



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUSIA**

**ELC CASE NUMBER 185 OF 2014 (O.S)**

**IN THE MATTER OF SECTION 7, 17 AND 38 OF THE LIMITATION OF  
ACTIONS ACT CAP 22 LAWS OF KENYA**

**AND**

**IN THE MATTER OF SECTION 7(D) OF THE LAND ACT 2012**

**AND**

**IN THE MATTER OF L.R. NO. BUKHAYO/KISOKO/7020, 5012 & 4674**

**AND**

**IN THE MATTER OF CLAIM FOR ADVERSE POSSESSION**

**BETWEEN**

**NATHAN LUSASI MUKHONO.....APPLICANT**

**= VERSUS =**

**MAURICE PIUS MAKOKHA.....1<sup>ST</sup> RESPONDENT**

**LUBONGA ZACHARIA LUSWETI.....2<sup>ND</sup> RESPONDENT**

**ADONGO EKESA ORODI.....3<sup>RD</sup> RESPONDENT**

**VINCENT OFISI.....4<sup>TH</sup> RESPONDENT**

**ERASTUS MATHEW MUCHANGA.....5<sup>TH</sup> RESPONDENT**

**LEONIDA KHALUYI LUKAKHA.....6<sup>TH</sup> RESPONDENT**

**J U D G E M E N T**

1. The Applicant commenced these proceedings vide the Originating Summons dated 31<sup>st</sup> May, 2012 and filed on the same date against the Respondents. The Applicant later filed a further amended Originating Summons dated 26<sup>th</sup> September 2016 with leave of court and filed in court on 3<sup>rd</sup> October 2016. The Applicant claims that he has acquired by way of adverse possession rights over L.R NO. BUKHAYO/KISOKO/7020 which was sub-divided from L.R. NO. BUKHAYO/KISOKO/5012 & 4674 or any other title derived therefrom as on the ground currently registered in the name of LEONIDA KHALUYI LUKAKHA. The Applicant sought the following orders:

**a) That the respondents' rights over L.R. BUKHAYO/KISOKO/7020 got extinguished by adverse possession upon the expiry of 12 years from the date the Applicant came into possession of the said half an acre out of the original L.R. NO. BUKHAYO/KISOKO/4674 and later L.R. NO. BUKHAYO/KISOKO/5012.**

**b) That the Respondents do pay the costs of this case.**

**c) A declaration that the Applicant having been in actual possession, exclusive, peaceful, open, continuous and uninterrupted occupation, possession and use of the whole L.R. NO. BUKHAYO/KISOKO/7020 measuring 0.5 acres or 0.17HA prior to its subdivision out of L.R. NO.4674 and later L.R.NO. 5012 from 5/1/1980 till 1992 a period of over 12 years, the Applicant has acquired title to the same by virtue of adverse possession as the 6<sup>th</sup> Respondent's title thereto has been extinguished by operation of law and holds title to the suit land in trust for the Applicant.**

**d) That under Section 7,17 and 38 of the Limitation of Actions Act Cap 22 Laws of Kenya and Section 7 (d) of the Land Act 2012 the Applicant is entitled to be registered as the proprietor of the suit land i.e. L.R. NO. BUKHAYO/KISOKO/7020 measuring half an acre or 0.17HA.**

**e) That the 6<sup>th</sup> Respondent herein be ordered to execute all the necessary documents to effect the transfer of title L.R. NO. BUKHAYO/KISOKO/7020 and vest the whole of the suit land in favour of the applicant herein in default whereof the Deputy Registrar of the Honourable Court be empowered to execute all such documents on behalf of the 6<sup>th</sup> Respondents.**

2. The Originating Summons was supported by the affidavit of NATHAN LUSASI MUKHONO. Annexed to the affidavit was a copy of the sale agreement dated 5/1/1980, official search certificate of L.R. NO. BUKHAYO/KISOKO/4674, copy of mutation form, copy of land register of L.R.NO. BUKHAYO/KISOKO/5012 and 4674, copy of the green card for L.R. NO. 7020, copy of official search certificate of L.R. NO. 7020.

