



REPUBLIC OF KENYA

High Court at Kakamega

Civil Case 136 of 1996

MARY MBAISI PLAINTIFF

V E R S U S

SAMWEL KIHAMBA DEFENDANT

J U D G M E N T

In her originating summons filed on the 18.7.1996 the plaintiff is seeking to have the following issues determined namely:-

1. *Whether the respondent's title to the suit parcel of land has been extinguished by the operation of the Limitation of Actions Act.*
2. *Whether the applicant has enjoyed quiet, un-interrupted and peaceful occupation of the suit parcel of land for a period of 12 years or more.*
3. *Whether the respondent is holding the title of the suit parcel in trust and for the benefit of the applicant.*
4. *Whether the applicant is entitled to be registered as the absolute proprietor of the suit parcel of land in adverse possession.*
5. *Whether the registration of the respondent as the absolute proprietor of the suit parcel of land should be cancelled.*

The plaintiff testified as PW1. Her evidence is that she was allocated plot number **KAKAMEGA/LUGARI/67** by the Settlement Fund Trustees. The defendant is her step son. She was married to the defendant's father one **THOMAS ASKARI** who is now deceased. She separated with Thomas Askari and the land was allocated to her not through her then husband. She further testified that she sold her cows to buy the land. She had a daughter by the name **JOYCE MUHONJA** who is now deceased. Joyce Muhonja used to work in Nairobi with the defendant. At one time the plaintiff gave her daughter the relevant documents for the plot and she never returned them back. The defendant used to work with the Kenya Army in Nairobi and according to the plaintiff the defendant used the documents to transfer the land into himself. It is the plaintiff's evidence that she has been living on the land since 1964. Some of her children died and were buried on the land. The defendant has never utilized the land. She sued the defendant in Kakamega PMCC No.1001 of 1995 but she abandoned the suit. She denied that she transferred the land to the defendant. She has sold part of the land to other people.

PW2, LAWRENCE KAPCHANGA RENGO, is a neighbor to the plaintiff. His plot number is **KAKAMEGA/LUGARI/68**. His evidence is that the plaintiff cultivates the suit land and all her children

live on the land. The plaintiff's deceased children were buried on the land and he attended all the burials. According to PW2 the plaintiff has sold part of the land to some buyers who have built their houses on the land. **PW3, EZEKIEL MWASAME**, testified that he is also a neighbor owning plot number 70. He has lived on his land since 1963 and all this time he knew the plaintiff to be the owner of the suit land. The plaintiff told him that her plot number had been taken away. His further evidence is that the defendant does not live on the land.

The defendant called three witnesses. He testified as DW1. His evidence is that the land used to belong to the plaintiff who is his step mother. He went with her to the Land Control Board and she gave him the consent. He paid the loan to the Settlement Fund Trustee and he took the entire land. He further testified that he did not forge the documents. In 1986 he was removed from the land by thugs. He has tried to cultivate the land but he has been stopped by the plaintiff who organizes thugs to assault him. His further evidence is that he got registered as the owner in 1983. He got the consent to transfer in 1974 and got his title in 1983. The plaintiff sued him in 1985. She was stopped from selling the land but she has defied that order. He has been assisting the plaintiff and has allowed her to occupy the land. He would like to remove the people who are occupying the land and an order stopping the plaintiff from selling the land.

It is the defendant's evidence that his father died in 1979. He used to work in Nairobi together with Joyce Mmbaisi, the plaintiff's daughter. He constructed two houses on the farm, one for himself and one for the plaintiff. The children who are residing on the land belong to the plaintiff's sister and they have their own father. He last cultivated the land in 1986 and last visited the land in 2002.

DW2, EVANS ADAVAJI LIROVO, testified that he is the chief of Lugari location where the land is located. He came to know about the land in 1997. There was a dispute between the parties and he asked the plaintiff to provide ownership documents but she did not have. Those people occupying the land stopped the defendant from utilizing it. According to the ownership documents the land belongs to the defendant. It is his evidence that there is no problem between the defendant and the plaintiff but it is the purchasers who are interfering between the parties. **DW3, NATHAN MUDAVE LIBOIYWO**, testified that he is a neighbor to the plaintiff. She is the wife of Thomas Askari who is the defendant's father. The plaintiff was allocated plot number 67 in 1964. The plaintiff transferred the plot to the defendant but later changed her mind. She has sold part of the land to six people. Thomas Askari died in 1979 while Joyce Muhonja, the plaintiff's daughter, died in 1986. The dispute between the parties started in 1997 when Peter who is the defendant's son went to reside on the land. In 1997 the defendant was chased away from the land with a panga. The defendant has not officially built his house on the land. The defendant was given the land for free by the plaintiff.

