



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 40 OF 2005 (O.S)**

**ENVIRONMENT AND LAND CASE NO. 76 OF 2012.**

**IN THE MATTER OF SECTIONS 28 AND 38 OF THE LIMITATION OF ACTIONS ACT CAP 2  
LAWS OF KENYA**

**AND**

**IN THE MATTER OF SECTIONS 28 AND 30 OF THE REGISTERED LAND ACT CAP 300  
LAWSA OF KENYA.**

**AND**

**IN THE MATTER OF ADVERSE POSSESSION IN RESPECT OF LAND PARCEL NO.  
BOKOLI/MISIKHU/583.**

**BETWEEN**

**PENDENIKO BWILE.....APPLICANT**

**VERSUS**

**BENJAMIN WANJALA BARASA.....RESPONDENT**

**JUDGMENT**

[1]. the applicant herein filed an originating summons dated 5.5.05 for the determination of the following issues.

1. Whether the applicant has been in occupation of and/or in possession of all that parcel of land comprised in Title No. Bokoli./Misikhu/583 for a period of more than 12 years, openly, peacefully continuously and/or without force.
2. Whether the applicant has acquired title to the same by adverse possession.
3. Whether the respondents title has been extinguished by the operation of law.
4. Whether or not the respondents registration on 15.5.2003 could defeat the applicant's entitlement to the same by way of adverse possession.
5. Whether the applicant should be registered as proprietor of land parcel number Bokoli/Misikhu/583.

6. Who should bear the costs of this suit.

[2]. The originating summons was supported by the affidavit of Pendeniko Bwire the applicant herein. The respondent Benjamin Wanjala Barasa filed his replying affidavit on 14.7.2005. Basically, replying and denying the averments of the applicant herein. This matter came to court severally culminating to 13.5.15 when the matter was by consent stood over to 28.5.2015 by which time the parties were to bind and paginate parties statements. All relevant documents in compliance with practice rules of 28.7.2014. on 28.5.2015 the parties told the court that they had complied with order 11. the suit was set down for hearing on 9.12.2015. On that day the suit was adjourned. Parties then fixed the case for hearing on 27.7.16. on that day, the parties through their lawyer by consent took the case out of the hearing list and the defendant was to pay to the plaintiff kshs.6,500/= before the next hearing date.

[3]. On that hearing day Madam Nanzushi who had appeared all along for the respondent told the court that she had not seen her client since 2009. that she has been writing letters to him and that he does not respond. She stated that her client gave her cell phone as 0721 991 532 and that she was unable to get to him. She said that she fixed the case but did not send a letter to him or send an sms message to him. Mr. Murunga learned counsel for the applicant took the court back to the history of the court attendance, he stated that the Kshs.6,500/= agreed to be paid to him as his costs on 27.7.2016 had not been paid. He argued that the respondent was always aware of the suit and that it was supposed to proceed that day, in any case, the respondents counsel took part in all stages.

[4]. The court found that the suit was fixed by consent. It was fixed for hearing subject to the respondent paying to the plaintiff kshs.6,500 before the next hearing date. The order was not complied with. The respondent and her counsel were in contempt of court orders and therefore the counsel for the respondent could not take part in the proceedings until she complied with the orders. The court ordered the suit to proceed.

[5]. The applicant relied on his statement of 18.11.2013. he stated that he had obtained letters of administration of the applicants estate. He relied on the affidavit in support of the originating summons sworn on 10.5.05. He produced a certificate of official search of Bokoli/Misikhu/583 that was registered on 18.1.87, a certified copy of the register, an agreement for sale between his father and the respondent dated 28.3.74. the witness said that his father entered the land in 1966 and the respondent moved out and went and bought another land in trans Nzoia. He produced a letter dated 6.11.93 from the clan showing that there was a dispute over that land between the parties herein but it was resolved that the land was occupied by the applicant and that he bought it. The witness also produced proceedings of Bungoma HCC No. 116 of 1985 between the applicant and the respondent where the respondent wanted the applicant to be evicted out of the suit land, a suit that was dismissed for want of prosecution on 11.2.08. Finally he produced his fathers certificate of death as an exhibit in this case. He asked the court to grant the prayers in the originating summons.

[6]. The applicant had one witness Christopher Makokha who said that he was the plaintiffs brother. He relied on his statement on court. The applicants case was closed. The respondent did not come to court and his counsel who was in court could not take part in the proceedings due to non compliance of court orders aforesaid.

[7]. The question for determination is whether the applicant herein has acquired title of land parcel Bokol/Misikhu/583 by way of adverse possession.

[8]. There is evidence that the applicant herein entered the suit land in the year 1966 and has been in occupation of the land until his demise on 15.12.2011. The agreement of 28.3.74 shows the respondents father Barasa Fundumila acknowledging receipt of Kshs.4,750/= as full payment of Bokoli/Misikhu/583.

There is evidence on record that the applicants have openly and continuously occupied land parcel Bokoli/Misikhu/583. The applicant testified that the respondents father moved to Tanzania in 1966 where he has bought a piece of land. He lived there and was buried there. The land herein was transferred to the respondent on 15.5.2003 by Barasa Fumundula. He was aware of the claim herein. The

respondent herein was merely a trustee of the suit land on behalf of the applicant who had been on the land in excess of 12 years see *Kairu Vs. Gacheru [1988] KLR 297, Githu Vs. Ndeete[1984] KLR 776 Luseneka & another Vs. Omocha [1994] KLR 490.*

[9]. Since the last payment was paid in 1976 from that time to the time the land was transferred to the respondent on 28.3.74 was a period of 26 years. Adverse possession had clearly taken place. It became overriding interest on the suit land under section 30 (f) of the Registered Land Act Cap 300 (now repealed) in favour of the applicant. The respondent held title subject to that interest.

[10]. From the foregoing it is apparent that the applicant originating summons is answered in the affirmative in their issues No. 1,2 and 3 and 5. That the orders in the originating summons are allowed in favour of the applicant. The costs of this originating summons shall be to the applicants.

It is so ordered.

Judgment read in open.

**DATED and DELIVERED at BUNGOMA this 10<sup>th</sup> day of March 2017.**

**S. MUKUNYA**

**JUDGE.**

**In the presence of:**

Court Assistant Chemtai/Joy

Mr. Musumba for the Plaintiff

Nanzushi for the Defendant