3. The Respondents were served with the originating summons but only the 6<sup>th</sup> Respondent entered appearance. The 6<sup>th</sup> Respondent filed her Replying Affidavit on 29<sup>th</sup> October 2018 and deposed that she was not aware of any purchase/interest/occupation/possession by the applicant of the suit property being BUKHAYO/KISOKO/7020 as at the date of her purchase of the said property. She deposed that vide a sale agreement dated 17<sup>th</sup> January 2011, she honestly and wilfully purchased through her husband, HESBON LUKAKHA CHIVINI, the suit land at a consideration of Kshs.730,000/= from the then registered owner one ERASTUS MATHEWS MUCHANGA and she completed paying the consideration amount to the vendor who transferred the title into her name after following all due process.

4. The 6<sup>th</sup> Respondent further stated that prior to purchase, she conducted due diligence on the property and there was neither any apparent overriding interest claimed by any other person nor was there anyone in occupation of the suit land. That she was subsequently issued with a good title deed to the suit property. She stated that she came to learn of the proceedings relating to the suit property through CMCC NO. 404 OF 2014 where the applicant had unsuccessfully tried to set aside the injunctive orders that the lower court had issued against him on 28<sup>th</sup> October 2014. She further stated that she is a bona-fide purchaser for value without notice and an indefeasible holder of the title. She deposed that the reliefs sought by the applicant against the respondents are untenable as the respondents have no capacity to transfer the title relating to the suit property and prayed that the originating summons be dismissed and she be allowed to continue utilizing her land uninterrupted.

5. The matter proceeded for hearing on 21/7/2020 with NATHAN LUSASI MUKHONO testifying as PW1 in the absence of the Respondents. He adopted his statement dated 6/11/2018 as his evidence in chief. He told the court that he lives in Nambale sub-county and he is a farmer. He informed the court that on or about 5/1/1980 he bought half an acre of land out of then L.R. NO. BUKHAYO/KISOKO/4674 from Mzee Orodi Masuo Keya alias Ekesa Orodi Ekeya which was witnessed by his son Ekesa Orodi and he paid the full consideration of Kshs.30,000/= and thereafter took immediate possession of the same. The agreement was reduced into writing and he produced a copy of the same as PEX1.

6. The plaintiff continued that he built a house on the said parcel of land in 1980 and started residing therein. That the half acre is clearly demarcated on the ground from the original L.R. NO. BUKHAYO/KISOKO/4674 which later changed to L.R. NO. BUKHAYO/KISOKO/5012 and at the time of filing this suit it had already changed to L.R. NO. BUKHAYO/KISOKO/7020 as at 4/11/2010 after being subdivided from L.R.NO. BUKHAYO/KISOKO/5012. He further informed the court that his occupation of the half an acre out of L.R.NO. BUKHAYO/KISOKO/5012 has been peaceful, uninterrupted since 1980 and he even buried his son on this land in 1985.

7. The witness continued that the children of the deceased Orodi Masuo Keya secretly did succession in respect to his estate and left him out as a purchaser or liability in respect to his half an acre out of L.R.NO. BUKHAYO/KISOKO/5012. The said children who are the 1<sup>st</sup> -4<sup>th</sup> Respondent partitioned L.R. NO. BUKHAYO/KISOKO/5012 into 7012-7020. He contended that his house is in L.R. NO. BUKHAYO/KISOKO/7020 and it is surrounded with the half an acre which the deceased EKESA ORODI EKEYA marked out to him from his former L.R. NO. 4674. He said that the 4<sup>th</sup> Respondent in collusion with his brothers sold the entire L.R. NO. 7020 measuring 0.17HA to Erastus Mathew Muchanga and transferred the title deed thereto. That while this suit was pending, Erastus Mathew Muchanga sold L.R.NO.7020 to Leonida Khaluyi Lukakha. He produced the copy of search for L.R. 5012 as PEX 3, copy of mutation as PEX 4, a certified copy of register for L.R. 7020 as PEX 5 and the copy of title for L.R. NO. 7020 as PEX 6. He asked the court to make him the registered owner of the suit land.