Parties opted to file written submissions. The plaintiff contends that she was allocated the suit land in 1964 and has been living there since then. She gave her ownership documents to her daughter who was living in Nairobi. She has been using the land openly by cultivating maize and has been staying there with her children. The plaintiff's two witnesses confirmed that she lived there. The plaintiff contends that from 1983 to 1996 when the suit was filed a period of 12 years had lapsed and therefore the plaintiff is entitled to the orders being sought. The defendant caused the land being transferred to him without the plaintiff's knowledge or consent. Counsel relies on the case of **GITHU V NDEETA [1984] KLR 776**.

Counsel for the defendant submits that the occupation of the suit property by the plaintiff has not been peaceful or continuous for a period of over 12 years. The defendant has been utilizing the suit land until when he was chased away. He got his title deed in 1983 and there was a suit vide **PMCC No.1001 of 1995** between the parties herein. The plaintiff has been organizing gangs to attack the defendant. The defendant lawfully acquired the suit land and no fraud was proved. The defendant allowed his step mother to use the land in her lifetime and not to sell the land. The plaintiff gave consent to the defendant in 1973 and there was no dispute until 1986 when the defendant settled his son **JOHN ALIHAMADU** on the land. There has been no continued peaceful occupation by the plaintiff lasting more than 12 years. No particulars of fraud are stated in the originating summons. There is no evidence as to the defendant's title should be cancelled. The defendant is relying on the case of **KAKAMEGA HCCC NO. 167 of 2000 SOLOMON JUMA AMBUNYA V JIMMY HABIL MKOMBO** and that of **JOHNSON NEHONDO**

V CHRISTOPHER NASHIKO & FREDRICK NAMATSI.KAKAMEGA HCCC. NO. 335 OF 1988.

The plaintiff's contention is that she was the original allottee of the suit land. She did not give out the land as a gift to the defendant. She had a daughter by the name Joyce Muhonja who used to work in Nairobi with the defendant.

She gave out her documents to her daughter so that she could pay the loan to the Settlement Fund Trustees only to later discover that the plaintiff was the registered owner of the land. The plaintiff contends that she did not transfer the land to the defendant. She has been living on the land for over 40 years now and would like to be recognized as the owner of the suit land.

The defendant acknowledges that the plaintiff was the original allottee of the suit land. His position is that the plaintiff and the defendant's father gave him the land as a gift. He has been taking care of the plaintiff and even built a house for him. Part of the defendant's documents is a letter dated 18th January 1973 from the Turbo area Settlement Officer asking the defendant to attend a meeting of the Land Control Board on 8/2/1973.

The defendant was also asked to take the plaintiff to the said meeting. The defendant also annexed a transfer form dated 17/7/1974 showing that the land was to be transferred by the plaintiff to the defendant plus an application for consent made to Kakamega Land Control Board. No date is indicated on the application. The application for the consent indicates that the suit land was to be transferred to the defendant as **"it is a gift from a mother to a son."**

The plaintiff also produced the extract from the land registry that shows that the land was registered under the Settlement Fund Trustee. On 4/11/1983 the land was transferred to the defendant who was issued with a title deed on 4/4/1986. The other relevant document is an allotment letter dated 27th November 1974 in favour of the defendant. The allotment letter indicates that the defendant had paid KShs.1600/= as the full purchase price and KShs.2000/= as development loan. The said letter authorized the defendant to pledge the land as security for any financial advances from any lending Institution.

The brief summary of the proceedings indicate that the plaintiff was indeed the original allottee of the land. It is not clear how the allotment letter dated 27/11/ 1974 in favour of the defendant came about as the defendant himself recognizes the plaintiff as the original owner. The application for consent of the land control Board as well as the transfer dated 17/7/1974 does prove that the land belonged to the plaintiff. The defendant also produced a letter dated 15/7/2002 from the Lugari D.C.I.O Indicating that the plaintiff personally transferred the land to the defendant.

