



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CIVIL SUIT NO.42 OF 2002 (O.S.)

HARRISON OKUMU AMALIANI.....PLAINTIFF

VERSUS

EDWIN PETER AMBAISI

MARTIN SHIPUKU MALAMA

JACKTON OMOTO.....DEFENDANTS

J U D G M E N T

The Plaintiff filed suit by way of originating summons under **Section 38** of the **Limitation of Actions Act** seeking a declaration of this court that he had acquired, by adverse possession, the parcels of land registered as LR.Nos.Kisa/Mundeku/1445, 1465, 1446, 1447 and 1448. The Plaintiff further prayed that he be registered as the owner of the above parcels of land because he had acquired the same by adverse possession. He further prayed that if the Defendants did not execute the conveyancing documents transferring the said parcels of land to him, the Deputy Registrar of the court executes the same on their behalf. The suit is supported by the grounds stated on the face of the originating summons and the annexed affidavit of the Plaintiff. The suit is opposed. Edwin Peter Ambaisi filed a replying affidavit in opposition to the suit. In the said affidavit, he deponed that he had purchased the suit parcel of land originally registered as LR. No.Kisa/Mundeku/32 from one Josephine Shitsewa. She had inherited the same from her late father Lihia Weboko through succession proceedings at Kakamega High Court. He deponed that after he had purchased the same, he caused it to be sub-divided hence the sub-divided portions that are the subject of these proceedings. He denied the Plaintiff claims that he was entitled to be declared as the owner of the suit parcel of land on the basis that he had acquired the same by adverse possession. He stated that the Plaintiff and his mother had previously lodged claims in respect of the suit parcels of land before the Land Disputes Tribunal and the High Court at Kakamega. Both claims were unsuccessful. He urged the court to dismiss the Plaintiff's claim with costs.

Directions were taken before the court to the effect that all the matters in dispute in the case would be determined by the court hearing *viva voce* evidence. Muchemi J heard the evidence of both the Plaintiff's and the Defendants' witnesses. This court took over the proceedings of this case at the submission stage. Mr. Otanga for the Plaintiff and Mr. Yogo for the Defendants highlighted the written submission that they had earlier filed before this court. This court has carefully considered the said submission. It has also read the pleadings and the evidence adduced by the parties in this case.

The facts of this case from the evidence adduced are as follows:

Lihia Weboko (deceased) was the father of Josephine Shitsewa (Josephine). The deceased was the registered owner of a parcel of land then registered as LR.No. Kisa/Mundeku/32. Josephine petitioned the

Kakamega High Court to be issued with a grant of letters of administration intestate to administer the estate of the deceased. The succession cause was No.153 of 1993. According to a copy of the ruling which was produced in evidence by the Defendants, the Plaintiff and his mother had attempted to challenge Josephine from being issued with said grant of letters of administration intestate. The objection was disallowed. Josephine was duly granted with the grant of letters of administration intestate. The same was confirmed. She was declared the sole beneficiary of the estate of her late father. She inherited the suit parcel of land on transmission. Upon inheriting the same, she sold the suit parcel of land to Edwin Peter Ambaisi. The suit parcel of land was transferred to the said Edwin Peter Ambaisi (Ambaisi). In 1998, Ambaisi caused the suit parcel of land to be sub-divided into various portions of land. The sub-divided portions were six (6). Each portion has a title.

From the evidence adduced in court, and which was in fact admitted by Ambaisi, it was clear that at the time Josephine petitioned the court to be issued with a grant of letters of administration intestate, the Plaintiff, his mother and his siblings were residing on part of the suit parcel of land. Ambaisi conceded that at the time he purchased the suit parcel of land from Josephine, the Plaintiff and members of his family were residing on a portion of the suit parcel of land. This portion was identified to be LR.No.Kisa/Mundeku/1466 measuring 0.6 hectares (approximately 1.5 acres). The undisputed evidence was that the Plaintiff and members of his family have resided on the said portion of land for a period of more than thirty (30) years without let or hindrance from either Josephine or Ambaisi.

It was adduced in evidence how the Plaintiff and his mother had made attempts, first by lodging a case before Kwisero Land Disputes Tribunal and later before the Kakamega High Court (No.26 of 2001 (O.S.)). In both cases, the Plaintiff was unsuccessful. The Kakamega High Court case was dismissed for want of prosecution. It was not determined on its merits. It was undisputed fact from the evidence adduced before court that the Defendants, particularly Ambaisi, had not made any efforts to remove or evict the Plaintiff and members of his family from the portion of land that they are currently in occupation. Ambaisi sold two of the portions of the suit parcels of land to his co-defendants Martin Shipuku Malama and Jackton Omoto. From the evidence adduced, it was apparent that the two are in occupation of their respective parcels of land. The Plaintiff has not interfered with their quiet possession of the same.

It is clear from the foregoing, and having evaluated the facts of this case, that the Plaintiff has established a case for this court to grant him the order of adverse possession that he craves for but only in respect to the portion of land registered as LR.No.Kisa/Mundeku/1466 where the Plaintiff and members of his family are currently in occupation. In **Harrison Ngige Kaara –Vs- Gichobi Kaara & Anor C.A. Civil Appeal No.79 of 1996** (unreported) the Court of Appeal held at page 5 as follows:

“The law of adverse possession is clear. Section 7 of the Limitation of Actions Act Cap.22 Laws of Kenya provides for a 12 years limitation period for actions to recover land. That period does not start running unless the land is in the possession of some person or persons whose interest in it is hostile to that of the owner thereof. Possession is hostile if it is open, without right, without force or fraud and exclusive. In other words, the adverse possessor must be shown to be using the land as though it is solely his own before a right of action to recover it can be said to have accrued for the limitation period to start running.”

In the present case, it was clear from the evidence that Ambaisi, even after purchasing the former undivided parcel of land from Josephine in 1985, made no attempt whatsoever to remove or evict the Plaintiff and members of his family from the portion of land that they are currently occupying. In this court’s considered view, the Plaintiff and members of his family acquired the said portion by adverse possession because they have occupied the said portion of land in an open, exclusive and hostile possession. The Plaintiff has occupied the said parcel of land without the permission or consent of the registered owner, Ambaisi. Ambaisi the registered owner, has made no attempt in the intervening period to assert his ownership over the said portion of land.

For the above reasons, this court holds that the Plaintiff established his case to the required standard of proof on a balance of probabilities that he had acquired the portion of land registered as L.R.

No.Kisa/Mundeku/1466 measuring 0.6 hectares (approximately 1.5 acres) by adverse possession. This court directs the District Land Registrar Kakamega to register the Plaintiff as the owner of the said portion of land. The Deputy Registrar of this court shall execute the necessary transfer documents transferring the said portion of land to the Plaintiff. For the avoidance of doubt, this court holds that the Plaintiff has no claim whatsoever in respect of the other five (5) parcels of land which were transferred and initially registered in the name of Ambaisi. Taking into account the peculiar circumstance of this case, this court directs that each party shall bear their own costs. It is so ordered.

L. KIMARU

JUDGE

DATED, COUNTERSIGNED AND DELIVERED AT BUSIA THIS 8TH DAY OF AUGUST 2013.

F. TUIYOT

JUDGE