8. LEONIDA KHAHUYI LUKHAKHA, the 6<sup>th</sup> Respondent testified as DW1 and stated that she is a civil servant working with the Ministry of Energy. She told the court that she is the registered owner of the land and was issued with a title in 2014 and produced the title deed as DEX1. She stated that she purchased the suit land after they did a search on 28/3/2014 which showed that it was registered in the name of Erastus Muchaya and produced the copy of search as DEX2. Subsequently, they signed a sale agreement dated 17/1/2011 and the purchase price of Kshs.730,000/= was paid.

9. The 6<sup>th</sup> Respondent produced the sale agreement as DEX 3. She informed the court that the seller was Erastus Muchaya and the buyer was her husband and herself. She produced the acknowledgment agreements as a bundle as DEX 4(a-f). She denied knowing the plaintiff and stated that the plaintiff constructed a structure on the land in 2014 but he was stopped from putting further structures through a court order issued in November 2018. She told the court that since the court order was issued, the plaintiff has not returned to the land and it was a lie

that he was cultivating the land.

10. Upon cross-examination by counsel for the plaintiff, she stated that she purchased the land in 2011 and she visited the land before buying it and there was no house on it. She said she has no house on the land. When she bought the land, there was nothing then someone attempted putting their home after she bought it. She noted that entry no.3 on the green card dated 6/3/2012 is a restriction placed by the plaintiff. She was not aware of any dispute over the land before she purchased it nor any food crops on the land. On re-examination, she said that she was not party to any case over the land where the plaintiff was involved as indicated in the restriction and there was no encumbrance on the title when she did a search.

11. Parties agreed to exchange written submissions. The Applicant filed his submissions on 13/8/2020 and submitted that he has been in possession of the suit land for a period of over 40 years and his possession has been open, continuous, uninterrupted and peaceful. It was his submission that the title of the portion the he is in possession out of the formerly L.R. 4674 got extinguished by operation of law on 4/1/1992. He further submitted that the subdivision of L.R. 4674 to L.R.7020 did not affect his occupation nor the registration of title in the different proprietors. He relied on the decision in **Kairu -V- Gacheru, Nairobi Civil Appeal No. 42 of 1987 KLR 302.**

12. The 6<sup>th</sup> Respondent filed her written submissions on 8/10/2020 and submitted that the applicant's oral testimony in court does not support a claim in adverse possession but rather an action premised on an alleged sale of land transaction, breach of contract and specific performance. She urged the court to note that the applicant alleges that he took possession of the suit land on the basis of a sale agreement which is a clear contradiction to a claim of adverse possession. She pointed out that the applicant failed to bring a single witness to attest to his allegation of having been in occupation and possession of the suit land and further that the applicant did not produce any form of evidence of his occupation by way of photographs of any structures or buildings that had been constructed by him on the suit land.

13. She urged the court to uphold their evidence and dismiss the suit. She relied on the decisions in **Mtwana Lewa V Kahindi Ngala Mwangandi (2005) eKLR, Maweu V Liu Ranching and Farming Cooperative Society 1985 KLR 430** and **Samuel Miki Waweru -V- Jane Njeru Richu. Civil Appeal No.122 of 2001.** The law in respect to adverse possession is thus settled. For one to succeed in a claim of adverse possession he must satisfy the following criteria stated out in the case of **Maweu Vs Liu Ranching and Farming and Framing Cooperative Society 1985 KLR** 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”.***

**In Mtana Lewa Vs Kahindi Ngala Mwangadi (2005) eKLR** the Court of Appeal defined adverse possession as ***“Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya is twelve (12) years”.***

14. Having carefully looked at the parties' pleadings, evidence adduced and submissions rendered, I frame the following questions for determination of the dispute;

- a) Whether the applicant has proved his claim of adverse possession against the 6<sup>th</sup> Respondent;
- b) Whether the 6<sup>th</sup> Respondent is an innocent purchaser for value;
- c) Who should pay costs?

