



**REPUBLIC OF KENYA**

**High Court at Bungoma**

**Civil Case 157 of 1995**

**IBRAHIM NYONGESA HUSSEIN.....PLAINTIFF**

**VERSUS**

**ALI BOYI WASHIYAMBI.....DEFENDANT**

**JUDGMENT**

This is an originating summons taken out by the applicant Ibrahim Nyongesa Hussein against the respondent ALI BOYI WASHIYAMBI. Both the originating summons and the replying affidavit were amended. Subsequently directions were taken with applicant treated as “plaintiff” and Respondent treated as “defendant”. In this judgment, the parties will therefore be referred to as plaintiff and defendant.

The plaintiff's claim is for a portion of land measuring six (6) acres in L.R. no. N. Wanga/Matungu/105 which he is entitled to by way of adverse possession. The brief evidence of the plaintiff is;

on 25th October 1971, he purchased a piece of land measuring six (6) acres from the defendant for Kshs. 4,600/= which he paid in full. The six acres was to be carved out of L.R. no. N. Wanga/Matungu/105. The parcel of land was registered in the names of Shaban Washiyambi – deceased at the time of sale and the defendant was son to the said deceased.

He produced an agreement as exhibit P2 (a) & (b) to confirm the transaction. He immediately began to live there. The defendant then took out letters of administration of the estate of his deceased father and had the land parcel 105 subdivided to create several parcels amongst them N. Wanga/Matungu/1391.

He has lived on this land for 38 years. His evidence is that the land he is living on is comprised in title no. 1391 which is registered in the defendant's name. He produced a green card as exhibit P3. In cross examination, he confirmed the land bought was part parcel no. 105. The agreement did not mention the issue of taking out the letters of administration. He therefore claims ownership of parcel 1391 by way of adverse possession.

The defendant also testified. In his testimony he admits selling the plaintiff's land but qualify it as 100 ft by 100 ft for Kshs. 2,100/= and not six (6) acres as demanded by the plaintiff. His father died in 1966 and left seven of them. He did take out grant in 1970's. He sold the land after his father had died. He also confirmed the plaintiff lives on the portion he sold to him which to him is measuring 100 by 100. In cross examination, he said he was paid Kshs. 2,100/= in full and he showed the plaintiff the boundaries of land measuring 100 by 100 ft. No surveyor was called to take the measurements. He has not given plaintiff title for the sold portion. When he wanted to give him title, the plaintiff sued him. He therefore prays for this suit to be dismissed.

The counsels for the parties filed their written submissions, which this court has had an opportunity of reading through. A claim for adverse possession is premised on the Limitation of Actions Act. There are also several decisions on case law that has laid down principles to be considered for an adverse possession claim to succeed. In the case of Wambugu vs. Njuguna [1983] KLR 172, the court of appeal held,

***“in order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his***

***possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.”***

From the evidence adduced before this court, it is not disputed that the plaintiff took occupation of this land sometimes in 1974 to-date. He has built his home on it. It is also not disputed that there was a sale agreement reduced into writing between the parties. What comes out as being disputed is what size the plaintiff is entitled to receive/get.

In paragraph 4 of the amended replying affidavit, the defendant admitted receiving Ksh.4100 and not Kshs. 4600 from the plaintiff. In his evidence before court, he said he received Kshs. 2100/=. At the time of filing suit he owned parcel L.R. N. Wanga/Matungu/1282 as his share from the original L.R. no. 105 (see paragraph 6 of the affidavit). He was ready to transfer 100ft. By 50ft provided the plaintiff refunded him the costs of the succession (paragraph 7). In his evidence before court, he stated the size of the land due to the plaintiff is 100 ft by 100ft. This evidence conflicts the size of land pleaded. In plaintiff exb. 2b which is a translation of the original sale agreement (2 a), the size of the land given is six (6) acres. He did not contest the sale agreement produced. He only stated it is the plaintiff who kept both copies of the agreement and that he does not have the kind of size of land the plaintiff is claiming. Plaintiff ex. 3 – green card shows L.R. No. N. Wanga/Matungu/1391 is measuring 2.86Ha, translated into acres is approximately 7 acres. Title 1391 was a subdivision of L.R. NO. N. Wanga/Matungu/1345. Unfortunately both parties did not tell this court where L.R. no. N. Wanga/Matungu/1345 emerged from. This court assumes it probably is a subdivision from L.R No N.Wanga/Matungu/1282 which is the defendant's share given from L.R No 105. There was no condition put in the agreement ex. 2 (b) which required the plaintiff to refund the defendant the cost of succession before he could transfer the land to him. This was an afterthought. He did not bring up this issue in his testimony before the court and this court therefore assumes he abandoned it. The defendant having admitted the plaintiff has lived on this land proved the earlier holding quoted above in the Wambugu case that he had ***been dispossessed of his rights as a proprietor i.e his enjoyment of the soil for the purpose for which he intended to use*** it and thus the plaintiff is entitled to the land. On the size of which the plaintiff is entitled to, I find it is six (6) acres of L.R. No. N. Wanga/Matungu/1391. This is based on the exhibit produced before court 2(b) contrasted with conflicting evidence of the defendant in his pleadings and oral testimony as regards the size. The plaintiff's suit therefore succeeds and I allow the orders as sought out in the O.S amended on 2nd June 2004. I do make an order directed at the defendant to execute all necessary documents of transfer of six acres from L.R N.Wanga/Matungu/1391 in favour of the plaintiff. In default of the defendant executing the documents, the deputy registrar to sign the requisite documents of transfer in favour of the plaintiff for the portion measuring six acres. I do also issue an order of permanent injunction restraining the defendant from interfering with the plaintiff's peaceful occupation and dealing with a portion measuring six acres of L.R no 1391. The costs of the suit is awarded to the plaintiff.

**JUDGMENT DATED, SIGNED, READ AND DELIVERED** in open court this 23rd day of May 2013.

**A. OMOLLO**  
**JUDGE**