



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL SUIT 7 OF 2006 (OS)

LAWI MASINJILA FANUEL.....PLAINTIFF

VERSUS

JOSHUA ANDALA.....1ST DEFENDANT

REGINA OPISA IMENDA.....2ND DEFENDANT

J U D G M E N T

1. The Originating Summons dated 6th February 2006 is premised on the provisions of **Sections 28 and 30** of the **Registered Land Act**, **Section 7A** of the **Limitation of Actions Act** and **Order XXXVI rules 3 and 3A** of the **Civil Procedure Rules**. The orders sought are that;

“a) The Plaintiff/Applicant be declared the owner of Land parcel No.Kak/Idakho/Shikulu/3542 which is fenced and clearly demarcated and whose boundaries are clearly marked on the ground and which the Plaintiff/Applicant and his family occupies and utilizes and to which he is entitled by virtue of adverse possession and the Defendants/Respondents be ordered to transfer title to the said parcel of Land to the Plaintiff/Applicant.

b) The Court do declare that the 2nd Defendant/Respondent is holding title to the Land parcel No.Kak/Idakho/Shikulu/3542 measuring 0.04 hectares in trust for the Plaintiff/Applicant and in default of the Defendants/Respondents transferring the same voluntarily the Court do make an order authorizing the Deputy Registrar, High Court of Kenya to execute all the documents necessary to effect the transfer of title to the suit Land aforesaid to the Plaintiff/Applicant.

c) The Honourable Court do make further orders or grant any other relief deemed fit and just.

d) The Defendants/Respondents be ordered to pay the costs of his summons to the Plaintiff/Applicant.”

2. In his Affidavit sworn on 6th February 2006 and in evidence before this Court, the Plaintiff's case is as follows;

3. That on 10th April 1962, he purchased a parcel of Land measuring 0.04 hectares from one Justo Ambutsi Musungu at a consideration of Kshs.700/- and a Sale Agreement was executed to confirm the transaction. In the Sale Agreement, the Land was said to be measuring 147ft by 37ft and later, parties agreed for the sale/purchase of another 4ft and thus the Land became 147ft x 41ft and this was in 1967.
4. That upon the initial Agreement, the Plaintiff took possession, fenced his portion and begun planting beans and maize thereon. The Land was unregistered as land adjudication had not been undertaken in the area and when it was finally registered, the larger portion was registered in the names of Justo Ambutsi Musungu. Later, the 1st Defendant purchased Land from Musungu which was neighbouring the Plaintiff's Land and he registered both his portion and the Plaintiff's portion in his names and acquired title, registered as land parcel No.Idakho/Shikulu/2298. This was done on 19th June 1973 and the Plaintiff was unaware of the registration as he was working in Mombasa and later, on 2nd March 2005, the 1st Defendant sub-divided the Land into two and one of the parcels was Idakho/Shikulu/3542 which was precisely the entire portion occupied by the Plaintiff.
5. It was the further case for the Plaintiff that on 30th June 2005 and without due regard to his interests over the land, the 1st Defendant transferred title No.3542 to the 2nd Defendant. Prior to that, in the year 2004, the 1st Defendant had attempted to enter the Land and drop building material but the Plaintiff intervened and it was agreed that she would transfer the Land to the Plaintiff who was to pay her Kshs.39,000/- for her troubles. He paid Kshs.20,000/- but she declined to attend the Land Control Board to formalize the transfer.
6. The Plaintiff added that he has put up a permanent building on the disputed portion of Land and also has six (6) rental houses and has used the Land without interruption since 1962. During cross-examination, he admitted that he had sold half of the Land he occupies to one Enock Imbiaka Ikutwa who has also put some structures on the Land.
7. Edward Okang'a Makotsi confirmed that he personally drew the Sale Agreement between the Plaintiff and Justo Ambutsi and he was present with Zakayo Shimwaka and one Philip when the two executed it. Thereafter, he was present when the Plaintiff's boundary was clearly demarcated in 1962 and he confirmed that the Plaintiff had been in occupation ever since.
8. Shem Shitukha confirmed that the Plaintiff entered the Suit Land in 1962 and had never left it.
9. In his Replying Affidavit sworn on 18th August 2006 and in evidence before this Court, the 1st Defendant stated that he purchased the whole of Land parcel No.Idaho/Shikulu/2298 from Justo Ambutsi Musungu in 1965 and obtained title thereto in 1974. Thereafter, in the year 2004, he sub-divided it and sold title No.3542 to the 2nd Defendant. He denied that the Plaintiff was in occupation of the Land and denied that the Plaintiff had developed any portion of it.
10. The 2nd Defendant also filed a Replying Affidavit and gave oral evidence the import of which was that she purchased the Land by Lawful means from the 1st Defendant and only became aware of the Plaintiff's claim on 15th October 2004 when she took construction material but was stopped from dropping them on the Land by the Plaintiff.
11. Both Defendants in a nutshell, stated that the claim by the Plaintiff was frivolous and ought to be dismissed with costs.
12. I have read the Submissions by Advocates appearing and I have read the following decisions submitted;
 - i) *Charles Matheka vs. Haco Industries Ltd [2008] eKLR* where it was held that where a party is unable to establish that he has been on disputed Land for a twelve year uninterrupted period, the orders of adverse possession cannot issue.

