



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CIVIL CASE NO. 150 OF 2000 (OS)**

**JOHN JARAH ODERA.....PLAINTIFF**

**V E R S U S**

**SICHIRI MUKUNZI.....RESPONDENT**

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

The originating summons dated 2.8.2000 seeks an order that the plaintiff be registered as the proprietor of plot number **MARAMA/LUNZA/608** after having acquired title by way of adverse possession. The summons is supported by the plaintiff's affidavit. The matter proceeded to full hearing but only the plaintiff testified. The defence closed its case without calling any witness. I have gone through the record of the court file and saw a memorandum of appearance dated 9.7.2001 and a replying affidavit by the defendant sworn on the same date in response to an application to have a restriction registered against the suit title. Counsel for the defendant has been appearing all along and filed written submissions after the case was closed.

The plaintiff's evidence is that he inherited the suit land from his father way back in 1955. He has been living on the suit land for over 50 years. However, he found that the suit land was registered in the names of the defendant's father and was later transferred to the defendant. When adjudication was done in 1974 he was given a title deed for plot number 713 and he found that it was only measuring 0.7 hectares yet he is occupying 12 acres on the ground. He does not reside on that plot number 713 and that plot is occupied by a relative of the defendant. According to him plot number 713 does not exist on the ground or even on the survey map. A case was filed before the Khwisero African Court vide case number 99 of 1960 and the decision was in favour of his father. He has been living on the suit land all along without interference. He is therefore claiming 12 acres out of plot number 609. There was also another case filed in Nairobi by his father against the defendant's father. It is his further evidence that the defendant is his neighbour and the defendant's sister lives on plot number 713 although it does not exist on the ground. He has not been disturbed by anyone for all these years.

Parties agreed to file written submissions but only the defence counsel complied. According to those submissions by the defence counsel it is contended that whereas the plaintiff was claiming the entire land in his examination in chief, he changed and claimed 12 acres during cross-examination. That evidence is contradictory and should not be relied upon. The plaintiff has not discharged the burden of proof and never called any witness.

I have seen the 1960 proceedings between Odera Munyalu and Odianya Inganga before the African court. There are also proceedings titled Arbitration report between the plaintiff and Jackson Majengo Mukunzi. The latter proceedings were land dispute case for **MARAMA/LUNZA/609** before the Butere Land Disputes Tribunal in 1982. The 1960 dispute involved a boundary dispute on the same land and the court held in favour of the claimant. Some of the findings of the Butere tribunal were that it was true that the plaintiff is living on plot number 609 which is owned by the defendant. The tribunal held that it had no jurisdiction as the land was registered and left the matter to the lands office. The defendant in that matter Jackson Majengo Mukunzi I presume is the defendant's father. In that case he stated that he had agreed with the plaintiff to exchange their land whereby the plaintiff was to live in plot number 713 while he lives in plot number 609.

Given the evidence on record it is established that the plaintiff has been living on the suit land throughout his life. The Green card for **MARAMA/LUNZA/609** shows that it is 24.5 hectares. This is a plot measuring over 50 acres. Plot number 713 is less than two acres. There is no evidence to contradict the plaintiff's claim. Although the burden of proof lies on him, I do find that the plaintiff has discharged that burden. It is clear that during adjudication the plaintiff's land was included in the defendant's title. That situation cannot be allowed to continue as the plaintiff is occupying land on the ground yet he has no title. There is no evidence that at any given time the defendant tried to evict the plaintiff from the suit land. Indeed it is the plaintiff who has been filing cases in pursuit of his land. The African court in 1960 ordered for the demarcation of the boundary. However when adjudication was done between 1967 and 1974 the entire land was registered in the names of the defendant's father. The defendant seems to have filed a succession cause and inherited the land. I am satisfied that the plaintiff has lived on the suit land for a period of over 12 years without any interruption. The litigation that has gone on between the parties was not occasioned by the defendant but were mainly an attempt to obtain title. I do find that the requirements for obtaining title by way of adverse possession have been satisfied. The period is long enough, the defendant has been aware about the plaintiff's occupation and has never tried to evict the plaintiff from the land. I agree with the plaintiff that the occupation has been quiet for all these time.

In the end I do find that the plaintiff has acquired title by way of adverse possession for 12 acres out of plot number **MARAMA/LUNZA/609** and do grant the prayers in originating summons herein. I do order that the above title be subdivided and 12 acres be transferred to the plaintiff. There shall be no order as to costs.

Delivered, dated and signed at Kakamega this 18<sup>th</sup> day of September 2014

**SAID J. CHITEMBWE**

**J U D G E**