



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

Civil Suit 31 of 1998

PAUL MUSAMALI WEKESA	1ST PLAINTIFF
VINCENT BARASA WEKESA	2ND PLAINTIFF
~VRS~	
LUMBUKU NABACHENJA	DEFENDANT

JUDGMENT

This case was fully heard by Justices Mbitio and Mitey in 2001 and 2003 respectively. It was set for Judgment by the latter Judge on 29/8/2003. The Judge retired in the year 2003 before writing judgment. I have now taken over this case for purposes of finalizing it.

The Plaintiffs Paul Musamali Wekesa and Vincent Barasa Wekesa sues the Defendant Lumbuku Nabachenja claiming for orders of eviction and costs of the suit. In their plaint dated 19th January

1998 and filed in court on the 26th May 1998, the Plaintiff avers that they are the registered proprietors of land parcel L.R. Bokoli/Chwele/62 measuring 1.1 hectares. The Defendant entered into the land unlawfully in 1993 and has remained there despite notices to vacate served on him.

The Defendant in his written statement of defence denies that he unlawfully entered the Plaintiff's land. He contends that the land was sold to him by the Plaintiff's father in 1973. He took possession of it then and has lived there up to date. There has been legal proceedings between the parties due to the dispute on the land ownership which the Defendant has won against the Plaintiff's father. The Defendant therefore claims that although the relevant Land Control Board consent was not obtained he is entitled to get title to the land through adverse possession.

The reply to the defence denies the claim of adverse possession on ground that the Defendant has not stayed on the land in undisturbed and quiet possession.

The Plaintiff called two witnesses. PW1 is the 2nd Plaintiff Vincent Barasa Wekesa. He testified on his own behalf and that of the 2nd Plaintiff. He told the court that he and the 2nd Plaintiff who is his brother are the sons of the late Musamali Wekesa who died in 1989. The Plaintiffs filed Succession Cause No.44 of 1992 through which they inherited the land and caused it to be registered in their joint names. The Defendant leased the land from their late father in 1973 and thereafter continued using it without the owner's consent. The Defendant sued the late Musamali in court in 1986 at Kimilili claiming ownership of the land. The Defendant has never filed a suit claiming adverse possession. It is the Plaintiff's prayer that eviction orders be issued against the Defendant who continues to occupy the land unlawfully.

PW2 said he knows the parties in this case and was a friend to the late Musamali the Plaintiff's father. He is aware that the deceased owned land L.R. Bokoli/Chwele/62. He gave the land to the Defendant for use many years ago. In 1987, the deceased stopped the Defendant from using the land. The Defendant sued the deceased before the District Officer, Kimilili. The case was then referred to the

elder's court in Sirisia after change of administrative boundaries. The Defendant failed to produce a land sale agreement and lost the case.

The Defendant's testimony was that he bought the land Bokoli/Chwele/62 from the deceased Edwin Wekesa Musamali in 1973 at a consideration of Ksh.1560/=. He moved into the land in 1993. He has lived there to date which period is over twelve (12) years. He had developed the land by planting crops and trees. The consent of the relevant control board was not obtained.

The Defendant called two witnesses, DW1 and DW3 both of whom supported his testimony. They testified that the Defendant bought the suit land in 1973 from the Plaintiff's now deceased father. DW2 was present when the land sale agreement was made. He testified that the Defendant occupies the land sold to him.

From the evidence of both parties, it is not disputed that the Defendant lives on the land and has been using it for many years. Both parties agree that it is in 1993 that the Defendant moved into the land after having tilled it for several years. The Defendant lived on the land even at the time this case was heard. The Defendant produced a handwritten sale agreement dated 8/5/1973 between him and the late Edwin Musundi for purchase of 2 ¼ acres of land. It is not disputed that the relevant Land Control Board was not obtained to validate the land sale agreement as required by the law. The agreement therefore becomes null and void under the provisions of the Land Control Act.

The claim of the Defendant for adverse possession forms the second limb of his case. From 1993 to the time the case was heard in 2003, the Defendant had lived on the land for ten (10) years. Time started to run when the Defendant entered the land. The period required by the law to lay a basis for adverse possession is twelve years. The Plaintiff's witness testified that although the Plaintiff was using the land from 1973 to 1987, the deceased stopped him in 1987. This is the time when the Defendant sued the deceased before the elder's court. In 1989, the Defendant filed another suit in Bungoma SPM CC No.221 of 1989 which suit abated due to failure to substitute the parties on death of the deceased Mr. Musamali. These two legal proceedings took place before the Defendant moved into the land. In a claim of adverse possession, the party claiming such rights must prove that he has lived on the land in a quiet and undisturbed possession for twelve or more years. It is not in dispute that the Defendant entered the land when an existing legal dispute between the parties had not been resolved. When he occupied the land in 1993, the Plaintiffs filed this case in 1998 after the Defendant had stayed on the land for only five (5) years. A claim based on adverse possession has not been established by the Defendant. It is important to note that a claim of adverse possession would not have been proved even against the deceased given the existing suits between the parties.

The Plaintiffs on the other hand produced documentary evidence to show they are the registered owners of the land Bokoli/Chwele/62 which was inherited from their deceased father. It has been established that the Defendant is on the land unlawfully. The Plaintiffs have proved their case on the balance of probabilities against the Defendant. I therefore enter judgment in favour of the Plaintiffs against the Defendant as prayed in the plaint. Due to the fact that the Defendant had some land purchase transaction with the deceased which did not materialize, he will not be condemned to pay the costs of this suit. I order that each party meets their own costs of this suit.

F. N. MUCHEMI
JUDGE

Dated, Delivered and Signed at Bungoma this 29TH day of APRIL 2010.
In the absence of the parties.