



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCA CASE NO. 14 OF 2019

RAMADHAN WANZALA OMORO.....APPELLANT

VERSUS

COUNTY GOVERNMENT OF KAKAMEGA.....RESPONDENT

JUDGEMENT

The appellant being aggrieved by the judgement of Senior Resident Magistrate delivered on the 17th April 2019 vide Mumias MCL&E Cause No 128 of 2018 and appeals as hereunder;

1. That the learned lower court erred in law and fact by alluding that the respondent which is a state entity had the right of adverse possession against a private entity.
2. That the learned lower court erred in law and fact by failing to conclusively determine when the cause of action the appellant claimed against the respondent arose.
3. That the learned lower court erred in law and fact by declining to find in favour of the appellant since his claim was not challenged.

The appellant's case is that, pursuant to the provisions of section 33 of the sixth schedule of the constitution, the defendant is the successor of the defunct County Councils of Kakamega and Butere/Mumias. The plaintiff avers that at all material times relevant to this suit he has been the registered proprietor of L.R. No. North Wanga/Kholera/353 (Plot 353). That in early 1990s the plaintiff and County Council of Kakamega entered into a transaction whereby the former gave out a portion of plot 353 to the latter for the purposes of construction of Shibanze Komoro Dispensary which generally serves the surrounding community. That the transaction between the parties herein also provided for the plaintiff to provide materials to be used in the construction of the dispensary; meet the actual costs of the construction and that he would be compensated for the same and for the value of the portion of the land which had been excised from Plot 353. That however, negotiations between the plaintiff on the one hand and the defunct County Councils and the defendant on the other hand have not borne any fruits despite the plaintiff undertaking a valuation of both the costs he incurred in the construction of the dispensary and land upon which it stands as had been directed. The appellant prayed for judgment against the respondent for;

- (a) Eviction of the defendant from L.R. No. North Wanga/Kholera/353.
- (b) Costs of the suit with interest herein.

The appellant submitted that the cause of action first arose in 2016 when he issued a demand letter for eviction and hence the suit cannot be time barred. He relied on the case of Sisto Wambugu Vs Kamau Njuguna (1983) ELR 172. And Samuel Miki Vs Jane Njeri Richu, CA No. 122 of 2001.

The respondent submitted that that if there was any agreement between the plaintiff and the Defunct Butere/Mumias County Council in 90's as alleged, then the suit herein is barred by the statute hence the same is bad in law and the orders sought are incapable of being granted. The appellant's suit was filed out of time and without leave of the court. They relied in the case of Chevron (K) Ltd vs. Harrison Charo wa Shutu Malindi CA No 19 of 2016.

This court has considered the appeal and the submissions therein. From the evidence on record That in early 1990s the plaintiff and County Council of Kakamega entered into a transaction whereby the former gave out a portion of plot 353 to the latter for the purposes of construction of Shibanze Komoro Dispensary which generally serves the surrounding community. That the transaction between the parties herein also provided for the plaintiff to provide materials to be used in the construction of the dispensary; meet the actual costs of the construction and that he would be compensated for the same and for the value of the portion of the land which had been excised from Plot 353. The respondent submitted that the suit was filed well over 12 years without leave of the court and hence should not succeed. Sections 7

and 8 of the Limitation of Actions Act, Cap 22 Laws of Kenya state as follows;

Section 7 of the Act provides:-

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or if it first accrued to some person through whom he claims to that person.

Section 8 of the Act provides:-

An action may not be brought, and distress may not be made, to recover arrears of rent, or damages in respect thereof, after the end of six years from the date on which the arrears became due.

In the instant case the question would be has the defendant proved adverse possession so as to rely on the limitation period? In the case of Samuel Miki Waweru vs. Jane Njeru Richu, Civil Appeal No. 122 of 2001, the Court of Appeal delivered the following dictum:

“...it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner of, or in (accordance with) provisions of an agreement of sale or lease or otherwise. Further, as the High Court correctly held in Jandu v Kirpal [1975] EA 225 possession does not become adverse before the end of the period for which permission to occupy has been granted.

It has come out in evidence that the appellant is the registered proprietor of the suit land. Sometimes in the 1990s the plaintiff and County Council of Kakamega entered into a transaction whereby the former gave out a portion of plot 353 to the latter for the purposes of construction of Shibanze Komoro Dispensary which generally serves the surrounding community. That the transaction between the parties herein also provided for the plaintiff to provide materials to be used in the construction of the dispensary; meet the actual costs of the construction and that he would be compensated for the same and for the value of the portion of the land which had been excised from Plot 353. That however, negotiations between the plaintiff on the one hand and the defunct County Councils and the defendant on the other hand have not borne any fruits despite the plaintiff undertaking a valuation of both the costs he incurred in the construction of the dispensary and land upon which it stands as had been directed. Indeed the trial magistrate in her judgement noted that'

“The letter dated 8/5/2016 confirms that the defendant knew that the plaintiff constructed the dispensary at his costs. It also indicates that the issue had been discussed and even agreed that the plaintiff be paid but for want of funds, I do opine that the issue raised is factual and evidence should have been adduced to counter the content of the letter.”

I find that the respondent is in exclusive possession of the land with leave and license of the appellant and the issue of limitation under Section 7 of the limitations of actions act cannot arise in this case. Indeed there is documentary evidence that compensation negotiations had been going on for a long time. In *Mwanasokoni v Kenya Bus Service (1982 - 88) 1 KAR 870*, it was held that this court is duty bound to revisit the evidence on record, evaluate it and reach its own decision in the matter. This court however, appreciates that an appellate court will not ordinarily interfere with the findings of fact of the trial court unless they were based on no evidence at all, or on misapprehension of it or the court is shown demonstrably to have acted on wrong principles in reaching the findings. The court finds that the decision was not judiciously arrived at. I find this appeal is merited and grant the following orders;

1. The respondent is to vacate from the suit land L.R. No. North Wanga/Kholera/353 within the next 6 (six) months from the date of this judgement.
2. Costs to the appellant.

It is so ordered.

DELIVERED, DATED AND SIGNED THIS 28TH DAY OF APRIL 2020.

N.A. MATHEKA

JUDGE