



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

**COMMERCIAL CIVIL CASE 62 OF 2008**

**IN THE MATTER OF THE ESTATE OF TIMOTHY NATEMBEYA WASIKE**

**BETWEEN**

**ELIUM WEKESA WASIKE                   : PLAINIFF**

**~VRS~**

**ZABLON KUNDU NATEMBEYA           : DEFENDANT**

**RULING**

This is a ruling on a preliminary objection raised by the Defendant/Respondent through his advocates M/s Walter Wanyonyi & Co. vide a notice dated 8<sup>th</sup> October 2009.

The grounds relied on are that the originating summons does not support the claim for adverse possession as the occupation of the suit land is based on the consent by the deceased. Secondly, that the Plaintiff/Applicant is a beneficiary to the estate of the deceased.

Mr. Wanyonyi argued that adverse possession cannot arise in a case where the owner of the land allowed the Plaintiff to occupy the land. The deceased who was the owner left several beneficiaries surviving him and his estate was distributed among them including the Plaintiff who has a share on the same land he is claiming title to. The counsel also submitted that on the supporting affidavit, it is not indicated as to who drew the document.

This court was referred to some decided cases. In the case of MWINYI HAMISI ALI –VRS- A.G. CIVIL APPEAL NO.125 of 1997 it was held that adverse possession does not apply where possession is by consent. The court also held that section 44 of the Registration of Titles Act cannot be invoked in aid of a person who is in possession by permission of the proprietor.

In the case of Busia HCCC No.6 of 2000, Justice A. Ringera held that where the Applicant enters the land with the blessing of the owner, however long he stays on it he cannot acquire the title by adverse possession.

In the case before me the applicant states in his originating summons that the deceased gave him 6.5 acres of the land reference number Ndivisi/Makuselwa/493 in 1980. He has been on the land for over twenty seven years in continuous, uninterrupted and exclusive possession. The applicant annexes a certified copy of register for the land which was issued in 1984. He also annexed copies of the register for L.R. No. Ndivisi/Makuselwa/493 the title closed for sub-division on 10/06/08. This was before this suit was filed. The land was sub-divided into ten (10) parcels in Succession Cause No.140 of 1992 and distributed to the beneficiaries of the deceased. The Applicant herein got parcel No. Ndivisi/Makuselwa/1903 measuring 1.3 acres.

The originating summons is very clear that the Applicant entered the land parcel no.Ndivisi/Ndivisi/493 with the blessings of the deceased Timothea Natembea Wasike. Succession was done from 1992 and grant confirmed in 2008. The estate of the deceased has now been distributed. The Applicant is a beneficiary in that estate.

I agree with the Respondents that the Applicant cannot benefit from an adverse possession claim since the deceased in his lifetime allowed him to enter and occupy the land. The Applicant was not a purchaser for value. He claims to have gotten the land as a gift but has not annexed any evidence to that effect. The originating summons as it is cannot sustain an adverse possession claim. It would be a waste of judicial time to hear this case.

I am well guided by the above authorities on this issue. I find that preliminary objection valid and I uphold it accordingly. The

originating summons dated 13/11/2008 and filed on same day is hereby struck out with costs to the Respondent.

**F. N. MUCHEMI**  
**JUDGE**

Ruling dated and delivered on the 6<sup>th</sup> day of October 2010 in the presence of Mr mukisu for Wanyonyi for Defendant/Respondent.

**F. N. MUCHEMI**  
**JUDGE**