



**Mbwana v Gadi & another (Civil Case 52 of 2008)  
[2022] KEELC 3735 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3735 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
CIVIL CASE 52 OF 2008**

**BN OLAO, J  
JULY 28, 2022**

**BETWEEN**

**SAADA BAKARI MBWANA ..... PLAINTIFF**

**AND**

**KADI MUBWANA (SUBSTITUTED BY MUMBWANA OMARI  
GADI) ..... 1<sup>ST</sup> DEFENDANT**

**GICHINGA KENNEDY NJOROGE ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1 By an Originating Summons dated 10<sup>th</sup> September 2008 and amended on 7<sup>th</sup> March 2022, Saada Bakari Mbwana (the plaintiff) sought a determination of the following issues with regard to a portion of land measuring 50 x 100 feet out of the land parcel NO East Bukusu/South Kanduyi/11395 (the suit land): -

1. Whether the plaintiff has been in occupation or in possession of 50 x 100 feet comprised in land parcel NO East Bukusu/South Kanduyi/11395 curved out of land parcel No East Bukusu/South Kanduyi/5769 for a period of 12 years peacefully, continuously and/or without force.
2. Whether the plaintiff has acquired title to the portion measuring 50 x 100 feet by adverse possession.
3. Whether the defendants' title to the said portion measuring 50 x 100 feet was extinguished by operation of the law.
4. Whether the defendants' registration and Mubwana Omari Kadi(minor's) registration on 7/8/2008 could defeat the plaintiff's entitlement to the portion measuring 50 x 100 feet by way of adverse possession.
5. Whether the plaintiff should be registered as the proprietor of the portion measuring 50 x 100 feet and comprised in the said title.



6. Who should bear costs of this suit.
2. Arising out of the above, the plaintiff sought the following orders as against Mbwana Omari Kadi and Gichinga Kennedy Njoroge (the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively): -
    - a. That the plaintiff has been in peaceful occupation of a portion measuring 50 x 100 feet out of the land comprised in the said title.
    - b. A declaration that upon expiry of 12 years, the defendants could only be registered to hold the portion measuring 50 x 100 feet in trust for the plaintiff.
    - c. That under Section 38 of the Limitation of Actions Act, the plaintiff be registered as proprietor of the suit land.
    - d. That the defendants be ordered to execute all documents of transfer to vest the said 50 x 100 feet in the name of the plaintiff failing which the Deputy Registrar of this Court be empowered to do so.
    - e. That the costs of this suit be borne by the defendants.
    - f. That this Court to grant any other relief it may deem fit to grant.
  3. In support of the Originating Summons, the plaintiff filed a supporting affidavit dated 11<sup>th</sup> September 2008 in which she averred, inter alia, that on 5<sup>th</sup> January 1996, she purchased a plot measuring 50 x 100 feet from Kadi Mbwana (now deceased and substituted with Mbwana Omari Kadi) to be carved out of the land parcel No East Bukusu/South Kanduyi/5769 which was later sub – divided to create the suit land. That she took vacant possession of the said plot upon payment of the full consideration. That she has resided on the plot exclusively together with her family without interruption for a period in excess of 12 years. That the said Kadi Mbwana signed the transfer documents but she was later surprised to find that the said plot had secretly and fraudulently been transferred to Kadi Mbwana’s then minor son (now the 1<sup>st</sup> defendant together with the 2<sup>nd</sup> defendant. That the said transfer was done to defeat her rights in the said plot which is clearly demarcated on the ground with a visible boundary and her home.

The plaintiff filed the following documents as her documentary evidence: -

1. Sale agreement between the plaintiff and Kadi Mbwanadated 5<sup>th</sup> January 1996.
2. Green Card for the land parcel No East Bukusu/South Kanduyi/5769 in the name of Kadi Mbwana.
3. Green Card for the land parcel No East Bukusu/South Kanduyi/5769 in the name of 1<sup>st</sup> defendant (then a minor) and the 2<sup>nd</sup> defendant on 7<sup>th</sup> August 2008.
4. Official Search for the land parcel No East Bukusu/South Kanduyi/11395.
5. Acknowledgement of payment of the balance of purchase price on 31<sup>st</sup> August 2003 and 9<sup>th</sup> March 2004 by Kadi Mbwana.
6. Further acknowledgment of purchase price by Kadi Mbwanadated:  
15<sup>th</sup> March 2004  
12<sup>th</sup> May 2004  
14<sup>th</sup> May 2004  
19<sup>th</sup> June 2004 and



20<sup>th</sup> December 2004.