15. On whether the applicant has proved his claim of adverse possession, the applicable law on adverse possession is now well settled both by statute and case law. As was held by Lord Denning M.R. in **Wellis' Cayton Bay Holiday Camp Ltd versus Shell Mex & BP LTD [1975] QB 94:**

*“Possession by itself is not enough to give a 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 in the nature of an ouster of the true owner by the wrongful possessor. When the true owner of land intends to use it for a particular purpose in the future, but meanwhile has no immediate use for it and so leaves it unoccupied, he does not lose his title to it simply because some other person enters it and uses it for some temporary purpose; like stocking materials or for some seasonal purpose, like growing vegetables. The reason is not because the user does not amount to actual possession.....rather his user is to be ascribed to the licence of permission of the true owner. By using the land, knowing that it does not belong to him, he impliedly assumes that the owner will permit it, and the owner by not turning him off impliedly gives permission..... acts done under licence or permitted by the owner do not give a licence or title under the Limitation Act 1939. They do not amount to adverse possession.”*

16. In Kenya, the law that grants a person in a possession of a parcel of land to claim that he has acquired title by virtue of being in adverse possession of the said parcel of land is **Section 37 and 38 of the Limitation of Actions Act.** The plaintiff must establish that he has been in continuous possession of the parcel of land in question for a period of twelve years or more, openly and without the registered owner thereof making a claim over it. As was held by *Potter J.* in **Githu versus Ndeetel[1984] KLR 774** at page 780:

*“It is stated in volume 24 of the Halbury's Laws of England, 3<sup>rd</sup> Edition, at page 252:*

***“To constitute dispossession, acts must have been done inconsistent with the enjoyment of the soil by the person entitled for the purpose for which he had a right to use it. (a) Fencing off is the best evidence of possession of surface land; but cultivation of the surface without fencing off has been held to be sufficient proof of possession.”***

17. In the present case, it is the applicant's case that he entered into a sale agreement with the deceased Ekesa Orodi Ekeya for purchase of land parcel now known as L.R. No. 7020 for a consideration of Kshs.30,000/= and that the purchase price was paid in full as was acknowledged in the sale agreement. The applicant has told the court that he took possession of the same by building a house and he even buried his son on the said land in 1985. This evidence was not controverted by the Respondents during cross-examination as they were not present for the hearing.

18. The 6<sup>th</sup> Respondent on the hand has averred that they jointly bought the suit land in 2011 with her husband and later obtained a title in her name in the year 2014. The 6<sup>th</sup> Respondent has submitted that the applicant's claim is premised on an alleged sale of land transaction, breach of contract and specific performance. She stated that since the applicant has submitted that he took possession on the basis of a sale agreement, it was a clear contradiction to a claim in adverse possession. I am inclined to disagree with this line of submission that a claim in adverse possession cannot arise out of a sale agreement. In the case of **Wanyoike v Kahiri [1979] KLR** at page 239 Justice Todd (as he then was), **held that in a purchase scenario, the period of limitation starts to run on the date of the payment of the last instalment of the purchase.** In the case at hand time started running from when the six-year period for bringing suits on contracts ended with the Plaintiff and his father still in possession of the suit land. The six-year period is deemed to have run from 1980 and ended in 1986. Therefore, the occupation by the plaintiff, if proved was adverse to that of the registered owner from 1987 which is a period in excess of twelve years by time the 6<sup>th</sup> Respondent purchased the land in 2011.

