



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 19 OF 2016

IN THE MATTER OF LAND PARCEL NO. N. KABRAS/MALAVA/1703

AND

IN THE MATTER OF LIMITATION OF ACTIONS ACT 22 SECTION 37 & 38

JOEL SHITANDA KHURO.....PLAINTIFF

VERSUS

JACOB WERUNGA WEKESA

ISAYA WEKESA WERUNGA.....DEFENDANTS

JUDGEMENT

This is the case of Joel ShitandaKhuro who claims to be occupier of land parcel No. N. KABRAS/MALAVA/1703 for determination of the following questions:-

1. If the plaintiff has been in possession of land parcel No. N. Kabras/Malava/1703 and has developed and has used the same for a period of more than twelve (12) years.
2. That the plaintiff's late father one Khuro Lumonje bought the suit land in 1985 from the late Kuto Injendi who was the grandfather of the defendants herein and the registered proprietor therein by then and subsequently bequeathed the same to the plaintiff who has continued adverse possession for a period of over twelve (12) years and that an order in terms of section 7, 17 and 38 Cap 22 of the Laws of Kenya as the title of the proprietor has been extinguished.
3. That even if the suit land is currently registered in the names of the defendants herein, both of them are not in occupation of the aforesaid land and the same should be registered in the names of the plaintiff who has been in ADVERSE POSSESSION peacefully, uninterrupted and without evasion or secrecy ever since 1985.
4. The costs of this application be awarded to the plaintiff.
5. That any order be made as this honourable court may deem fit and just to grant.

The plaintiff, PW1 testified that his late father one Khuro Lumonje bought land parcel L.R. No. N/KABRAS/MALAVA/1703 from one Kuto Injendi at a consideration of Ksh. 27,500/= which was fully paid in for 1985. Thereafter their late father bequeathed the said land to his 2 sons including himself. That they have been living in the said suit land peacefully without any disturbances whatsoever to date. That he received information from reliable sources that the grandsons of the said seller have processed succession and are on the verge of registering themselves therein without them being involved in the process. That he has no other place to go and in the circumstances they shall be rendered landless since that is the only place known to him.

PW2, Alfred KomboKhuro testified that he is a resident of Namakara village, Funye sub-location. Subsequently, he was bequeathed the same land to his two brothers and himself. Unfortunately, his said father died before processing the transfer of the said land from Kuto Injendi into their names. They have been staying in the said land without any complaint from anybody whatsoever from 1985 to date. They learnt from reliable sources that the grandsons of the said seller have processed succession and have registered themselves as the proprietors therein. They pray to be registered as proprietors by adverse possession since they have no other land parcel to call their home. They have learnt again from reliable sources that now the grandsons are on the verge of evict them from the said land parcel. The mother of one of the

grandsons was a witness during the sale agreement.

PW3, Paul Shamani Khuro stated that he is a resident of Namakara village, Funye sub-location. His late father one Khuro Lumonje purchased Land parcel N. KABRAS/MALAVA/1703 from the late Kuto Injendi in 1985. Subsequently, he bequeathed the same land to his two brothers and himself. Unfortunately, their father died before processing the transfer of the said land from KutoInjendi into their names. They have been staying in the said land without any complaint from anybody whatsoever from 1985 to date. He learnt from reliable sources that the grandsons of the said seller have processed succession and have registered themselves as the proprietors therein. They pray to be registered as proprietors by adverse possession since they have no other land parcel to call home. They have learnt again from reliable sources that now the grandsons are on the verge of evict them from the said land parcel. The mother of one of the grandsons was a witness during the sale agreement.

PW4, KarakachaWanakacha comes from Kabras Central Location. The late Khuro Lumonje was his cousin. His cousin bought a parcel of land namely, N. KABRAS/MALAVA/1703 from one Khuro Lumonje sometimes on the 11th July 1985 a consideration of Ksh. 27,500/= .Khuro made his 1st payment of Ksh. 17,910/= remaining with a balance of Ksh. 9,590/= .Unfortunately, Mr. Kuto Injendi (seller) died before his final payment was made. In the year 1989 on the 11th of February, his cousin went and made his final payment of Ksh. 9,590/= to the widow of the late Kuto Injendi one Maria Injete. Maria Injete later died leaving behind one (1) daughter called Julia Kwakhuro who was in the initial agreement before his father passed on. Since then, his cousin and his family members have been living there peacefully until his death. It was just sometime in the year 2002 when they came to realize that the grandchildren of the late Kuto Injendi one Jacob Wekesa Werunga and Isaya Wekesa Werunga conducted a succession cause behind their back on the said parcel of land which his cousin Khuro Lumonje bought.