7. Acknowledgment of compensation of trees.
  8. Search for the land parcel No East Bukusu/South Kanduyi/11395.
  9. Title deed for the land parcel No East Bukusu/South Kanduyi/11395 in the name of the defendants.
  10. Official Certificate of Search for the land parcel No East Bukusu/South Kanduyi/11395.
  11. Application for Consent of the Land Control Board.
  12. Transfer of Land Form.
  13. Mutation Form for survey and sub – division of the land parcel No East Bukusu/South Kanduyi/5769 to create land parcel No East Bukusu/South Kanduyi/11395.
  14. Photographs of a home.
  15. Official Search for the land parcel No East Bukusu/South Kanduyi/11395 dated 15<sup>th</sup> January 2014.
- 4 The plaintiff also filed witness statements dated 15<sup>th</sup> March 2014 of the following witnesses who testified during the trial: -
1. Suleiman Sakwa Mukumba(PW 2)
  2. Rehema Bakari(PW 3) and;
  3. Patrick Barasa Mechumo(PW 4)
- 5 Allan Babu(PW 5) a Land Registrar based in Bungomadid not record a statement being an expert witness. In addition to her supporting affidavit, the plaintiff also recorded a statement dated 15<sup>th</sup> September 2014. That statement is basically a repeat of what is contained in her supporting affidavit.
- 6 In his statement Suleiman Sakwa Mukumba(PW 2) states that he knew the deceased Kadi Mbwanawho was the father of the 1<sup>st</sup> defendant. That he was a witness when the plaintiff bought land from him in 1996 and which she has occupied without interference upto the time of filing this suit. That the land is clearly demarcated with a boundary and a home. That before the deceased passed away around 2008, he started threatening to evict the plaintiff who then decided to file this suit. That the plaintiff has done substantial development on the land including sinking a bore hole, building houses, digging a pit latrine and planting trees.
- 7 Rehema Bakari(PW 3) is the daughter to the plaintiff. She stated that in 1996, the plaintiff purchased land from Kadi Mbwanaand took possession thereof until 2008 when he started threatening to evict the plaintiff. That the plaintiff has done substantial development on the land including constructing residential houses sinking a bore hole and pit latrine as well as planting trees and bananas.
- 8 Patrick Barasa Mechumo(PW 4) is a retired Assistant Chief of South Kanduyi Sub –Location. He knows all the parties herein including the deceased Kadi Mbwanafather to the 1<sup>st</sup> defendant who was his neighbour. That he is aware that on 5<sup>th</sup> January 1996, the late Kadi Mbwana sold the plaintiff a plot at a consideration of Kshs. 25,000/= . That the plaintiff made a down payment of Kshs. 10,000/= for the plot measuring 50 x 100 feet and took possession after Kadi Mbwana vacated it. He added that he witnessed the payment of the balance and signed and stamped the acknowledgment of the balance since the land was within his jurisdiction and the said Kadi Mbwana was a brother – in – law to the