From the plaintiff's evidence, it is proved that she has been living on the suit land since 1974. The plaintiff has always carried herself to be the owner of the suit land. She has gone ahead and sold portions of the suit land to third parties. During the pending of this suit, parties herein litigated before the Lugari Land Disputes Tribunal, vide case No. 8 of 2002. I have read the evidence adduced before the tribunal and do find it to be similar to the evidence adduced before this court. The plaintiff maintains that she did not gift the land to the defendant while on the other hand the defendant states that the land was given to him and he paid about KShs.16,000/= to the Settlement Fund Trustees to clear the loan balance.

The plaintiff's suit is based on adverse possession. From 1974 to 1983, the land was registered under the names of the settlement Fund Trustees although the loan balance was paid before 1983. The defendant was registered as the owner of the suit land in 1983 and he took a title deed in 1986. The first suit between the parties was filed in 1995. It appears from the proceedings that the late Joyce Muhonja was a step sister to the defendant. She was the daughter of the late Thomas Askari. The plaintiff has buried all her deceased family members on the land. Although the defendant testified that he used to live or develop the suit land until when he was chased away by thugs hired by the plaintiff, I am satisfied from the evidence on record, specifically from the evidence of PW2 and PW3 that the defendant has never lived on the suit land. The plaintiff has since 1974 exercised the full powers and rights of the owner. Even if time is considered to have started running from 1983 when the defendant got registered, I do find that by 1995

when the earlier suit that was withdrawn was filed, Twelve years had elapsed. Further, the purported allotment letter dated 27th November 1974 recognized the defendant as the owner of the suit property with powers to mitigate it.

The evidence before the Lugari Land Disputes Tribunal is to the effect that the plaintiff gave her supporting documents on the ownership of the land to her daughter, Joyce Muhonja together with KShs.9000/= to settle any liabilities. This is the same evidence the plaintiff adduced before this court. The defendant's right and claim the suit land is attributed to a purported gift by the plaintiff. The plaintiff has disowned that she gave the land as a gift. Since the defendant did not purchase the land from the plaintiff and his stand is that it was a gift, it is not clear as to why the defendant would keep on clinging to the land yet the giver of the gift has decided to denounce the gift if at all it was indeed a gift. There was no consideration given to the plaintiff from the defendant's evidence, it is clear that upon the demise of the plaintiff, all those occupying the suit land will be evicted including the plaintiff's relatives. There is no evidence that between 1983 and 1995 parties were litigating no quarreling over the suit land. It is part of the evidence that the plaintiff was still in occupation between this period.

From the evidence on record, I am satisfied that the plaintiff did not transfer the property to the defendant in form of a gift. Although the originating summons does not state that the defendant acquired the suit land fraudulently and although it is a requirement that particulars of fraud have to be pleaded, I do find that the evidence on record leads me to no other conclusion that the fact that the defendant obtained his title deed through fraudulent means. There is no evidence in form of minutes from the Kakamega land control board to show that the plaintiff appeared before the Board on 8/2/1973 as per the letter dated 18th January 1973. If in 1973 the plaintiff was recognized as the owner of the suit land, it is unclear as to how the same land could be allocated to the defendant on 27/11/1974. From 1974 the defendant never exercised any claim of ownership to the suit land despite the purported allotment later.

From the evidence on record, I am satisfied that the plaintiff is the lawful owner of the suit property. I do find that she has acquired title through adverse possession and that the defendant acquired his title to the suit property through, unlawful means. Article 159 of the Constitution calls upon the courts to administer justice without undue regard to procedural technicalities. The bottom line is that the plaintiff is the owner of the suit land. She did not acquire the land through the help of the defendant's father. She did not give it as a gift to the defendant and she has all along taken herself to be the owner of the suit land.

In the end, I do find that the plaintiff has proved her case on a balance of probabilities. The originating summons filed on 18/7/1996 is granted as prayed. The defendant's title to plot number **KAKAMEGA/LUGARI/67** is hereby cancelled and the plaintiff shall be registered as the proprietor of the land. The plaintiff shall have costs of this suit.

Dated, signed and delivered at Kakamega on the 29th day of May 2013.

SAID J. CHITEMBWE
JUDGE