



**REPUBLIC OF KENYA.**

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

**ELC CASE NO. 75 OF 2012.**

**SAMSON B. KHWATENGE.....PLAINTIFF**

**VERSUS.**

**PHILIP W. SILUNGI.....DEFENDANT**

**JUDGMENT.**

[1]. On 26<sup>th</sup> November, 2001, the plaintiff applicant filed an Originating Summons and prayed for the following;

(a). *The defendant's occupation of 3 Acres out of L.P. NDIVISI/MIHUU/99 got extinguished by operation of Law upon expiry of 12 years from the time the plaintiff took possession thereof and thus the defendant holds the same in trust for the plaintiff.*

(b) *The plaintiff having acquired title over the said land by way of adverse possession an order should be made under the provisions of sections 38 of the Limitation of Actions Act Cap 22 that he be registered as the owner of 3 Acres out of Land Parcel No. NDIVISI/MIHUU/99.*

(c) *The defendant be condemned to pay costs of this suit.*

[2]. Pursuant to the originating Summons, he swore an affidavit and averred, that he purchased 3 acres from the defendant out of land parcel No. Ndivisi/Mihuu/99 in 1979. He states that the purchase price was agreed at Kshs.3,600. He states that he paid Kshs.2,800 leaving a balance of Kshs.800. He avers that the respondent refused to collect the balance and he duly deposited the same in Webuye Court vide receipt No. B045146 dated 8/1/1998. He claims that he has been in continuous occupation of the land for over 12 years and that the defendant title over the said three acres has been extinguished by operation of Law.

[3]. The defendant in his replying affidavit to the originating summons replied and stated, he truly entered into a sale agreement in 1997 for the sale of 3 acres with the applicant plaintiff in 1997 and that Kshs.2,800/= was paid leaving a balance of Kshs.800/=. He stated that the balance was never paid for a period of fifteen years and that the applicant plaintiff cannot obtain the order he was seeking.

[4]. On cross examination by Mr. Bw' Onchiri, the learned Counsel for the respondent, the applicant admitted that there was a demand for the balance of the 800 in 1980. He says that he did not pay the said amount because he had school fees problems. He says that he was sued by the respondent in 1997. He however, says that he paid the money in 1998 19 years after the agreement was made.

It is agreed and conceded that the entry to the suit land was not through trespass the same was permissive. It was through an agreement for sale.

[5]. The purchase price agreed was Kshs.3,600/=. Kshs.2,800/= was paid leaving an outstanding balance of Kshs.800/=. This amount was not paid when demanded in 1980. The respondent had to go to court in 1977. The respondent then allegedly deposited the same in court in 1978. This fact was disputed by the respondents. No time for adverse possession could therefore run when the full purchase price was not paid In

*Wambugu Vs. Kamau Njuguna, Civil Appeal No. 10 of 1982* was that if a purchaser has not paid the full purchase price, time for adverse possession does not being to run, and that it will only be deemed to start running after the full purchase price is paid.

The applicant/plaintiff entered the defendants land with the defendants consent through sale. He cannot be in adverse possession since in reality, he has not dispossessed the owner of the land since the entry was not illegal. This was the dicta in *Kasuve V Mwaani Investments Limited & 4 Others [2004] 1KLR*. It was also emphasized in *Samuel Miki Waweru V Jane Njeri Richu, Civil Appeal No. 122 of 2001, (UR)* that

*"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”*

[6]. The above principles of law apply in this case since the entry was with the permission of the owner. Secondly, the full purchase price was not paid and consequently no time for adverse possession could run.

[7]. This originating summons must therefore fail. It is dismissed with costs.

Judgment read in open Court in the presence of the Counsel and parties.

**Dated at Bungoma this 21<sup>st</sup> day of February, 2018.**

**S. MUKUNYA**

**JUDGE**

**In the presence of:**

Joy: Court Assistant

Mr. Kundu: For Bw' Onchiri for the defendant

Plaintiff: In person present