- plaintiff. That the plaintiff lived on the land until 2008 when Kadi Mbwana started interfering with her and refused to give her the title yet he had moved and was living in Kwa Dismas Estate.
- 9 Allan Babu(PW 5) is a Land Registrar in Bungoma. He told the Court that Kadi Mbwanawas the first registered proprietor of the land parcel No East Bukusu/South Kanduyi/5769 on 15<sup>th</sup> May 1992. It was then sub – divided to create land parcels No East Bukusu/South Kanduyi/ 11394, 11395 and 11396. He produced the Green Cards for the land parcels No East Bukusu/South Kanduyi/5769 and 11395.
- 10 Gichinga Kennedy Njoroge(DW 1), is the 2<sup>nd</sup> defendant. He recorded a statement dated 10<sup>th</sup> April 2014 in which he stated that in 2004, the plaintiff encroached onto the land parcel NO East Bukusu/south Kanduyi/113 and demolished the Applicant’s house (he must have meant the then 1<sup>st</sup> defendant’s house). That the then 1<sup>st</sup> defendant (Kadi Mbwana) reported the matter to the Chief who summoned the plaintiff but she did not turn up. When she later respondent to the District Officer’s summons, she alleged that she had loaned Kadi Mbwana Kshs. 2,000/= which he was to repay by refunding Kshs. 20,000/= and she also admitted that she did not purchase the land in dispute. The District Officer ordered her, vide a letter dated 17<sup>th</sup> September 2008, to vacate the land but she refused. It was then that Kadi Mbwana transferred the suit land to him to hold in trust for his minor son (now the 1<sup>st</sup> defendant). Therefore, the plaintiff has no right to the suit land and has not even been in occupation thereof for a period of 12 years as alleged. She therefore has no claim whatsoever to the suit land and she should give vacant possession to the 1<sup>st</sup> defendant who is the rightful owner.
- 11 Fridah Gadi(DW 2) is the wife to the late Kadi Mbwana. Her testimony as contained in her statement is that in 2004, the plaintiff went to the suit land, demolished her house and took away her property. That this was done on the instructions of the Assistant Chief Musikoma Location who even threatened to beat up the 2<sup>nd</sup> defendant. She later learnt that the plaintiff had done so because Kadi Mbwana had advanced her a loan which he defaulted in paying and so she decided to take the suit land in order to off – set the loan. That there was no such agreement and the plaintiff is still in occupation of the land. This Court should therefore order the plaintiff to vacate.
- 12 Mumbwana Omari Kadi(DW 3) is the 1<sup>st</sup> defendant in this case. He filed a replying affidavit dated 11<sup>th</sup> March 2022 after being sub substituted in place of his deceased father Kadi Mbwana. It is his testimony that the suit land is registered in his names having been transferred to him by his late father. That in 2004, the plaintiff forcefully entered the suit land and demolished his father’s and his house claiming that she had loaned him Kshs. 2,000/= which his late father did not pay and the outstanding sum had now reached Kshs. 20,000/=. That the matter was referred to the Office of the District Officer who recommended that they settle the matter in his office and wrote a letter dated 17<sup>th</sup> September 2008. And although the 1<sup>st</sup> defendant was willing to refund her the loan, the plaintiff insisted on having the suit land as compensation. That by the time this suit was filed, the plaintiff had only lived thereon for 4 years and not 12 years having entered the same in 2004. That they have been having disputes all through and therefore the plaintiff’s occupation of the suit land has never been peaceful and continuous as there have been disputes with regard to how the plaintiff entered the said land since she never produced any sale agreement. That before entering the suit land, the plaintiff was living in Mjini Estate in a rental house since she had no land on which she could build her home. She is not entitled to the suit land by way of adverse possession since she has only lived there for 4 years and her occupation has not been peaceful or un – interrupted. The Originating Summons should therefore be dismissed.
- 13 Annexed to that replying affidavit are the following 00documents: -
1. A letter dated 17<sup>th</sup> September 2008 written by one Jared Otieno The District Officer Kanduyi Division.



2. Green Card to the land parcel No East Bukusu/South Kanduyi /5769.
  3. Green Card to the land parcel NoEast Bukusu/South Kanduyi /11395.
- 14 The hearing commenced on 25<sup>th</sup> September 2017 when the plaintiff and her witness Suleiman Sakwa Mukumba (PW 2) testified before Mukunya J. Thereafter, I took over on 2<sup>nd</sup> November 2020 and heard the remaining witnesses of the plaintiff as well as the defendants. They all adopted as their testimony their respective affidavits and statements contents of which I have already summarized above. They also produced as their documentary evidence the documents filed herein.
- 15 Thereafter, submissions were filed both by MS Chungeinstructed by the firm of Elizabeth Chunge & Company Advocates for the plaintiff and by Mr Kunduinstructed by the firm of Bulimo & Company Advocatesfor the defendants.
- 16 I have considered the evidence on record by all the parties and the submissions by Counsel.
- 17 The plaintiff's case is that in 1996, she purchased a plot measuring 50 x 100 feet from the late Kadi Mbwanawhich was hived from the suit land and took possession thereof. That she has occupied and extensively developed the said plot peacefully, exclusively and without interruption after the deceased executed the transfer forms. She is therefore entitled to it by way of adverse possession.
- 18 The defendants' case however is that the plaintiff forcefully occupied the said plot after the deceased Kadi Mbwanawas unable to repay a loan of Kshs. 2,000/= which had accrued interest and risen to Kshs. 20,000/=. That her occupation of the said plot is forceful and the District Officerhad even arbitrated over their dispute and resolved it in favour of the defendants. In any case, she only entered the suit land in 2004 and therefore, she has not occupied it for 12 years in order to be entitled to the plot by way of adverse possession.

I consider the following issues to be relevant in the determination of this dispute: -

1. Is the plaintiff in occupation and possession of a plot measuring 50 x 100 feet out of the suit land?
  2. If so, has such occupation and possession of the said plot been peaceful, exclusive, open, un – interrupted and with the knowledge of the defendants or did she forcefully invade it and destroy the defendants' house?
  3. What disposal orders should this Court make with respect to the said plot?
  4. Who meets the costs?
- 19 This being a case hinged on adverse possession, I must begin by setting out the relevant law and some of the precedents that will guide me.
- 20 Section 38(1) of the *Limitation of Actions Act* allows a person who is in occupation and possession of land registered in the names of another to approach the Court for a declaration that he has acquired ownership of the same by way of adverse possession. It provides: -

38(1) “Where a person claims to have become entitled by adverse possession to and registered under any of the Acts cited in Section 37 or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land.”