The defendants were served but failed to attend court or file any defence to be considered. There is no defence to consider. PW1 in his evidence produced a certificate of confirmation of grant PEx1 showing that the defendants are the representatives of the deceased Mr. Kuto Injendi who was the seller of the suit land parcel N. KABRAS/MALAVA/1703. It is the plaintiff's case that his late father one Khuro Lumonje bought N. KABRAS/MALAVA/1703 from one Kuto Injendi on 11th July 1985 for a consideration of Ksh. 27,500/= . Khuro made his 1st payment of Ksh. 17,910/= remaining with a balance of Ksh. 9,590/= . Unfortunately, Kuto Injendi (seller) died before his final payment was made. On 11th of February 1989, he went and made his final payment of Ksh. 9,590/= to the widow of the late Kuto Injendi one Maria Injete. Maria Injete later died leaving behind one (1) daughter called Julia Kwakhuro who was in the initial agreement before his father passed on. Since then, the plaintiff and his family members PW2 and PW3 have been living there peacefully. It was just sometimes in the year 2002 when they came to realize that the grandchildren of the late Kuto Injendi one Jacob Wekesa Werunga and Isaya Wekesa Werunga, the defendants herein conducted a succession cause behind their backs on the said parcel of land which their father bought.

In determining whether or not to declare that a party has acquired land by adverse possession, there are certain principles which must be met as quoted by Seron J in the case of **Gerald Muriithi v Wamugunda Muriuki & Another (2010) eKLR** while referring to the case of **Wambugu v Njuguna (1983) KLR** page 172 the Court of Appeal held as follows;

1. In order to acquire by statute of limitations title to land which has a known owner the owner must have lost his right to the land either by being dispossessed of it or by having continued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it. The respondent could and did not prove that the appellant had either been dispossessed of the suit land for a continuous period of twelve years as to entitle him, the respondent to title to the land by adverse possession.

2. The limitation of Actions Act, on adverse possession contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not the claimant has proved that he has been in possession for the requisite number of years.

3. Where a claimant pleads the right to land under an agreement and in the alternative seeks adverse possession, the rule is: the claimant's possession is deemed to have become adverse to that of the owner after the payment of the last installment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least 12 years after such payment.

In applying these principles to the present case, it is a finding of fact that the defendants are the legal representative of the owner of the said property N. KABRAS/MALAVA/1703. It is the plaintiff's case that his late father one Khuro Lumonje bought N. KABRAS/MALAVA/1703 from one KutoInjendi on 11th July 1985 for a consideration of Ksh. 27,500/= .The purchase price was subsequently paid in full. Unfortunately the seller died before transferring the same to the buyer. It was sometime in the year 2002 when they came to realize that the grandchildren of the late Kuto Injendi one Jacob Wekesa Werunga and Isaya Wekesa Werunga conducted a succession behind their back on the said parcel of land which his Khuro Lumonje bought. The plaintiff and his brothers PW2, PW3 and their families have lived on this land peacefully, openly, continuously from 1985 to 2002. This is a period of over 12 years. That even if the suit land is currently registered in the names of the defendants herein, both of them are not in occupation of the aforesaid land and the same should be registered in the names of the plaintiff who has been in adverse possession peacefully, uninterrupted and without evasion or secrecy ever since 1985. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. A declaration that defendants' right over the whole of land parcel No. N. KABRAS/MALAVA/1703 got extinguished by operation of law (adverse possession upon expiry of twelve (12) years when the applicant was in possession).
2. An order that the whole of land parcel No. N. KABRAS/MALAVA/1703 vests in the applicant/plaintiff and that the applicant should be registered as owner thereof under section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya.
3. An order that the defendants do sign all relevant documents including application for consent forms, transfer forms and attend relevant Land Control Board Meetings to facilitate the transfer of the whole of land parcel No. N. KABRAS/MALAVA/1703 to the

applicant and that in default the Deputy Registrar of this honourable court do sign the same.

4. The defendants to pay the costs of this suit.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 8TH DAY OF MARCH 2018.

N.A. MATHEKA

JUDGE