



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

**Civil Case 93 of 2005**

**MARTIN FWAMBA WANYAMA ..... APPLICANT**

**V E R S U S**

**CHARLES MAKANDA MANGOLI ..... RESPONDENT**

**J U D G M E N T**

The case before me was commenced by way of an Originating Summons, through which the applicant was seeking, inter alia, an order that upon the expiry of 12 years from the date when he or his father had been in possession of some four (4) acres within *L.R. NO. N.WANGA/KHALABA/1264*, he acquired title thereto pursuant to the doctrine of adverse possession.

He therefore asks this court to order the respondent to execute all the requisite transfer documents for the transfer of the four acres to him.

The Originating Summons was filed in court on 25<sup>th</sup> November, 2005. Thereafter, on 10<sup>th</sup> February, 2006 the applicant filed an application for directions. In that application the applicant also sought orders of inhibition on the title to the suit property until the substantive suit was heard and determined. He also asked for an injunction to restrain the respondent from claiming the property in issue, or from interfering with or disturbing the applicant's peaceful use and occupation of the said property.

Although the respondent was served with that application, he filed nothing in response thereto. Thereafter, when the court had given consideration to the application, it ordered that an inhibition do issue. The court also ordered that the status quo expressly stipulated that the respondent, his agents or servants, or any other person claiming on his behalf were to be restrained from interfering with or disturbing the applicant's peaceful use and occupation of the four acres which were part of **L. R. NO. N.WANGA/KHALABA/1264**.

Those interlocutory orders were made on 10<sup>th</sup> July, 2006. subsequent thereto, the case was fixed for hearing on 15<sup>th</sup> April, 2008.

On that date the applicant and his advocate attended court, but there was no attendance by the respondent or his advocate. Having satisfied myself that the respondent had been duly served with a Hearing Notice, I allowed the applicant to prosecute his claim. **PW1, MARTIN FWAMBA WANYAMA**, testified that he was the son to **MARKO WANYAMA**, now deceased. Following the demise of his father PW1 filed a Succession Cause No.577 of 2004, and a grant was issued to him on 24<sup>th</sup>

March, 2005.

A copy of the grant of letters of administration was exhibited in court.

Meanwhile, it was the testimony of PW1 that his father bought five (5) acres of land from **CHRISTOPHER MANG'OLI SITUMA**, on 8<sup>th</sup> December, 1969. The said 5 acres of land were a part of **L. R. NO. NORTH WANGA/KHALABA/290**.

PW1 said that the agreed purchase price was KShs.1,000/= and one sheep. And in order to demonstrate the fact that the agreement was executed, PW1 produce an Agreement for sale, which is Exhibit 2A.

As the Agreement was hand-written in the Bukusu language, PW1 also produced an English translation thereof. The translation was duly certified by Mr. Michael Muhuyi Kiveu, advocate.

It was the evidence of PW1 that after his father had bought the land, a surveyor duly demarcated the 5 acres. Thereafter, in 1970 the father to PW1 built a house on the land, and PW1 moved into that house, together with the rest of the family.

PW1 also testified that his father planted trees alongside the boundary of the land he had bought, and that the exercise of planting trees was conducted in the presence of the seller, Christopher Mang'oli Situma.

According to PW1, his father's family had not only established a home on the property, they also cultivate the other parts thereof. And, when the father died, PW1 says that the father was buried on the same property.

Meanwhile, the seller also died in 1991, and his son, **CHARLES MAKANDA MANG'OLI**, who is the respondent herein, filed Succession Cause No. 73 of 1991 at Kakamega High Court.

It was the evidence of PW1 that the defendant later divided parcel No. 290 into three portions, being parcels numbered 1264, 1265 and 1266.

To support his story, PW1 made available copies of the "**Greencards**" for each of the three parcels of land.

Parcel No.1266 is 0.4 of an Hectare, and is registered in the names of **Wanyama Makheti**, who is the father to the applicant herein.

Parcel No.1265 is 1.20 Hectares and the same is registered

to **Ramadhani Chitechi Mitati**. The Greencard shows that **Ramadhani Chitechi Mitati** became the registered proprietor on 9<sup>th</sup> January, 1995, and that a title deed was issued to him on 27<sup>th</sup> February 1995.

On 30<sup>th</sup> November, 2001 a restriction on transactions to parcel No.1265 was registered. However, on 24<sup>th</sup> October, 2005 the said restriction was removed, on the strength of a letter from a District Officer.