- 21 The title deed to the suit land was first registered in the names of the 1<sup>st</sup> defendant (then a minor) and the 2<sup>nd</sup> defendant on 7<sup>th</sup> August 2008 following the sub – division of the land parcel No East Bukusu/



South Kanduyi/5769. That registration was done under the repealed Registered Land Act. Section 30(f) of that Act recognized that a claim for land by way of adverse possession was among the overriding interests that need not be registered on the title. It states that: -

30 “Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same without their being noted on the register –

- (a) –
- (b) –
- (c) –
- (d) –
- (e) –
- (f) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.”

22 That was the law when this suit was filed on 11<sup>th</sup> September 2008.

23 The new land laws enacted after the promulgation of the 2010 Constitution also recognize the doctrine of adverse possession. Section 28(h) of the new Land Registration Act 2012 has a similar provision. Further, Section 7(d) of the new Land Act provides that: -

7 “Title to land may be acquired through: -

- (a) ....
- (b) .....
- (c) .....
- (d) prescription.”

24 In *Kasuve .v. Mwani Investment Ltd & Others* 2004 1 KLR 184, the Court of Appeal had the following to say on proof of a claim by adverse possession: -

“ And in order to be entitled to land by adverse possession, the Claimant must prove that he had been in exclusive possession of the land openly and as of right and without interruption for a period of 12 years either after dispossessing the owner or by the discontinuation of possession by the owner on his own volition – *Wanje .v. Saikwa*(No 2) 1984 KLR 284. A title by adverse possession can be acquired under Limitation of Actions Act for a part of the land and the mere change of ownership of the land which is occupied by another under adverse possession does not interrupt such person’s adverse possession – see *Githu .v. Ndeete* [1984] KLR 776.”

25 In *Mate Gitabi .v. Jane Kabubu Muga & Others* C.A Civil Appeal No 43 of 2015 (Nyeri) it was stated thus: -

“ For one to succeed in a claim for adverse possession one must prove and demonstrate that he has occupied the land openly, that is without secrecy, without force and without license or permission of the land owner with the intention to have the land. There must be an apparent



dispossession of the land from the land owner. These elements are contained in the Latin Maxim nec vi, nec clam, nec precario.”

26 The occupation and possession by the plaintiff of a plot measuring 50 x 100 feet out of the suit land is not really contested. The only point of divergence is that while the plaintiff claims to have been in occupation and possession of the said plot since 1996 when she purchased it from Kadi Mbwanathe deceased father to the 1<sup>st</sup> defendant, the defendants’ case is that the plaintiff infact forcefully and unlawfully invaded the suit land in 2004, demolished the 1<sup>st</sup> defendant’s family house and claimed that it belonged to her. She has not therefore been in occupation and possession of the said plot peaceful and for a period of 12 years.

27 To bolster her claim that she entered the suit land through a sale agreement with Kadi Mbwana dated 5<sup>th</sup> January 1996, the plaintiff did provide the said sale agreement. It bears the name of Gadi Mbwana (who I have no doubt is the same person referred to as Kadi Mbwana) and who was the original 1<sup>st</sup> defendant herein. The agreement bears his Identity Card No xxxx and a thumb print and refers to him as the seller. The purchase price of the plot is indicated as Kshs. 25,000/= of which Kshs. 10,000/= was paid upon execution of the sale agreement which is also signed by the plaintiff and bears the number of her Identity Card No xxxx and her thumb print. The balance of Kshs. 15,000/= was subsequently paid in various instalments between 5<sup>th</sup> April 1996 upto 5<sup>th</sup> April 2004 when the last instalment of Kshs. 2,050/= was paid. The acknowledgment slip for that day reads: -

“Today 5/4/2004 Mr Gadi Mbwanahas been paid the balance of a plot 2050 two thousand and fifty shillings only.

Sign Kadi.”

