPLICANT**

**VERSUS**

**NAMUNYU MICHAEL .....RESPONDENT**

**JUDGEMENT**

[1] The plaintiff filed this Originating Summons under Order xxxvi Rule 3 & 7 of the Civil Procedure Rules for the determination of the questions:

1. Whether the defendant is the absolute registered owner of land parcel No. West Bukusu/North Mateka/879
2. Whether the plaintiff bought 5 acres from the defendant on the 2/8/1970
3. Whether the plaintiff has lived peacefully and continuously on the said land parcel since 1970 and has established his home and planted permanent crops thereon.
4. Whether the defendant has refused and or neglected to give the plaintiff title to the 5 acres of land
5. Whether the defendant's title to the 5 acres has now been extinguished by operation of the laws
6. Whether the plaintiff has acquired title to the 5 acres of land by way of adverse possession
7. Whether the defendant should be condemned to pay costs of the Originating Summons

[2] The respondent filed a Replying affidavit dated 7/10/2010. He denied ever selling his land to the plaintiff. He also denied ever entering into an agreement for sale with the plaintiff. He averred that the agreement for sale was manufactured by the plaintiff to fit his illegal schemes to fraudulently and forcefully grabbing his land with documents of forgery. He averred that the plaintiff was his nephew who had hatched a plan to disinherit him of his ancestral land.

[3] During the hearing of this case the applicant said he was an Inspector Mechanic and he returned home in 1994. He told the court that he knew the defendant. That in 1970 2<sup>nd</sup> August he bought a piece of land of five acres(out of a land of 58 hectares) from the defendant for an agreed sum of Kshs.1,200.00. He told the court the said purchase price was paid in instalments. The last instalment was paid in August 1974. He told the court that he lives on the land and that he has seven(7) houses for himself and his children. The applicant stated that he has planted food crops. Further that when the respondent sold the land he went to live in Tranzoia. The applicant said that the respondent signed an agreement for sale. He

said that one Destimu Namunda his uncle who died in 1977 was the clerk. The agreement was produced as PExh 1. He said that he allowed the defendant to bury his grandmother who had died in Tranzoia since they had a house and after burial they went back to Tranzoia.

He said he wanted the respondent to give him his five acres. He further said the respondent was his younger father. He prayed for costs of the suit.

On cross examination he admitted that there was no signature or finger print of the defendant on the agreement. He admitted that the last instalment was paid in 1974 and that he has lived on the land since 1970. He admitted that they have had a dispute elsewhere for this land. That was before the chief and sub chief in 2010.

[4] Mr. Richard Wafula, the plaintiff's 1<sup>st</sup> witness said that he knew the agreement produced in court. He said the agreement was for the sale of land for Kshs.1200/=. He said that he was the secretary. He told the court that both parties signed. He went on to say that the agreement produced in court was the original. That the entire purchase price was paid. The witness said that when the applicant paid the amount, he started living on the land further that his children lived on the land.

On cross examination, the witness said that there was no signature on the agreement and that the agreement was a photocopy. The applicant then closed his case.

[5] The respondent gave evidence and said that the applicant was his brother's son. He told the court that the applicant lives on his land. He said that he was given the suit land by his father. He narrated to court how he and his four siblings were given land by his father. That one of his siblings was the applicant's father. He said that the applicant lives on his father's land and that he has built a cement house on that land and that no one lives there.

He stated that he lives in Kiminini with his family. He said that he buried his mother on the suit land. He produced a search showing the suit land was in the names of Destimu(his brother) and himself, he denied having an agreement with the applicants. He told the court that he started living in Tranzoia in 1950. He denied that the applicant was living on his land and that no one was cultivating his land. He said the agreement is no agreement and that it was a photocopy. The defendant then closed his case.

[6] There is no dispute that the respondent, who is the registered owner of the suit land together with one Destimu Naminda does not live on the land. Evidence on record that is not disputed is that the respondent lives in Kiminini in Tranzoia. That he only came once in the suit land to bury his mother, the applicants' grandmother. He then left for Tranzoia.

