



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCC No. 77 OF 2019

MUSA NDALE MACHIO.....PLAINTIFF

VERSUS

LEONIDA AUMA MAKOKHA.....1ST DEFENDANT

JULIUS W. MAKOKHA.....2ND DEFENDANT

IBRAHIM M. MAKOKHA.....3RD DEFENDANT

JOHN N. MAKOKHA.....4TH DEFENDANT

PATRICK W. MAKOKHA.....5TH DEFENDANT

JUDGMENT

1. Proceedings in this matter commenced on 27th September 2001 when the plaintiff filed Originating Summons dated 18th September 2001 as Kakamega HCCC No. 109 of 2001 (OS). The matter was later transferred to this court and acquired its current case number. The initial summons was replaced by undated Amended Originating Summons filed on 8th November, 2012.

2. The plaintiff averred in the Amended Originating Summons that he is entitled by virtue of adverse possession to 5½ acres of the parcel of land known as N. Wanga/Matungu/593 as subsequently subdivided to N. Wanga/Matungu/1861, 1862, 1863, 1864. He therefore sought the following orders:

(a) A declaration that the Respondents' rights over 5 ½ acres of title No. N. Wanga/Matungu/593 as subsequently subdivided to N. Wanga/Matungu/1861, 1862, 1863, 1864 got extinguished by adverse possession upon expiry of 12 years when the Applicant was in possession.

(b) A declaration that upon expiry of 12 years the said 5 ½ acres of title No. N. Wanga/Matungu/593 as subsequently subdivided to N. Wanga/Matungu/1861, 1862, 1863 and 1864 were held and are currently held in trust of the applicant.

(c) An order that the 5 ½ acres of title No. N. Wanga/Matungu/593 as subsequently subdivided to N. Wanga /Matungu/ 1861, 1862, 1863, 1864 vests in the applicant and that the applicant should be registered as owner thereof under section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya.

(d) An order that the respondents do sign all relevant documents to facilitate transfer of 5 ½ acres of title no. N. Wanga/Matungu/593 as subsequently subdivided to N. Wanga/Matungu/1861, 1862, 1863, 1864 to the applicant and that in default the Deputy Registrar of this Honourable Court to sign the same.

(e) An order that the respondents be condemned to pay costs of this suit.

(f) Such further orders or relief as this Honourable court may deem just and reasonable to grant.

3. The Amended Originating Summons is supported by an affidavit sworn by the plaintiff. He deposed that title number N. Wanga/Matungu/593 was initially registered in the name of Makhoha Werunga who is now deceased and that the first respondent is the administratrix of the estate of the said initial owner pursuant to a grant of representation issued to her in Bungoma HC. Succession Cause No.

154 of 1993. That title number N. Wanga/Matungu/593 was later subdivided to N. Wanga /Matungu/ 1861, 1862, 1863, 1864 and the title deeds were issued in the names of the second, third, fourth and fifth respondents. That he purchased 5 ½ acres out of the said N. Wanga/Matungu/593 from the deceased in 1972. He added that N. Wanga/Matungu/593 was subsequently subdivided to N. Wanga/Matungu/ 1861, 1862, 1863, 1864 and that he had lived on and occupied the 5 ½ acres with his family for a period of 29 years as at the date swearing his affidavit. That his mother was buried on the same parcel and that he constructed grass thatched huts on the land, planted numerous trees and further that he grows sugarcane, maize, cassava, bananas, arrow roots and other food crops on the land. He annexed copies of certified copy of register in respect of N. Wanga/Matungu/593, grant of letters of administration issued on 7th March 1996 and certificates of official search in respect of N. Wanga/Matungu/1861, 1862, 1863, 1864 as on 7th October 2009. agreement dated 1st May 1972 and agreement dated 23rd May 1975 together with their certificate of translation.

4. Although duly served, the defendants did not neither filed responses nor defended the claim. Although the first defendant attended court in person on 25th February 2003 and later a notice of appointment of advocates was filed on her behalf on 21st February 2006, the said defendant did not take any further step in the matter. The plaintiff's case therefore remains wholly unchallenged.

5. At the hearing, the plaintiff testified as the sole witness. He adopted his aforesaid affidavit as his testimony and produced the annexures as exhibits. He also produced copies of agreements dated 1st May 1972 and 23rd May 1975 as well their translations into English and certificates of translation.

6. Both the plaintiff's and defence cases were then closed. It was ordered that parties file and exchange submissions. The defendants did not file any.

7. It was argued on behalf of the plaintiff that he has proven his case on a balance of probabilities and has met the requirements to succeed in a claim for adverse possession. Relying *inter alia* on the case of **Wambugu –vs- Njuguna (1983) KLR 173**, the plaintiff urged the court to grant him judgment as prayed.

8. I have considered the pleadings, the evidence and submissions herein. The issues that emerge for determination are whether the plaintiff has established adverse possession and whether the reliefs sought should issue.

9. The law and principles relating to adverse possession are well settled and are founded on **Sections 7, 13, 17 and 38 of Limitation of Actions Act**. In the case of **Wines & Spirits Kenya Limited & another v George Mwachiru Mwango [2018] eKLR**, the Court of Appeal discussed the circumstances under which the cause of action accrues as follows:

So when does the cause of action accrue? Section 13 provides that:

“(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession.....” ...