The other acknowledgment slips all bearing the thumb print of Kadi Mbwanaare dated as follows: -

Date Amount

1. 5<sup>th</sup> April 1996 - Kshs. 2,000/=
2. 16<sup>th</sup> January 2000 - Kshs. 2,000/=
3. 25<sup>th</sup> May 2000 - Kshs. 4,000/=
4. 23<sup>rd</sup> August 2003 - Kshs. 3,350/=
5. 31<sup>st</sup> August 2003 - Kshs. 2,000/=
6. 9<sup>th</sup> March 2004 - Kshs. 600/=

28 The defendants’ case, however, is that the plaintiff forcefully entered the suit land in 2004 claiming a refund of a loan of Kshs. 2,000/= which she had advanced to Kadi Mbwanaand which remained un – paid and had accrued interest and risen to Kshs. 20,000/=. The plaintiff was therefore invading the suit land in order to force Kadi Mbwanato repay the loan. This is what the 1<sup>st</sup> defendant has deponed in paragraphs 4, 5, and 8 of his replying affidavit dated 11<sup>th</sup> March 2022: -

- 4: “That the Applicant in the year 2004 forcefully entered the said land, demolishing my father’s house and my house claiming that she had leased (sic) my father Kshs. 2,000/= and that my father had failed to pay her back.”



- 5: “That we have had quarrels with the Applicant over issues to do with the Kshs. 2,000/= loan which she claimed that it had accrued profit of Kshs. 20,000/= and that she was occupying the land forcefully as compensation of the said amount of money.”
- 8: “That we were willing to pay her the loan money but she claimed she wanted title to my land as compensation she refused to take the money.”

29 On his part, the 2<sup>nd</sup> defendant stated as follows in paragraphs 4 and 10 of his statement dated 10<sup>th</sup> April 2014: -

- 4: “That the Applicant sometimes in the year 2004 encroached into land parcel E. Bukusu/S. Kanduyi/113 forcefully and unlawfully and demolished the Applicant’s (sic) family house and carried all the belongings that were in the house.”
- 10: “That she was later arrested to explain the said action and when she appeared before the D. O’s office she stated that she has advanced the owner of the land Kadi Mubwana(the deceased herein) a loan of Kshs. 2,000/= and he was to pay double the amount which was Kshs. 2,000/=.”

30 Other than allege that the plaintiff invaded the suit land in order to enforce the repayment of a loan of Kshs. 2,000/= which had accrued interest upto Kshs. 20,000/=, neither of the defendants could confirm when the deceased Kadi Mbwanaborrowed the said Kshs. 2,000/= from the plaintiff. Indeed, the 1<sup>st</sup> defendant admitted that in 1996, he was only 9 years old and so he would not have been in any position to know about the sale agreement. They could not explain how the Identity Card number of the said Kadi Mbwana ended up in the sale agreement dated 5<sup>th</sup> January 1996. The said agreement is self-explanatory and I shall reproduce only the first paragraph in extenso: -

“ 5. 1.1996

Agreementof sale of landEast Bukusu/South Kanduyi/5769.

Today 5.1.96 Mr Gadi Mbwanaof I.D Cardxxxx has sold a plot measuring 50 feet x 100 feet at the cost of 25,000/= Twenty-five thousand shillings only.

The balance is 15,000/= fifteen thousand shillings only. By Mr Bakari Mbwana Omollo of I.DCardxxxx.

1. Gadi Mbwana  
I.D Card xxxx  
Thumb print
2. Bakari Mbwana Omollo  
I.D Cardxxxx
3. Saada Bakari Mbwana  
I.D Cardxxxx  
Thumb print”

31 Both the vendor and the purchaser affixed their thumb prints on the said agreement.



32 In paragraph 10 of his replying affidavit dated 11<sup>th</sup> March 2022, the 1<sup>st</sup> defendant has averred as follows:

10 “That we have been having disputes with the Applicant all through and therefore, her occupation of the said land has never been peaceful and continuous. The disputes have been over how the Applicant entered the land without purchasing the same as she never produced any sale agreement.”

33 On his part, the 2<sup>nd</sup> defendant at paragraph 13 of his statement dated 10<sup>th</sup> April 2014 says: -

“That the Applicant confessed of never buying the land and that she only advanced the deceased Kadi Mubwanaa loan.”

34 The plaintiff having produced as part of her documentary evidence the sale agreement dated 5<sup>th</sup> January 1996 for the purchase of a plot measuring 50 x 100 feet from Kadi Mbwana, the onus shifted to the defendants to produce evidence that infact the plaintiff had advanced a loan of Kshs. 2,000/= to Kadi Mbwana which remained un – paid and attracted interest. The Green Card to the suit land shows that indeed it was a sub – division of the land parcel NO EAST Bukusu/South Kanduyi/5769 which is the subject of the said sale agreement.