19. By the time the 6<sup>th</sup> Respondent was coming into the picture, the applicant had already been on the suit land for a period of over 12 years. Therefore, since the initial registered owner's title had been extinguished by 1986, the children of the deceased being the 1<sup>st</sup> – 4<sup>th</sup> Respondent did not have title to pass onto the 5<sup>th</sup> Respondent and subsequently, the 5<sup>th</sup> Respondent did not have a good title to pass to the 6<sup>th</sup> Respondent. This position was restated in the case of *Kairu vs Gacheru supra* at p. 302 *that a grantor of land cannot grant a better title than he has.* In defending her title, the 6<sup>th</sup> Respondent's submitted that she is a bonafide purchaser for value and that there was no evidence that the applicant was in occupation of the suit land when she bought the same. She claimed that there were no houses on the suit land as the applicant has claimed and that he only attempted to put up structures on the land but was stopped by a court order.

20. The 6<sup>th</sup> Respondent had an obligation to prove that indeed she was an innocent purchaser for value without notice. She mentioned in her evidence that she undertook due diligence before purchasing the land which included carrying out a search at the lands office. The search was indicated produced as Dex2 however there was no copy of search annexed to both the replying affidavit or the affidavit sworn in support of the motion. The green card for the suit parcel produced as Pex5 has at entry No. 3 a restriction entered in favour of the Applicant on 6/3/2012. An attempt was made to remove it at entry number 4 on 1/11/2012. However, the Land Registrar made a statement thereon that entry no challenged to await confirmation of the order. The inference drawn is that as at the time the 6<sup>th</sup> Respondent was obtaining her title in 2014, she would have learnt of the Applicant's interests on the suit title merely by seeking a copy of records.

21. Further, as a bonafide purchaser, the 6<sup>th</sup> Respondent ought to have shown this court that she procedurally acquired her title. Except for the sale agreements and copy of title, there was no copy of consent of the Land Control Board allowing the transaction or a copy of transfer of land form signed in her favour. In the absence of these important documents, I find that her defence of bonafide purchaser falls below the threshold. The consequence is that the court is in doubt that she visited the land to ascertain that it was indeed in vacant possession.

22. From the foregoing I find that the applicant has proved that he is in adverse possession of the suit land on a balance of probabilities. It is my considered opinion that the Erastus Muchanga, the 5<sup>th</sup> Respondent did not have good title to pass onto the 6<sup>th</sup> Respondent as the title of deceased Ekesa Orodi Ekeya had been extinguished in 1999 by virtue of adverse possession.

23. The Court of Appeal had this to say in **Mweu vs. Kiu Ranching & Farming Co-operative Society Ltd. [1985] KLR 430**: that

**“adverse possession is a fact to be observed upon the land. It is not to be seen in the title. A man who buys land without knowing who is in occupation of it risks his title just as he does if he fails to inspect his land for 12years after he had acquired it.”**

24. Also, in the **Githu -vs- Ndeete** case [supra] the Court of Appeal held that: -

**“The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person's adverse possession.”**

25. Costs follow the event and since the applicant is the successful party in this suit, he is awarded the costs of this suit to be paid by the 1<sup>st</sup> to 5<sup>th</sup> Respondents.

26. The upshot of the foregoing is that the applicant's Further Amended Originating Summons dated 26<sup>th</sup> September 2016 is merited and allowed as follows;

**a) A declaration be and is hereby issued that the applicant has acquired title to the whole of land parcel number BUKHAYO/KISOKO/7020 by virtue of adverse possession after having been in occupation and possession of the same for a period in excess of 12 years.**

**b) An order be and is hereby given that the 6<sup>th</sup> Respondent shall forthwith execute all necessary documents to facilitate the transfer and registration of land BUKHAYO/KISOKO/7020 measuring 0.17 HA into the applicant's name failing to which the Deputy Registrar of the court do execute the documents in place of the 6<sup>th</sup> Respondent.**

c) The applicant is awarded the costs of the suit to be met by the 1<sup>st</sup> to 5<sup>th</sup> Respondents.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 16TH DAY OF MARCH 2022.

A. OMOLLO

JUDGE