



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL SUIT NO.23 OF 1993

MULAA SUMBA BARASA.....PLAINTIFF/APPLICANT

VERSUS

ALFRED WERIMO.....DEFENDANT/RESPONDENT

J U D G M E N T

1. The Originating Summons dated 29th January 1993 is brought under Order XXXVI Rule 3 of the Civil Procedure Rules, as well as Sections 7, 17 and 38 of the Limitation of Actions Act, Cap.22 and Section 30 of the Registered Land Act, Cap 300. The sole prayer is that *“the Applicant be declared the owner of Land parcel Number Marachi/Elukhari/133 by presumption”*. In the Supporting Affidavit sworn on 25th January 1993, the Plaintiff/Applicant, Mulaa Sumba Barasa deponed and added at paragraphs 3, 4 and 5 thereof, that he had lived on the said parcel of land for over twelve (12) years and he should *“be registered as the owner thereof by adverse possession”*.

2. Alfred Werimo, the Defendant/Respondent in a Replying Affidavit sworn on 10th March 1993 deponed that he is the registered owner of land parcel number Marachi/Elukhari/133 which he purchased from one, Nicholas Barasa, the Respondent’s father, who at the time the Summons was filed, was still alive and had no claim to the land. He denied that the Applicant was in occupation of the disputed parcel of land but added that the latter *“and members of his family have been very hostile ... with the result that [he] has been unable to make use of the land”*. Further, that *“if the plaintiff has been in occupation of the suit land for over twelve (12) years which is hereby expressly denied, his said occupation has not been peaceful and without force”*. He raised one other issue; that his ownership of the land has never been in doubt since he has used the title thereof as security to obtain loans from financial institutions, to develop other parcels of land.

3. At the oral hearing of the Summons, the following evidence was tendered by the Applicant; firstly, that the land in dispute was registered in the Respondent’s name in 1966 and it measures 18 acres. At the time, he added, he was working in Nairobi and had started occupation and use of the land in 1952 and has continuously used the land for grazing of cattle, excavation of stones, and planting of sorghum, maize and sweet potatoes.

4. It was also his case that the Respondent had never used the land and so the Applicant’s possession had never been interrupted.

5. In cross-examination, the Applicant stated partly as follows;

- (I) he actually lives on parcel number Marachi/Elukhari/135 and had done so since he was born,
- (II) he had built no house on title number Marachi/Elukhari/133,
- (III) the Respondent had filed suit and he was ordered to stop using land parcel number 133.

6. PW 2, Gerald Masibayi Kuchio, stated that the land was occupied and used by the Applicant exclusively and the Respondent obtained the registration of the land in his name by irregular means.

7. PW 3, Nicholas Ochieng stated that the Applicant was the one using the land in dispute, presently, and that in 1966, although he was in the neighbourhood where the land is situated, he could not tell who was cultivating it.

8. PW 4, Gabriel Ongoma merely confirmed that since 1971, the Applicant has been using the suit land and he was unaware of any dispute with regard to it.

9. The Respondent's case on the other hand was that on 1st January 1960, Nicholas Barasa Sumba also known as Mulaa Sumba Barasa offered to sell to him an unregistered parcel of land in Elukhari area. He agreed to do so and without any Sale Agreement, he paid Kshs.2,700/- as purchase price and obtained title on 11th December 1968 upon the land adjudication process being completed, and registration having been done in 1966. Although he had built a house in 1967, the same was burnt down by unknown people the same year. He never built another house there and thereafter used the suit land to graze cattle and that when he attempted to plough the land in 1975, the Applicant's wife prostrated herself in front of the tractor and the driver drove off and never returned.

10. The Respondent added that he took a loan in 1982 and used the land as collateral. Further, that the Applicant only entered the land in 2001 and started removing building stones while cultivating parts of it at the same time.

11. DW 2, Namenge Mulaa Sumba, brother of the Applicant, stated that the Applicant sold the suit land to the Respondent but he later returned and burnt the Respondent's house.

12. In cross-examination, he admitted that the Applicant has used the suit land since 1960 and has been hostile to the Respondent.