35 The plaintiff’s evidence that she entered the suit land in 1996 following the sale agreement between her and Kadi Mbwanawas corroborated by Suleiman Sakwa Mukumba (PW 2), her daughter Rehema Bakari (PW 3) and Patrick Barasa Mechumo (PW 4) who was then the Chief of Kanduyi Sub – Location where the suit land is located. In his statement dated 1<sup>st</sup> October 2018 and which he adopted as his evidence during the trial, Patrick Barasa Mechumo had the following to say in paragraphs 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 28, 32, 33, and 34: -

13: “That I am aware that on 5<sup>th</sup> January 1996 the late Mubwana and Saada Bakari invited me at the disputed portion herein at the home of the late Mubwana.”

14: “That as the Chief, I proceeded at Mr Mubwana’s home and after arrival he informed me that he was to sale part of his land so that he buys a bigger land elsewhere because it was a plot.”

15: “That they had agreed the total sum of Kshs. 25,000/=.”

16: “That on the very day as (sic) the Chief, I did not have a problem with the agreement of sale since he was to buy an alternative land and indeed he had gotten the land in Mwandaarea in Bumula Division.”

17: “That agreement was reduced in writing and that there were other witnesses who included one Bakari Mubwanawho signed on the agreement.”

18: “That on the said (sic) Saada paid Kshs. 10,000/= and the balance was Kshs. 15,000/=.”

19: “He was selling an area of 100 ft x 50 ft and he signed on the agreement.”

20: “That I did not sign on the agreement as a condition that I was to sign on the final payment where my village elder one Hamdan was also to sign.”

21: “That I saw the plot, there was his house a very old house I am aware that they agreed that he vacates the house and demolish it.”



- 22: “That I am aware that immediately after the purchase Mubwanamoved out of his house and rented another house.”
- 23: “That he was to fully vacate immediately within a period of 3 months to pave way for the plaintiff and demolish his house.”
- 24: “That the plaintiff started immediately using it.”
- 28: “That the final payment was made on the 5<sup>th</sup> April 2004.”
- 32: “That the plaintiff has stayed on that land for some time a period of not less than 12 years.”
- 33: “That she has extensively developed the same with a residential home with several structures and big trees.”
- 34: “That she stayed until in 2008 when interference started when I was informed that Mubwanadid not give her the title number for the said plot.”

36 It is instructive to note that the acknowledgment dated 9<sup>th</sup> March 2004 which both the plaintiff and Kadi Mbwana signed upon receipt of Kshs. 600/= is also signed by Patrick Barasa Mechumo (PW 4) and bears the official stamp of the assistant chief South Kanduyi. The witness adopted the contents of his statement during the plenary hearing on 2<sup>nd</sup> November 2020 and was cross – examined by Mr Kundu when he reiterated contents of that statement. He denied that the arrangement between the plaintiff and Kadi Mbwana had anything to do with a loan. He said: -

“I am aware that the agreement was duly executed because the plaintiff took the land and even put up a house on it. She could not have done so if she had not finished paying for the land in dispute. I was the Assistant Chief at that time. This was not a loan. It was an agreement for sale of land.”

37 Patrick Barasa Mechumo(PW 4) was an independent witness and the Assistant Chief of the parties. I did not hear any of the witnesses suggest that he had any reason to give false testimony against any of the parties. He did not strike me as a dishonest witness and I am satisfied that his testimony was a true account of what transpired between the plaintiff and Kadi Mbwanawith respect to the said plot. The story about plaintiff having advanced Kadi Mbwana a loan of Kshs. 2,000/= which earned interest and rose to Kshs. 20,000/= can only have been concocted to conceal the truth of the matter which is that on 5<sup>th</sup> January 1996, Kadi Mbwana voluntarily sold a portion measuring 50 feet by 100 feet to the plaintiff and put her in possession thereof. Further, that she has remained in occupation and possession thereof having developed the same until 2008 when the defendants started harassing her to vacate.

38 To further compound the dishonesty of the defendants, they have alleged in their replying affidavits that the plaintiff forcefully entered the suit land and demolished the 1<sup>st</sup> defendant’s house in 2004. One would have expected that they would have quickly moved to Court to seek redress for that serious violation of their rights to property protected under Article 40 of *the Constitution*. However, there is no evidence to suggest that they have ever done so. Indeed, there is even no Counter – Claim filed by them seeking any orders against her. The 1<sup>st</sup> defendant has pleaded in paragraph 6 of his replying affidavit that the dispute was reported to the District Officer who wrote a letter dated 17<sup>th</sup> September 2008 in favour of Kadi Mbwana. The letter was produced as part of the defendants’ documentary evidence. It is brief and I will reproduce it in extensor: -

“ 17<sup>th</sup> September 2008



To whom it may concern

According to the case between Mubwana Omar and Saada Bakar the case was ruled in favour of Mubwana Omar parcel No East Bukusu. South Kanduyi/11395.

As per now Saada Bakar should move out of the said plot.