ii) *Benjamin Murima & 3 others vs. Gladys Njeri C. A. No.213/1996* where the Court of Appeal held *inter alia* that where a Land owner grants the trespasser permission to use the Land, then the occupation is not adverse but if it is not so derived, then it is adverse.

iii) *Githu vs Ndeete [1984] KLR 776* where Potter J.A. held that **“the mere change of ownership of Land which is occupied by another person under adverse possession does not interrupt such person’s adverse possession”**.

iv) *Charity Warugugu Maina vs. Maginda Ranchod Chouham HCCC No.27/2003 (Milimani)* where Osiemo, J. held that once the Plaintiff had established a claim for adverse possession, then she **“has acquired a transmittable interest in the portion occupied by her against the whole world including the defendants.”**

13. All the authorities above are relevant to the present case and I should begin by stating that the evidence tendered by the Plaintiff and his witnesses was consistent on one point; the Plaintiff entered into a Sale Agreement with Justo Ambutsi Musungu on 10th April 1962 and the person who drafted the Agreement was PW2, Edward Okang’a Makotsi who also witnessed the execution thereof. Further, the cumulative evidence of all the witnesses is that the Plaintiff thereafter took possession and I do not believe the evidence of the 1st Defendant that the Plaintiff never occupied the Land. In his evidence, he admitted that he was aware that Enock Indiakha had constructed some houses on the Land and that evidence was in tandem with that of the Plaintiff that he sold part of the Land to Indiakha. The legality of that transaction notwithstanding, it merely confirms the Plaintiff’s interest in the Land.

14. Having so said, it follows that since 1974 when he obtained title, the 1st Defendant had never accepted the Plaintiff as lawfully on the land and occupation having been proved and user of the Land also proved, it follows that on the authority of *Benjamin Murima (Supra)* and *Githu (Supra)*, then adverse possession has been proved and the Plaintiff is entitled to prayers (a) and (b) above which reads as follows;

a) The Plaintiff/Applicant be declared the owner of Land parcel No.Kak/Idakho/Shikulu/3542 which is fenced and clearly demarcated and whose boundaries are clearly marked on the ground and which the Plaintiff/Applicant and his family occupies and utilizes and to which he is entitled by virtue of adverse possession and the Defendants/Respondents be ordered to transfer title to the said parcel of Land to the Plaintiff/Applicant.

b) The Court do declare that the 2nd Defendant/Respondent is holding title to the Land parcel No.Kak/Idakho/Shikulu/3542 measuring 0.04 hectares in trust for the Plaintiff/Applicant and in default of the Defendants/Respondents transferring the same voluntarily the Court do make an order authorizing the Deputy Registrar, High Court of Kenya to execute all the documents necessary to effect the transfer of title to the suit Land aforesaid to the Plaintiff/Applicant.

15. No order as to costs.

16. Orders accordingly.

**I. LENAOLA
JUDGE**

**DELIVERED, DATED AND COUNTER-SIGNED BY B. T. JADEN, JUDGE AT KAKAMEGA
THIS 1st DAY OF FEBRUARY, 2012**

**B. T. JADEN
JUDGE**