



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA
CIVIL CASE NO. 335 OF 1988**

**JOHNSON NEHONDO ----- PLAINTIFF
VERSUS
1. CHRISTOPHER NASHISAKO
2. FREDRICK NAMATSI -----DEFENDANTS**

JUDGMENT

The Plaintiff filed the Originating Summons dated 20th September, 1988 seeking to be declared as the rightful owner of Plot No. **EAST WANGA/LUBINU/1191**. In his evidence, the Plaintiff testified that Plot No. **1191** was created from Plot No. **585** and was initially registered in the names of his father, Aggrey Nyapola who died in 1999. The Plaintiff further testified that his late father had sub-divided the land into three portions for his three wives respectively. The Plaintiff's mother, Sarah Nyapola was given 5 acres and this is plot No. 1191.

The Plaintiff contends that he was born on plot No. 1191 in 1956 and has since then lived on that land. He has built houses and his two children namely Justus and Ronald have their houses on the land. He has constructed a fishpond too. The Plaintiff realized that the plot had changed hands in 1984 when the 1st defendant tried to sell the land. The Plaintiff is not aware that his brother by the names JAMES had instituted Kakamega RMCC No. 100 of 1984 and Kakamega Civil Appeal No. 72 of 1985.

PW2, JOHN SHISIA MASAKHALIA knew the Plaintiff's father. His evidence is that the Plaintiff lives on Plot No. 1191 with his family. He has lived on the plot since 1956. **PW3, MALOBA NYAPOLO OKELO's** testimony is that the Plaintiff is the son of the late Aggrey Nyapola. The Plaintiff was born in 1956 and was given his portion of land by his father in 1969. The Plaintiff utilizes the land and has planted cassava, beans and also has a fish pond and a well that was dug in 1970.

On his part, the 1st Defendant's testimony is that he bought plot No. EAST WANGA/LUBINU.1191 in 1975 from the late Aggrey Nyapola. By that time the land had not been sub-divided. He sued the late Aggrey Nyapola and he got his plot. Nyapola also sued him but his case was dismissed. The 1st Defendant later sold the plot to FREDRICK KWENA NAMATSI, the 2nd Defendant. The Plaintiff's brother, JAMES, sued him vide Kakamega RMCC No. 100 of 1984 but he lost.

The 2nd Defendant's evidence is that he is the current registered owner of the suit property. He bought the land in 1987. In 1988 he sued the Plaintiff but his case was referred to the High Court as the Plaintiff had filed this suit.

The Plaintiff filed written submissions and reiterates his contention that he has acquired title to the suit land by way of adverse possession. He also denied that his suit is *Res-judicata*. On their part, the respondents contend that the Plaintiff's suit is *res-judicata* and that the 2nd Respondent's title was properly acquired.

On the issue as to whether this suit is *Res-Judicata*, the court record settles this matter. The respondents filed a Notice of Preliminary Objection on 11th October, 2005. The Objection was heard on 21st February, 2006 and was dismissed by my brother, Justice G.B.M. Karuki on the same dated 21.2.2005. Since there was no appeal from the said ruling, I will take it that this suit is not *res-judicata*.

The next issue is whether the Plaintiff has acquired title of plot No. **EAST WANGA/LUBINU/1191** by way of adverse possession. The Plaintiff contends that he was born on the land in 1956 and has never been made to vacate the same.

From the extract from the Land Registry, Plot No. **EAST WANGA/LUBINU/856** was opened on 17th

May, 1966. The Plot measures 17.5 acres and was registered in the names of Aggrey Nyapola. On 7th August, 1974, a caution was registered in favour of Christopher Nachisako claiming purchaser's interest. This is the 1st Respondent. The caution was removed on 19th May, 1975. Plot No. 585 was closed on 9th October, 1975 after sub-division and two plots namely **E.WANGA/LUBINU/1190** measuring 3.5 acres and **E.WANGA/LUBINU/1191** measuring 5 acres were created.