Jared Otieno

District Officer

Kanduyi Division.”

39 Embolded by the contents of the above letter, the 1<sup>st</sup> defendant has averred in paragraph 6 of his replying affidavit as follows: -

6: “That we reported the matter to Chief’s Officer who recommended us to solve the issue at the office of the D.O and the D.O wrote a letter dated 17/9/2008 in favour of my father. See copy marked MOG – 1.”

40 On his part, the 2<sup>nd</sup> defendant stated as follows in paragraphs 14 and 15 of his statement: -

14: “That the District Officer’s Office in Kanduyi Division through a letter dated 17.9.2008 ordered that the Applicant herein to move out of the said land parcel.”

15: “That she was offered the money she loaned out to the deceased herein but she totally refused to appear and be given the money.”

41 While the District Officer Mr Jared Otieno is to be commended for the efforts made to resolve the dispute, there is no evidence to suggest that the parties had filed any complaint before the then Land Disputes Tribunal at Kanduyi as envisaged under Section 3 (1) of the then Land Disputes Tribunal Act which was the law that would have empowered the said District Officer to Chair a panel of elders to arbitrate over the dispute. Therefore, what the District Officer did was well beyond his jurisdiction and of no legal consequences.

42 I am therefore satisfied that the plaintiff entered the suit land peacefully following a land sale agreement in 1996, that she has developed the land where she lives. By September 2008 when the dispute was reported to the District Officer Kanduyi, she had been on the disputed plot for 12 years and 4 months having taken possession in May 1996.

43 Having said so, however, there is documentary evidence that although the plaintiff took occupation and possession of the plot in May 1996 following a land sale agreement, she only paid Kshs. 2,050/= being the last instalment of the purchase price on 5<sup>th</sup> April 2004. Therefore, for purposes of adverse possession, time started running on the day when she paid that last instalment. In *Hosea .v. Njiru & Others* 1974 E.A 526, Simpson J following *Bridges .v. Mees* 1957 2 ALL ER 577 held that once payment of the last instalment of the purchase price had been effected, the purchaser’s possession became adverse to the vendor and that he, henceforth, by occupation for 12 years, was entitled to become the registered proprietor of the land in dispute. This has been followed in many cases including *Sisto Wambugu .v.*



Kamau Njuguna 1983 eKLR. See also *Public Trustee .v. Kamau Wandiri* 1982 – 88 1KAR 498 at page 505 where KNELLER J.A (as he then was) said: -

“The limitation period will begin to run from the date of payment of the purchase price in full or last instalment.”

44 In the circumstances of this case, time would start running from 5<sup>th</sup> April 2004 when the last instalment of the purchase price was paid or in September 2008 when the defendants repudiated the sale agreement by attempting to claim back the plot on the ground that the plaintiff had forcefully taken possession thereof to enforce the repayment of his loan then standing at Kshs. 20,000/= . Either way, by the time this suit was filed on 11<sup>th</sup> September 2008, the longest time which the plaintiff had been adversely in occupation and possession of the plot was 4 years well short of the 12 years’ statutory period. A claim for adverse possession cannot therefore be sustained.

45 In her Originating Summons, however, the plaintiff also pleaded that her claim is founded on trust in paragraph 6 (b) as follows: -

“A declaration that upon expiry of 12 years, the Respondents and one Mubwana Omari Kadico could only be registered to hold 50 x 100 ft in trust for the Applicant.”

46 As is now clear from the preceding paragraphs of this Judgment, the plaintiff has been in occupation and possession of the plot measuring 50 feet x 100 feet hived out of the suit land since 1996. She took possession following a sale agreement with Kadi Mbwanathe then registered owner of the land parcel NO East Bukusu/South Kanduyi/5769 from which the suit land was hived. She paid the purchase price in instalments and completed doing so on 5<sup>th</sup> April 2004. Four (4) years later on 8<sup>th</sup> August 2008, the suit land was registered in the names of the defendants and a title deed was issued to them and one month later in September 2008, the defendants started complaining that the plaintiff had in fact forcefully invaded the suit land claiming that she was entitled to the said plot in return for the Kshs. 2,000/= which she had advanced as a loan to Kadi Mbwana an allegation that has now been found to be untrue. I have no doubt in my mind that this is a proper case in which this Court can conclude that the defendants hold the said plot in a constructive trust in favour of the plaintiff.