Further, under Section 17, if the registered proprietor fails to recover the land within 12 years of uninterrupted adverse occupation, the proprietor's title to the land stands extinguished. The legal implication of the doctrine was well summarized by this Court in the case of Benjamin Kamau Murima & Others vs. Gladys Njeri, C A No. 213 of 1996 where it was held that:

“The combined effect of the relevant provisions of sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land.”

Once an adverse possessor is eligible for title under the doctrine, he must move court Section 38 of the Act; ...

[13] Having the above pre-requisites in mind, it therefore follows that the onus is on the person or persons claiming adverse possession to prove that they have used this land which they claim as of right. This is the Latin maxim of *nec vi, nec clam, nec precario* (which means that the occupation of the land must have no force, no secrecy, no evasion). Accordingly, the respondent herein was beholden to not only show his uninterrupted possession, but also that the 1st appellant had knowledge (or the means of knowing) actual or constructive of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavours to interrupt it or by any recurrent consideration; (See Wanyoike Gathure v/s Berverly (1965) EA 514, 519, per Miles J.)

[14] Consequently and as rightly submitted by the appellants' counsel, the burden of proof in adverse possession lies primarily with the adverse possessor who wishes to rely on the doctrine. ...

10. The plaintiff's case against the defendants is that he entered into an agreement to purchase 5½ acres of the parcel of land known as N. Wanga/Matungu/593 from the deceased who was the first defendant's husband. From the copies of agreements dated 1st May 1972 and 23rd May 1975 as well their translations into English which the plaintiff produced, I am persuaded that he and the deceased entered into the said agreement and that the plaintiff fully paid the purchase price of KShs 1,920 as at 23rd May 1975. Indeed, it is clearly indicated in the agreement dated 23rd May 1975 that 'there is no debt'.

11. Based on the certified copy of register in respect of the parcel of land known as N. Wanga/Matungu/593 which the plaintiff has produced, I am satisfied that the deceased became the registered proprietor of the said property on 10th July 1970. Entry number 2 in the proprietorship section of the said register is a caution registered on 11th November 1993 in favour of the plaintiff herein, claiming a purchaser's interest.

The register further confirms that the title in respect of parcel number 593 was closed on 26th July 2006 upon its partition into parcel numbers 1851 to 1864, which includes N. Wanga/Matungu/1861, 1862, 1863 and 1864 which the plaintiff has referred to in his pleadings and evidence. Equally, the certificates of search produced by the plaintiff confirm that the second, third, fourth and fifth defendants are the registered proprietors of N. Wanga/Matungu/1861, 1862, 1863 and 1864. I have also confirmed that the total area of N. Wanga/Matungu/1861, 1862, 1863 and 1864 is approximately 2.2274 hectares which translates to 5 ½ acres as claimed by the plaintiff. As I understand it, the plaintiff does not claim the whole of as N. Wanga/Matungu/593 which measures approximately 21 acres but only a portion thereof measuring 5 ½ acres which he has identified as parcel numbers N. Wanga/Matungu/1861, 1862, 1863 and 1864.

12. The plaintiff's case that he had lived on, occupied, developed and farmed the 5 ½ acres together with his family for a period of 29 years as at 18th September 2001 when he swore his affidavit in support of the initial Originating Summons has not been challenged and I accept it as proven. Although he entered the property pursuant to a sale agreement, his possession became adverse to the deceased from 23rd May 1975 when he completed paying the purchase price. See **Wambugu vs Njuguna [1983] KLR 172**. Thus, the period of limitation started to run in favour of the plaintiff from 23rd May, 1975 so that as at 18th September 2001 when the suit was filed, the plaintiff had been in exclusive, open and uninterrupted possession of the suit property for a period of over twelve years and is thus entitled to be registered as the owner of the land comprised in N. Wanga/Matungu/1861, 1862, 1863 and 1864.

13. In view of the foregoing, I am persuaded that the plaintiff has proven his case on a balance of probabilities. I therefore make the following orders:

a) A declaration is hereby issued that the defendants' rights over the parcels of land known as title numbers N. Wanga/Matungu/1861, N. Wanga/Matungu/1862, N. Wanga/Matungu/1863 and N. Wanga/Matungu/1864 got extinguished by adverse possession upon expiry of 12 years when the plaintiff was in possession.

b) A declaration is hereby issued that upon expiry of 12 years the said parcels of land known as title numbers N. Wanga/Matungu/1861, N. Wanga/Matungu/1862, N. Wanga/Matungu/1863 and N. Wanga/Matungu/1864 were held and are currently held in trust for the plaintiff.

c) An order is hereby issued that the parcels of land known as title numbers N. Wanga/Matungu/1861, N. Wanga/Matungu/1862, N. Wanga/Matungu/1863 and N. Wanga/Matungu/1864 vest in the plaintiff and that the plaintiff should be registered as owner thereof under section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya.

d) An order is hereby issued that the defendants do sign all relevant documents to facilitate transfer of the parcels of land known as title numbers N. Wanga/Matungu/1861, N. Wanga/Matungu/1862, N. Wanga/Matungu/1863 and N. Wanga/Matungu/1864 to the plaintiff within 45 (forty-five) days from the date of delivery of this judgment and that in default the Deputy Registrar of this court to sign the same.

e) Each party bear own costs of the suit.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 8TH DAY OF MARCH 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Masakhwe for the plaintiff

No appearance for the defendants

Court Assistant: E. Juma