As regards Parcel No.1264, the same is 2.40 Hectares, and it is registered to **Charles Makanda Mang'oli**, who is the defendant herein. By the plaintiff's calculations, parcel No.1264 is 6 acres. And it is out of the said 6 acres that the plaintiff wants 4 acres.

**PW2, JOHN WABWIRE VENESIA**, is a farmer, who resides at Musamba sub-location. He testified that he knows both the plaintiff and the defendant. He also said that he had known Mr. Mang'oli Situma, (now deceased), who was the father to the defendant. PW2 said that he was 94 years old, as he was born in 1914.

He then went on to testify that the plaintiff's father bought plot No.290 from the father to the defendant. According to PW2, the purchase price of KShs.1,000/= and one sheep was paid in full. He was one of the persons who witnessed the payment being made.

PW2 also testified that the plaintiff and his siblings were staying on the parcel of land which their father had purchased. Indeed, it was PW2's testimony that houses had been built on that parcel of land; there were also big trees and food crops.

**PW3, PETER SIMIYU**, testified that he knew Marko Wanyama very well. He said that before 1969, Marko Wanyama was living at Bumula, Kaya village.

However, in 1969 Marko bought a parcel of land in North Wanga, Khalaba. He then moved onto that parcel of land, which PW3 identified as **L. R. NO. NORTH WANGA/KHALABA/290**.

PW3 also said that the purchase price was KShs.1,000/= and a sheep, which Marko is said to have paid in full. At the time the sheep was paid, and which was after the money had been paid, PW3 witnessed the payment being made.

It was his further evidence that not only does the plaintiff's family reside on that parcel of land, but also that Marko Wanyama was buried on the said parcel of land. PW3 attended the burial.

He went on to explain that in the Luhia tradition, it is during burials that creditors, if any, were supposed to lay their claims. However, when Marko Wanyama was being buried, nobody lay any claims against him.

According to PW3, the ceremony at which creditors are expected to put forward their claims is called "**Lufu**." The said ceremony is conducted some three days after the burial.

And in the case of Marko Wanyama, the family of the defendant did not put forward any claim.

After the testimony of PW3, the plaintiff closed his case. Thereafter, the defendant tendered no evidence at all.

It is also significant that the plaintiff's witnesses were not cross-examined at all. In effect, the evidence produced by the plaintiff was uncontroverted.

I therefore find and hold that the father to the plaintiff bought some five (5) acres of land from the father to the defendant. The said piece of land was a part of **L.R. NO. NORTH WANGA/KHALABA/290**.

Although the full purchase price of land was handed over to the family of the plaintiff's father in or about 1969; and even though the family established a home on that parcel of land, the defendant thereafter caused some four acres of land, which is part of what Marko Wanyama had bought, to be transferred to his name.

The defendant has failed to demonstrate to this court that he has any legal claim to the 4 acres which the plaintiff is laying claim to, in his capacity as the administrator of the estate of his late father.

In the result, I am satisfied that the estate of Mariko Wanyama Makheti did acquire title to the 5 acres which they have occupied since 1970, when their late father built a house thereon. I am also satisfied that the plaintiff and his siblings have enjoyed un-interrupted and peaceful occupation of the said parcel of land, for a period well in excess of 12 years.

Having done so, and even though the purchase by Marko Wanyama may not have been concluded in accordance with all the requirements of statute, the rights of the defendant or that of his late father, **Christopher Mang'oli Situma**, were extinguished. It was therefore irregular and unlawful for the

defendant to have caused 4 acres of that parcel of land to be registered to his name.

In the result, the defendant is now ordered to execute a transfer and all other requisite documents to transfer 4 acres of land from Parcel **No.1264**, to the plaintiff. If the defendant should fail to execute the requisite documents, the learned Deputy Registrar of this court will be duly mandated to do so, on his behalf.

It is further ordered that upon the transfer of the 4 acres of land to the plaintiff, the said property will only be held by him as an administrator to the estate of the late Mariko Wanyama Makhete alias Wanyama Makhete.

The costs of this suit are awarded to the plaintiff, and the same are to be paid by the defendant, Charles Fwamba Mangoli.

It is so ordered.

***Dated, Signed and Delivered at Kakamega, this 15<sup>th</sup> day of May, 2008***

**FRED A. OCHIENG**

**J U D G E**