[7] The applicant produced an agreement of sale for purchase of land between himself and the respondent. The same is dated 2/8/70. The same was for sale of five acres for Kshs.1200/=. The agreement was printed by the respondent. He argued that he did not sign the same. The same was signed by the applicant and by other people all relatives of the respondents, including the headman one Wechabe Nabwela. The secretary was Richard Mukwana. The respondent received Kshs.350/= and 6/9/70 received Kshs.100/= and on 5/2/72 he received Kshs.450/= . He signed on the said agreement for sale.

The applicant on the reverse of that agreement recorded on 1/8/74 that, he gave (baba yangu) the respondent Kshs.500/= he recorded the balance as Kshs.50/=

[8] Mr Richard Wafula Mukwana gave evidence in court and told the court that he was the secretary for that agreement between the applicant and the respondent. He said that the applicant paid the entire amount and that he entered into possession. That the respondent does not live on the suit land. He said that the applicant lives on the suit land with his children and has planted food crops and trees. That one of the witnesses to the agreement for sale(number 5) is Distimu Naminda the co-registered proprietor with the respondent.

From the evidence produced by the applicant, the agreement for sale and the evidence of Richard Wafula

Mukwana, I am on the balance of probabilities convinced that the respondent does not live on the suit land.

Further that the applicant entered into an agreement of sale for the purchase of five(5) acres from what is now land parcel West Bukusu/North Mateka/879. That he paid by instalments Kshs.1,200/= for the same. I am also convinced that he entered into the land on or around 1970 and has effected developments on the five acres by building seven(7) houses for himself and his sons. He has also planted food crops and trees on the said five acres

Does that entry and occupation amount to adverse possession?

[9] The Court of Appeal in the United Kingdom on entry and occupation in Wallis Cayton Bay Holiday Camp Ltd. Vs Shell-Mex and B.P. Ltd(1974) 3 ALL ER 575 per Lord Denning M.R.

*“Possession by itself is not enough to give title. It must be adverse possession. The true owner must have discontinued possession or have been dispossessed and another must have taken it adversely to him. There must be something on the nature of an ouster of the true owner by the wrongful possessor”*

The applicant herein started paying for the five acres in 1970. He entered the land thereafter. He stated in his own evidence that he finished paying for the same in 1974. Somewhere around 1974 when he finished paying for the land he had to obtain land control consent within three months thereafter. No consent was ever obtained. The sale therefore became void after the said three months for lack of consent pursuant to the Land Control Act Cap 302 which was in force. Time for adverse possession started running from 1975. See Samuel Miki Waweru Vs Jane Njeri Richu[2007] eKLR which stated

***“where a purchaser of land in a controlled transaction is permitted to be in possession of the land by the vendor, or lessor pending completion and the transaction thereafter becomes void under Section 6(1) of the Land Control Act for lack of consent of the land control Board such permission is terminated by the operation of the law and the continued possession, if not illegal becomes adverse from the time the transaction becomes void”***

There was no notice to terminate the occupation prior to the 12 years that ended around 1987. At least none was proved to me.

[10] The applicant’s action of entering the five acres, building seven houses for himself and his sons, planting food crops and trees in the entire five acres and staying there since 1970 to date was an act of dispossessing the registered owners of the five acres. This position was clearly stated by the Court of Appeal in Titus Mululu Kasuvee Vs Mwaani Investments Ltd. & Others in Civil Appeal No 35 of 2002

The court stated

***“And in order to be entitled to the land by adverse possession the claimant must prove that he has been in exclusive possession of this land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition. A title of adverse possession can be acquired under Limitation of Actions act for a part of the land and the mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person’s adverse possession”***

[11] In the premises, I find questions 1,2,3,4,5,6 and 7 in the Originating Summons dated 15/1/2010 are answered in the affirmative.

The applicant has acquired five acres from land parcel number West Bukusu/ North Mateka/879 by adverse possession. The land registrar shall register the said five acres after the requisite survey and sub division of the suit land and have five acres registered in the applicant’s name.

Since the parties herein are relatives, each party shall bear its own costs.

**Dated, Signed and Delivered at Bungoma this 27<sup>th</sup> day of July 2016**

**MUKUNYA - JUDGE**

**In the presence of**

Miss Bett for the defendant

Mr. Murunga for Sifuna

Gladys court assistant