47 In the case of *Macharia Mwangi Maina & 87 Others .v. Davidson Mwangi Kagiri* 2014 eKLR, the Court of Appeal observed as follows on the issue of a constructive trust and proprietary estoppel: -

“In the instant case, it was the respondent who put the appellants in possession of the suit property not as licensees but with the intention that he was to transfer individual plots purchased by them. The respondent went ahead and received the purchase price. We are of the considered view that the doctrine of proprietary estoppel and constructive trust are applicable and the respondent cannot renege. As Lord Bridge observed in *Lloyds Bank Plc .v. Rosset* 1991 1 AC 107, 132, a constructive trust is based on a “common intention” which is an agreement, arrangement or understanding actually reached between the parties and relied on and acted on by the claimant.”

48 The Court went on to add: -

“Constructive trust is an equitable concept which acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention.”



49 The Court then cited *Hussey .v. Palmer* 1972 3 ALL E.R 744 where it was held that a constructive trust is a trust imposed by law whenever justice and good conscience require it. It is an equitable remedy by which the Court can enable an aggrieved party to obtain restitution.

50 The contract between the plaintiff and Kadi Mbwanawas executed in 1996 during the regime of the now repealed Registered *Land Act*. Section 27(a) of the said Act provided that the registration of a person as the proprietor of land shall vest in him the “absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.” The same section however had a provisosal “that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.” A similar provision is found in Section 25 of the new *Land Registration Act*. And among the overriding interests recognized under Section 28(b) of the new *Land Registration Act* are: -

“trusts including customary trusts.”

51 While it is correct that neither of the defendants were parties to the sale agreement between the plaintiff and Kadi Mbwanawa on 5<sup>th</sup> January 1996, their registration as proprietors of the suit land on 8<sup>th</sup> August 2008 did not extinguish the overriding interest which the plaintiff enjoyed with respect to a portion thereof measuring 50 feet by 100 feet and for which they became constructive trustees holding it in trust for the plaintiff. In *Willy Kimutai Kitilit .v. Michael Kibet* 2018 eKLR, the Court was dealing with a case in which a contract for the sale of land was void for lack of the consent of the Land Control Board but it nonetheless went on to observe that under the current Constitution, Article 10(2) (b) had “elevated equity as a principle of justice to a Constitutional principle and requires the Courts in exercising Judicial authority to protect and promote that principle amongst others, it follows that the equitable doctrines of constructive trust and proprietary estoppel are applicable to and supersede the Land Control Act where a transaction relating to an interest in land is void and enforceable (sic) for lack of consent of the land Control Board.” This case does not involve the lack of any consent from the Land Control Board and indeed we are not told if the agreement was subject to the provisions of the Land Control Act. However, there is no doubt that the broad principles of a constructive trust and equitable estoppel apply. In *Mwangi & Another .v. Mwangi* 1980 KLR 328, it was held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land. The defendants therefore acquired the proprietorship of the suit land subject to the plaintiff’s rights in the portion measuring 50 feet by 100 feet the absence of any reference to the existence of a trust in the title documents notwithstanding. It must also be remembered that a constructive trust can be imposed by the Court guided by the circumstance of each case and the dictates of equity. In the circumstances of this case, I am satisfied that the plaintiff has proved, as pleaded in paragraph 6(b) of her Originating Summons, that the defendants hold a portion of land measuring 50 feet by 100 feet out of the suit land in trust for her. She is therefore entitled to that declaration.

52 On the issue of costs, it is clear from the evidence of the plaintiff that the deceased Kadi Mbwanawas her brother in law which means the 1<sup>st</sup> defendant is her nephew. Being family, the order that commends itself in the circumstances is to order each party to meet their own costs.

53 Ultimately therefore and having considered all the evidence herein, there shall be Judgment for the plaintiff against the defendants in the following terms: -

1. A declaration that the defendants hold a portion measuring 50 feet by 100 feet out of the land parcel No East Bukusu/South Kanduyi/11395 in trust for the plaintiff.
2. That trust is hereby determined.



3. The defendants shall within 30 days from the date of this Judgment execute all documents to facilitate the sub – division and transfer of a portion measuring 50 feet by 100 feet out of the land parcel No East Bukusu/South Kanduyi/11395 into the names of the plaintiff.
4. In default of (3) above, the Deputy Registrar of this Court shall be at liberty to execute such documents on behalf of the defendants.
5. The parties shall meet their own costs.

**BOAZ N. OLAO.**

**J U D G E**

**28<sup>TH</sup> JULY 2022.**

**JUDGMENT DATED, SIGNED AND DELIVERED AT BUNGOMA BY WAY OF ELECTRONIC MAIL ON THIS 28<sup>TH</sup> DAY OF JULY 2022.**

Right of Appeal explained.

**BOAZ N. OLAO.**

**J U D G E**

**28<sup>TH</sup> JULY 2022.**

