



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT CASE NO. 72 OF 2010

PETER MASEKE GIKURI PLAINTIFF

VERSUS

STEPHANO KAFUJA DEFENDANT

JUDGMENT

1. The plaintiff/applicant filed an originating summons dated 14th March 2010 under the previous Order XXXVI Rule D of the Civil Procedure Rules and Section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya and the Registered Land Act, Cap 300 Laws of Kenya (now repealed) against the defendant/ respondent and sought the following orders:-

- 1. That the honourable court do declare that the applicant has acquired adverse possession of all that parcel of land known as Bukira/Buhirimonono/208 measuring 11.2Ha or thereabouts, having been in uninterrupted occupation and/or possession of the said portion for over 12 years since 1976.**
- 2. That the honourable be pleased to order the transfer of land parcel No. Bukira/Buhirimonono/208 and its registration in the name of the applicant.**
- 3. That the court do issue injunctions restraining the respondent from interfering with the applicants enjoyment of the said land of 11.2Ha Bukira/Buhirimonono/208.**
- 4. That my other relief the honourable court may deem fit to grant in the circumstances.**

The originating summons is premised on the ground that the applicant has been in continuous and uninterrupted occupation of the suit land number **Bukira/Buhirimonono/208** for over 12 years and on the affidavit sworn in support by Peter Maseke Gikuri, the plaintiff/applicant herein.

2. The plaintiff vide the affidavit sworn in support of the originating summons on 16th March 2010 avers that the respondent is the registered owner of land parcel No. **Bukira/Buhirimonono/208** hereinafter referred to as “**the suit property**” and has annexed a copy of the abstract of title marked “MPGI” which shows the respondent was registered as owner of the suit property on 11th June 1975. The abstract of title further shows the land parcel is approximately 11.2Ha and that the plaintiff on 2nd January 1979, registered a caution in his favour claiming a purchaser’s interest.

3. The plaintiff further depones he has since 1976 been in occupation of the suit property having purchased the same from the defendant who was the registered proprietor the same year 1976. The

plaintiff states he has put up a permanent homestead on the suit property and has been in continuous uninterrupted occupation and possession of the property for a period exceeding 12 years and thus has become entitled to ownership having acquired title of the land by reason of adverse possession. The plaintiff further states his occupation of the suit property was open and with the knowledge of the respondent and for that reason the respondent's title to the land became extinguished after the expiry of 12 years.

4. The defendant as per the affidavit of service sworn by one **Daniel C. Muriri** a process server on 2nd June 2010 was served with the summons to enter appearance and the originating summons and the affidavit in support on 15th April 2010 at Kakrao Village where the defendant resides. The defendant did not enter appearance or file any response to the originating summons. The court on 19th July 2013 gave directions that the originating summons herein be disposed of by way of affidavit evidence and the plaintiff was given liberty to either list the originating summons for hearing through oral submission or to file written submissions. The plaintiff elected to file written submissions which basically reiterated the contents of the plaintiffs' affidavit in support of the originating submissions.

5. I have considered the affidavit evidence and the written submissions filed on behalf of the plaintiff and I note the evidence is uncontroverted as the defendant did not appear or file any response to the originating summons. On the basis of the evidence on record the plaintiff has been in open and continuous occupation and possession of the suit property since 1976 and has constructed a permanent home on the property and that possession as per the evidence has been uninterrupted. I am satisfied that the ingredients that an applicant on a claim for adverse possession must prove to succeed have been satisfied in this case. The applicant must prove he has been in continuous and uninterrupted possession for a period of 12 years and that the possession has been adverse to the rights and interest of the registered owner. The real owner must have been dispossessed of the property by the adverse possessor and that the possession has to be open and not forceful.

6. In the instant case the plaintiff has constructed his permanent homestead on the suit property. The act of constructing his home on the suit property can be said to be a hostile act to the rights and interests of the real owner and is proof that the possession by the plaintiff can only be adverse to the rights and interests of the registered owner. The plaintiff may have initially been a purchaser of the suit property as he claims but such purchase whether by a written agreement or otherwise would have required the consent of the land control board under the provisions of the Land Control Act Cap 300 Laws of Kenya which requires consent to be sought and obtained within 6 months of the agreement otherwise the transaction becomes null and void. In such a situation if the purchaser is in possession his possession starts becoming adverse after the sixth month from the date of the agreement of sale and if the possession extends for over 12 years it serves to extinguish the title of the real owner.

7. The plaintiff in the present matter registered a caution against the suit property in 1979 claiming a purchaser's interest. The defendant must have been served notification of the registration of caution by the plaintiff as is required under the provisions of the Registered Land Act Cap 300 Laws of Kenya (repealed) and as the plaintiff claims he was in possession since 1976 the defendant must have had knowledge of the defendant's possession and chose to do nothing to recover his land. Consequently his title to the land became extinguished after the expiry of 12 years from 1976.

8. I am in the premises satisfied that the plaintiff has proved his case on a balance of probabilities and I accordingly enter judgment in favour of the plaintiff and make the following orders:-

- i. **That the plaintiff has acquired title to land parcels Bukira/ Buhirimonono/208 and is entitled to be registered as the owner thereof in place of the defendant.**
- ii. **That the Land Registrar Migori County is hereby directed to cancel the registration of Stephano Kafuja as owner of land parcel Bukira/Buhirimonono/208 and in place thereof to register Peter Maseke Gikuri the plaintiff herein as the owner thereof.**
- iii. **The Deputy Registrar of the court to execute all the necessary documents to effect the transfer and registration of the plaintiff as the owner of the suit property.**
- iv. **There shall be no order for costs of the suit.**

Judgment dated, signed and delivered at Kisii this 13th day of November, 2015.

J. M MUTUNGI

JUDGE

In the presence of:

N/A for the plaintiff

N/A for the defendant

J. M. MUTUNGI

JUDGE