13. DW 3, Benedict Olunga Werimo confirmed the Respondent's evidence (*they are brothers*) and, I see no reason for repeating that evidence.

14. DW 4, Alois Oloo Mulaa, was a witness to the sale/purchase transaction between Barasa Sumba and the Respondent, and he further testified that the Applicant chased the Respondent away from the suit land in 1975 and has continuously used the same since then and that although the Respondent used to graze cattle there before 1975, he has not been able to do since that time.

15. DW 5, Charles Ogutu on his part stated that in 1975, the Respondent hired him to plough the suit land but a certain lady intervened and threatened to lie down in front of the tractor and so he stopped ploughing and left.

16. I have taken into account the submissions by advocates for the parties and it is agreed that the claim before me is one based on a claim to land by adverse possession. If that be so, then I agree with the advocate for the Respondent that Kuloba J. in *Mbira vs. Gachuhi* (2002) 1 EALR 137 (HCK) captured the principals to be applied. His Lordship stated as follows:

“Broadly, and in so far as it suffices to dispose of present suit without examining all other aspects of the doctrine of adverse possession, a person who raises that doctrine for a statutory acquisition of title to land must satisfy the court on normal standard of proof in civil cases;

a) That there has been absence of possession by the true owner through abandonment (discontinuance);

b) That the adverse possessor has been in actual possession of the same piece of land;

c) That the adverse possessor has no colour of right to be there, other than his entry and occupation;

d) That he has openly and without permission or agreement of the true owner done acts which are inconsistent with the enjoyment by the true owner of the land for the purposes for which he intended to use it;

e) That there was a sufficient *anumus* to dispossess and an *animo possidendi*;

f) That all this has lasted for the statutory period, in this case, twelve years, since the adverse possession began;

g) That the nature of the property was such that in the light of the foregoing acts, there resulted adverse possession;

h) That throughout [the] twelve years which tolled, there was no interruption of the adverse possession;

A period of continuous adverse possession of not less than twelve years tolling takes away or bars the re-entry of any person who had been disposed or whose possession had been discontinued or abandoned.”

17. I adopt the above conclusions as wholly applicable to this case for the above reasons;

18. Firstly, it is not in doubt that the respondent obtained title to the suit land on 11th December 1968 but never took possession wholly although there is evidence that he used the land for purposes of grazing cattle. It is however also not in doubt and the evidence in that regard is one, that since 1975, he had not used the land at all.

19. Secondly, whether the land was sold to the Respondent by the Applicant's father or by the Applicant himself is not an issue; the issue, which is again uncontested, is that since 1975, the Applicant, without the permission of the Respondent, has been in occupation of the suit land to the exclusion of the registered owner. It is instructive in this regard that the Respondent's witnesses especially DW 4 and DW 5, confirmed the fact that the Applicant and his family were hostile to any attempt by the Respondent to take possession of the land.

20. Thirdly, the Respondent took no legal action to evict the applicant from the suit land and there is no evidence that his occupation of the suit land was ever interrupted. The evidence that I have reproduced elsewhere above is consistent in that regard.

21. Fourthly, the Applicant has shown that he uses the land to graze cattle, excavate stones and plant maize, sorghum and sweet potatoes. The converse is true of the Respondent who stopped using the land in 1975.

22. Lastly, the present proceedings were instituted on 29th January 1993, eighteen (18) or so years after the Respondent was forcibly denied entry into his own land. The statutory twelve (12) years had long lapsed and adverse possession had crystallized.

23. In the end, and following the decision in Mbira (Supra) I am satisfied that the sole claim by the Applicant has been proved to the required standard and so I will accede to his request and declare that he has become entitled to the whole of land parcel number Marachi/Elukhari/133 by adverse possession and

the Respondent's registration is ordered to be cancelled and the Applicant shall be registered as proprietor in his stead.

24. The nature of the matter requires that each party should bear his own costs.

25. Orders accordingly.

I. LENAOLA
JUDGE

DELIVERED, DATED AND COUNTER-SIGNED BY L. KIMARU, JUDGE AT KAKAMEGA
THIS 13TH DAY OF JUNE, 2011

L. KIMARU
JUDGE