



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
CIVIL SUIT NO. 83 OF 2010 (O.S)
IN THE MATTER OF THE REGISTERED LAND ACT & IN THE
MATTER OF LAND TITLE NO. NDIVISI/MUCHI/2111
GABRIEL MUMELA MACHASIO.....PLAINTIFF
VERSUS
GEORGE WANYAMA MACHASIO.....DEFENDANT

JUDGEMENT

[1]. The plaintiff filed this originating summons on 18.8.2010 for orders that;

1. That the plaintiff has been in continuous and peaceful occupation and parcel Reg. No. NDIVISI/MUCHI/2111 for a period exceeding 12 years.
2. That although the title to the said land is registered in the name of the defendant, it is so registered merely on trust for the plaintiff and his family.
3. That although the title to the said land is registered in the name of the defendant, the same has been extinguished by the adverse possession of the plaintiff.
4. That an order be made that the register be rectified so as to register the plaintiff as the owner of the said title in the place of the defendant.

[2]. The grounds on which the originating summons is based are that the defendant was registered as a mere trustee for the plaintiff and his family. That the trust has been abused and should determine and finally and in the alternative and without prejudice that land title No. Ndivisi/Muchi/2111 has been extinguished by the adverse possession of the plaintiff

[3]. The originating summons was supported by the affidavit of one Gabriel Mumela Machasio the plaintiff herein. He said that he is 92 years old. That in 1960 he owned nearly 42 acres of land in his home area. That he was an employee of East Africa Railways Corporation and was away on the course of his duties. That for that reason and during the first registration of land in his area he authorized his first born son hold brief in that registration in trust for the whole family should anything happen to him. That his land Ndivisi/Muchi/1202 was registered in his son. He produced the certified copy of the title of Ndivisi/Muchi/2111 and their certificates of official search.

[4]. He stated that upon his retirement from E.A. Railways and Harbors Corporation in 1974, he called his clansmen to assist him distribute the land among his 8 children as follows;

1. Samani Machasio Mumela (Myself)	7 Acres
2. George Wanyama Machasio (elder son)	8 Acres
3. Simeon Wandera Machasio	8 Acres
4. Freddy Wekesa Machasio	4 Acres
5. Joseph Wamalwa Machasio	5 Acres
6. Peter Mumelo Machasio	4 Acres
7. Patrick Chwala Machasio	4 Acres
8. Tindi Machasio	2 Acres
Total	42 Acres

[5]. Also produced was the memorandum of distribution. He averred that the defendant did not subdivide the land as the plaintiff and the clan had suggested and that in 1984 the defendant decided to subdivide the land into 4 portions Ndivisi/Muchi/2109, 410, 2111 and 2217. that the defendant was supposed to transfer parcel No. Ndivisi/Muchi/2111 to the defendant and has not done so. The plaintiff said that he has lived on parcel No. Ndivisi/Muchi/2111 all his life and that he wants it registered in his name.

[6]. The plaintiffs witness Mr. Rogers Wasike Waswa. He said he was a cousin to the plaintiff. He said that the land was registered in the name of the defendant because he was leaned and that on 22.12.74 the family called his family members to distribute the land. He produced these minutes. He said he does not know what land the plaintiff claims but said the plaintiff has lived on the land for over 30 years.

PW3 Mr. Johnson Musungu Mimizi said that he is a village elder that the plaintiff decided that the land be registered in the plaintiffs sons name. He said that as a village elder he was called in 1974 to share the land to the plaintiffs sons. That the defendant was given one piece. That the difference now is with respect to the area where Murrum was extracted.

[7]. The defendants defence/affidavit in reply was struck out for noncompliance with the court orders of 18.5.2015. The issue for determination is whether the plaintiff has established his case for adverse possession.

The essential elements of adverse possession are well settled in law. The entry of the suit land must be through trespass and/or sale that is subject to land control and in which no consent is obtained within the time required by law. The same must be without force and must be continuous for 12 years without interruption by notice from the registered owner. The entry must not be under license. If the above conditions happen, then the adverse possessor can claim that the registered owners proprietary interests are extinguished by provisions of Section 7,9,13, 37 and 38 of the Limitations Act.

[8]. The plaintiff in this case states in his originating summons that the land was his even before land consolidation and registration. He allowed his son to be registered as a trustee. He now wants that trust determined to enable him to get part of his land now registered as Ndivisi/Muchi/2111.

[9]. He brings this suit not through trust but under originating summons for adverse possession.

Trust and adverse possession are different concepts in law. They are antithetical concepts. In one you are

entitled from the beginning and in the other you become entitled by operational law subject to certain conditionalities.

I am afraid, that no adverse possession has been established in this case at all. this suit in as far as it is based on the doctrine of adverse possession fails. The suit is dismissed. Since the parties are father and son. There shall be no order as to costs.

Judgment read in open court.

DATED and DELIVERED at BUNGOMA this 10th day of March 2017.

S. MUKUNYA

JUDGE

In the presence of:

Court Assistants Joy/Gladys

Maloba for Khaemba for Plaintiff

Mr. Kajama for Situma for defendant.