



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELCC No. 27 OF 2019**

**CHRISTOPHER MBAYI .....1<sup>ST</sup> APPLICANT**

**JACKSON KANGU ABUKO .....2<sup>ND</sup> APPLICANT**

**VERSUS**

**AGGREY MAKOMERE .....RESPONDENT**

**JUDGMENT**

1. The applicants commenced proceedings herein through Originating Summons (OS) filed on 23<sup>rd</sup> July 2019. They averred that they are entitled to 2 acres and 1 acre respectively of the parcel of land known as L.R Marama/Buchenya/390 by way of adverse possession. They therefore sought determination of the following questions:

- 1. If the Respondent is the registered proprietor of L.R No Marama/Buchenya/390;*
- 2. If the 1<sup>st</sup> and 2<sup>nd</sup> Applicants have been permanent residents upon the said parcel of land occupying and utilizing 2 acres and 1 acre respectively;*
- 3. If the residence, occupation and utilization by the Applicants over the portions of land has been in excess of 12 years and in an open, peaceful and uninterrupted manner;*
- 4. If the residence, occupation and utilization by the Applicants over the portions of land has been adverse to the proprietary interests of the Respondent;*
- 5. When did time necessary to constitute adverse possession in favour of the Applicants begin to run;*
- 6. If having been in possession and use of the parcel of land in a peaceful and open manner for a period in excess of 12 years, whether the Applicants have acquired ownership of the same through prescription;*
- 7. If the proprietorship of the Respondent with respect to the parcel of land is subject to the prescriptive rights of the Applicants;*

2. The OS was supported by the affidavit of the first applicant who deposed that the second applicant is his brother and gave him authority to swear the affidavit. He stated that the respondent's and applicants' fathers were brothers and that the parties herein are cousins. That the parcel of land known as L.R No Marama/Buchenya /390 measuring approximately 5 acres was registered in the name of the respondent having inherited it from his father. That the respondent's father although registered as the proprietor was holding the same in trust for himself and the applicants' late father. That the applicants have resided on the said parcel of land and set their respective homesteads for periods in excess of 12 years. He added that the first applicant has been in occupation of 2 acres of the suit property while the second applicant occupies 1 acre of the land and they have both done so in an open, peaceful, uninterrupted and continuous manner.

3. Although duly served, the respondent neither entered appearance nor defended the claim. The applicants' case therefore remains wholly unchallenged.

4. During hearing, Christopher Mbayi Wabuko, the first applicant testified as sole witness in respect of the applicants' claim. He adopted the aforesaid affidavit as his evidence and produced a copy of a certificate of search in respect of the suit property as at 24<sup>th</sup> June 2019. The applicants' case was closed and there being no appearance by the respondent, his case was also closed. Parties were ordered to file written submissions. The respondent did not file any.

5. The applicants relied on the case of **George Ogake Pius v Esther Nyasani Makori & 2 others [2018] eKLR** and argued that they merit

being registered as proprietors of the respective portions under their occupation.

6. I have carefully considered the OS, the evidence and the submissions herein. As noted earlier, the respondent has not contested the applicants' case. The issues that arise for determination is whether the applicants have established the ingredients of a claim of adverse possession and whether the reliefs sought are available.

7. The Court of Appeal (Murgor, JA) restated the essentials of adverse possession in **Loise Nduta Itotia v Aziza Said Hamisi [2020] eKLR** as follows:

*In line with the Act, Kneller, J. (as he then was) in the case of Kimani Ruchire vs Swift Rutherford & Co. Ltd. [1980] KLR. 10, outlined some tenets of adverse possession thus;*

*“The plaintiffs have to prove that they have used this land which they claim as of right. Nec vi, nec clam, nec precario (No force, no secrecy, no persuasion). So the plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it or by way of recurrent consideration.”*

*In the case of Wambugu vs Njuguna [1983] KLR 172 This Court cited the case of Wallis Cayton Bay Holiday Camp Ltd. vs Shell Mex and B.P. Ltd. [1975] Q.B. 94 with approval and cited the following passage therefrom*

*“The next question, therefore is what constitutes dispossession of the proprietor. Bramwell LJ in Leigh vs. Jack (1879) 5 Ex D 264) said at 273, that to defeat a title by dispossessing the former owner 'acts must be done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.”*

*The above considered together, make it clear that for a claim of adverse possession to succeed it must be demonstrated that the occupation was continuous, open and uninterrupted for a period of 12 years.*

8. The applicants produced a copy of a certificate of search in respect of the suit property as at 24<sup>th</sup> June 2019. It shows that the respondent became registered proprietor of the suit property on 5<sup>th</sup> July 1995 and that the property measures approximately 5 acres. It further shows that on 5<sup>th</sup> September 1995, one Christopher Mbayi Wabuko who I presume to be the first applicant herein lodged a caution against the property claiming a licensee's interest. Pursuant to **Sections 34 and 35 of the Land Registration Act**, the certificate of search, being a document signed by a land registrar, is to be received as prima facie evidence of the contents unless the contrary is proved. No contrary evidence has been offered herein.

9. The first applicant's testimony that he had occupied and established his home on 2 acres of the suit property while the second applicant had occupied and established his home on 1 acre of the suit property for a period in excess of 12 years as at the date of filing this suit has not been challenged. I therefore find it to be an established fact. Equally, the applicants' assertion that their occupation has been peaceful, open and uninterrupted has not been challenged and I accept it.

10. In view of the foregoing, I am persuaded that the applicants have established the ingredients of a claim of adverse possession and that they merit judgment in their favour. I therefore make the following orders:

**a) Having been in possession and use of 2 (two) acres of the parcel of land known as L.R Marama/Buchenya/390 in a peaceful and open manner for a period in excess of 12 years, the first applicant has acquired ownership of the said 2 (two) acres through prescription.**

**b) Having been in possession and use of 1 (one) acre of the parcel of land known as L.R Marama/Buchenya/390 in a peaceful and open manner for a period in excess of 12 years, the second applicant has acquired ownership of the said 1 (one) acre through prescription.**

**c) The respondent to subdivide and transfer to the first applicant 2 (two) acres of the parcel of land known as L.R Marama/Buchenya/390 and to the second applicant 1 (one) acre of the parcel of land known as L.R Marama/Buchenya/390 within 45 (forty-five) days from the date of delivery of this judgment.**

**d) In default of the respondent complying as above, the Deputy Registrar of this court to execute on his behalf all necessary documents to facilitate subdivision and transfer to the applicants as ordered above.**

**e) Each party to bear own costs of the suit.**

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 15TH DAY OF MARCH 2022.**

**D. O. OHUNGO**

**JUDGE**

**DELIVERED IN OPEN COURT IN THE PRESENCE OF:**

**MS IKHUMBA FOR THE PLAINTIFFS/APPLICANTS**

**NO APPEARANCE FOR THE DEFENDANT/RESPONDENT**

**COURT ASSISTANT: E. JUMA**