The Plaintiff's claim is against the two respondents. Although the Plaintiff correctly states in his written submission that the transfer of property or that the change of title does not affect a claim for adverse possession, it is evident that the Plaintiff cannot claim adverse possession for the period prior to 1975 as by then the land belonged to his late father and also one cannot claim adverse possession against a non-registered owner. The first respondent became the registered owner on 26th September, 1975.

The Plaintiff's brother AGGREY NYAPOLA filed Civil Suit No. 100 of 1984 before the Kakamega Senior Resident Magistrate. The Plaintiff is not a party to the suit. However, between 1975 and 1984 it is only 9 years. Even if the Plaintiff was not a party to that suit, it can be deduced from the suit that the 1st Defendant's ownership had been recognized by the Plaintiff's brother and father. Indeed from the extract from the Land Registry, Plot No.585 was sub-divided after case No. RMCC 36 of 1976 was decided in favour of the 1st Respondent.

The 2nd Respondent filed Case No. PMCC 576 of 1988 before the Kakamega Court. In the Plaintiff's paragraph 4 thereof it is stated that the defendant (current Plaintiff) in 1987 unlawfully took possession of a portion of the 2nd Respondent's land and erected a house thereon. The 2nd Respondent sought an eviction order. The 2nd Respondent was registered as the owner of the land on 9th March, 1987 twelve years from the time the 1st Respondent became the registered owner of the land.

Had the 1st Respondent's title to the land become extinguished by way of adverse possession by the time he sold the land to the 2nd Respondent? From the pleadings and evidence adduced, I do find that the 1st Respondent had a valid title by the time he sold the property to the 2nd Respondent. I have no reason to doubt the averments in the Plaintiff's paragraph 4 of the PMCC No. 576 of 1988 that the Plaintiff herein went to the suit land in 1987. His claim for adverse possession can only run from 1987 when he took possession of a portion of the suit land. This being the case and the current suit having been filed in 1988, I do find that the Plaintiff has not established that he has been in actual possession of the suit land for over 12 years before he filed this suit. It is possible that the Plaintiff has been leaving in the remaining portions of Plot No. 585 (i.e. Plot Nos.1190) and not on plot No. 1191. The filing of the various court cases is enough evidence that whoever was residing on the suit land was not doing so peacefully or that he was not aware of the dispute involving the land.

I note that although the 2nd Respondent testified that he bought 5 acres from the 1st Respondent, he is also the registered owner of Plot No. 1239 measuring 3.5 acres which he bought from Nyapola s/o Okelo in 1977. That shows that the 2nd Respondent has 8.5 acres out of the original 17.5 acres of Plot No. 585. I hope that is a different transaction altogether.

The Plaintiff cannot claim that he was not aware of the court cases filed by his brother and father relating to the suit property. Even if the Plaintiff has been in occupation of the suit property since 1987, that does not constitute adverse possession as the 2nd Respondent resorted to filing Kakamega PMCC No. 576 of 1988 instead of forcefully evicting the Plaintiff. In the suit filed by the Plaintiff's brother in 1984, James, he contended that he went to Uganda and when he came back he found his father had sold five acres to the 1st Respondent. By 1984 the Plaintiff herein was about 28 years old. I do not find the Plaintiff's brother was litigating on a five acre portion of land that was being occupied by the Plaintiff. Further, I do not think that the Plaintiff was not aware of that suit.

In the end, I do not find that the Plaintiff has been in possession of Plot No. **EAST WANGA/LUBINU/1191** since 1956 to date. I also do not find that the Plaintiff is entitled to be registered as the proprietor of the said land by way of adverse possession or that the proprietor's title to the land has been extinguished even if he is not in occupation. I do find that the Plaintiff has not proved his claim and the same is dismissed with costs to the respondents.

SAID J. CHITEMBWE
J U D G E

Delivered, dated and countersigned at Kakamega this 30th day of September, 2010

ISAAC LENAOLA
JUDGE