



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CIVIL CASE NO. 89 OF 2001**

**EDWARD TUTI NAMAYI .....APPLICANT/PLAINTIFF**

**VERSUS**

**1. AMINA MAYABI MUMANYI  
2. MOHAMED OMAR KWEYU .....**

**RESPONDENT /DEFENDANTS**

**3. SHEBAN AMAKOBE OMAR**

**JUDGMENT**

**1.** The amended originating summons dated 23.3.2004 in premised on the provisions of SS.37 and 38 of the Laws of Limitation of Actions Act, Cap.22 Laws of Kenya and it seeks determination of the following questions;

- a) Whether the applicant has been in open, peaceful and continuous occupation of a portion of land originally comprised in Land parcel No. ISUKHA/SHIRERE/900.
- b) WHETHER the applicant has continued to be in adverse possession of the said suit land since 1981, a period of 20 years and is entitled to be registered as proprietor to the said portion.
- c) WHETHER the occupation of the applicant has been of right and without the consent of the First Respondent and is thus adverse to the said Respondent's registered title thereto as to extinguish the Respondents proprietary rights to a portion thereof measuring 1 acre as aforesaid.
- d) WHETHER at the time the Respondents were applying for letters of administration, their proprietary rights over a portion of one acre occupied by the applicant had been extinguished.
- e) WHETHER the applicant should be registered as the proprietor of the said suit land
- f) WHETHER at the time of sub-division of the original parcel of land into three portions, the applicant had already acquired rights of adverse possession so as to extinguish the Respondents' claim of ownership over the said portion of 1 acre occupied by the applicant.
- g) WHO should be condemned in costs hereof.

**2.** The following orders are then sought upon the said questions being determined;

**(a) “That the applicant has been in continuous and uninterrupted occupation of the suit land a portion of 1 acre covering part of land parcel ISUKHA/SHIRERE/4509 and 45010 registered in the names of the Second and First Respondents above named respectively since 1981 uptodate.**

**(b) That the applicant has thus acquired adverse possession of the suit land.”**

3. In his supporting Affidavit sworn by the Applicant and in evidence before this court, the Applicant’s case is that on 23.5.1981, he purchased one (1) acre of land to be excised out of land parcel no. Isukha/Sherere/900 from the 1<sup>st</sup> Respondent, Amina Mayabi Mumanyi at a consideration of Kshs.15,000/= . On 23.5.1981, he paid Kshs.2,000/= and a sale Agreement [P.EXH.1 (a) + (a)] was then executed. On 27.4.1984, he paid the balance of purchase price and the acknowledgment thereof was produced as P.EXH. 2 (a) + (b) thereafter. It was his further evidence that the 1<sup>st</sup> Respondent allowed him to enter and built a house on the land and to-date , he has been in occupation of the One(1) acre that he purchased.

It was also his evidence was that he fenced his portion off, planted bananas, trees and other crops and he also built semi-permanent houses which he has leased out to tenants.

4. It was also the evidence of the Applicant that although he knew that the land belonged to Omar Kweyu (deceased), the 1<sup>st</sup> Respondent showed him his death certificate and later he came to know that the land was registered in the Respondents’ joint names in 1993. On 5.11.1995, the 1<sup>st</sup> Respondent agreed together with the 2<sup>nd</sup> Respondent and others that he would build a house for the 2<sup>nd</sup> Respondent to enable transfer of the land to the Applicant. He did so. The agreement in that regard was produced by the Applicant as P.Exh.7. Later, the 3<sup>rd</sup> Respondent demanded a cow and he bought it for him and signed another agreement – P.Exh.8. In spite of all the above actions on his part, the Respondents declined to transfer the land and so he decided to file suit.

5. PW 2, Johnston Nandwa Otieno confirmed that he was a witness to P.Exh.1, the initial sale agreement for the land and he was aware that the Applicant entered the land a year after the agreement was signed.

6. He also confirmed that the Applicant had put up seven (7) semi-permanent houses on the land as did Jared Kuta, PW3, who was a tenant in one of the houses in 1996 and has been a tenant to-date.

7. The Respondents on their part and in evidence before this court. Stated as follows;

According to DW 1, Amina Muyabi Munami, she was not party to the agreement date 23.5.1981 and that her in-laws, Juma Shikanga and Rajab Bushuru were the ones who sold the land. That she signed some documents during that period but in her evidence, she was doing so to facilitate the inheritance of her husband’s land. Later, together with the other Respondents she obtained title to the land and then sub-divided it among the three of them.

8. DW 2, Mohammed Kweyu Omari denied knowledge of the sale of the land to the Applicant but in cross-examination, he stated as follows;

**“I have seen the plaintiff on the land but I do not know when he entered it. I have never gone to court to stop him from using it”.**

He denied the document produced as P.Exh.8 and denied signing it.

9. DW3, Shaban Amakobe Omari also denied selling the land and as regards P.Exh.8, he admitted receiving Ksh.4,000/= from the Applicant as “help” towards the payment of his dowry. He admitted that the Applicant had been on the land since 1982 and had built houses on it. He stated further as follows;

**“When I received Kshs.4,000/= my mother and brother were present. They signed the**

**acknowledgement thereof. I also signed”.**

Later in re-examination he said;

**“Mohamed never signed P.Exh.8. My mother signed it”.**

I should state here that the 1<sup>st</sup> Respondent in cross-examination stated partly as follows;

**“Edward started using the land from 1981 to-date. He has houses and he rents them out. The land is about one acre. It has a boundary with trees”.**

**10.** I have taken into account the submissions made by the advocates for the parties and it is not contested from the above evidence that the Applicant took possession of one acre comprised in title no. Isukha/Shirere/900. It is also not in doubt that he has put up houses on the land and which he rents out to tenants including PW3. It is also not an issue to be contested that he has put up a fence to clearly demarcate the one acre that he occupies.

Regarding whether the Respondents were parties to the transaction that led to the Applicant taking possession, I am satisfied that they did so. The 1<sup>st</sup> Respondent signed not one but two documents. P.Exh.1 and P.Exh.8 indicative of the fact that she was aware of what she was doing. Only the 3<sup>rd</sup> Respondent struck me as partly honest of the three of them but he too lied when he said that the Applicant out of magnanimity of the heart gave him Kshs.4,000/= to “help” him acquire a wife. I do not believe him as both documents, which were duly signed, speak for themselves.

**11.** It is also not an issue that since 1981, the Respondents made no move to evict the Applicant. They all admitted that he was on the land and none of them said that from 1993 when they obtained title, they took no action to remove him from the land. It is not sufficient in a claim for adverse possession to argue that neither themselves nor Shikanda aforesaid had any capacity to sell the land. Adverse possession is predicted not on a claim to entitlement to land through purchase but possession adverse to the present and past owner’s title. That is why in Mbira Vs Gachuki [2002] IE.A.137 (HCK), Kuloba J. argued that the possession had to be adverse in that occupation had to be inconsistent with and in denial of the title of the true owner of the premises.

**12.** In the present case, the Respondents all maintained that the Applicant had no lawful right to be in possession and that he never entered the land with their consent. I have said that their stand is inconsistent with the evidence and to my mind their conduct only reinforces the argument by the Applicant that his occupation became hostile when the Respondents refused to transfer the land to him.

**13.** If the above be true, when did time start running? I am satisfied that time begun running when the Applicant entered the Land in 1981 and that the fact the Applicants obtained title in 1993 did not affect that fact – see Githu Vs Ndeete [1984] KLR 776.

**14.** I should state here that if, as it is true, the Applicant entered the land without the consent of the registered owner, then his otherwise unlawful entry was adverse from the time of entry.

**15.** The present proceedings were instituted in 2001, and it is obvious that more than twelve (12) years had elapsed since entry and the adverse possession has crystallized.

**16.** I will, for the above reasons, allow the summons as prayed and the final order is as follows;

**17.** That the applicant has been in continuous and uninterrupted occupation of the suit land a portion of 1 acre covering part of land parcel ISUKHA/SHIRERE/4509 and 45010 registered in the names of the Second and First Respondents above named respectively since 1981 uptodate.

**18.** That the applicant has thus acquired adverse possession of the suit land.

**19.** The nature of the suit necessitates that each party should bear their own costs.

**20.** Orders accordingly.

*Delivered, dated and signed at Kakamega this 14<sup>th</sup> day of April, 2011*

**ISAAC LENAOLA**  
**J U D G E**