



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 619 OF 2014**

**JOSEPH MAKOKHA AKHULUNYA.....PLAINTIFF**

**VERSUS**

**JAMES THOMAS ANDAFU.....DEFENDANT**

**JUDGEMENT**

This is an originating summons application of Joseph Makokha Akhulunya who claims proprietary interests by way of adverse possession in the whole land parcel No. Butso/Indangalasia/248 for orders and or determination of the following main questions;

1. Whether the applicant herein is entitled to the whole of land parcel No. Butso/Indangalasia/248 by way of adverse possession.
2. Whether the applicant has satisfied all the statutory requirements and or prerequisites entitling him to the said land by way of being in adverse possession for a period of over 12 years.
3. Whether the respondent's proprietary interests in the said land have been extinguished by virtue of the applicant's adverse possession of the same.
4. Whether the title deed issued in the names of James Thomas Andafu as the sole proprietor of land parcel No. Butso/Indangalasia/248 be cancelled and or revoked and the same be transferred to the applicant herein as the sole proprietor.
5. That costs of this summons be provided for.

The plaintiff submitted that, the land parcel No. Butso/Indangalasia/248 is registered in the names of the respondent herein as the sole legal proprietor (see copy of green card PEx 3. That he has since 1974 build his houses for himself and his entire family on this land where he lives to-date. That his entire family have peacefully, continuously and or quietly occupied, developed and utilized the said entire land since 1974 to-date without any disturbances and or interferences whatsoever from any person. That respondent herein has never lived or occupied, developed and or utilized the said land any manner since he took its actual possession in 1974. That their occupation and or utilization of the said land parcel has been consistent uninterrupted and notorious. That during his quiet and or peaceful occupation, development and enjoyment of the said land since 1974 the respondent or any member of his entire family has never occupied, developed and or constructed any structure on the said land nor claimed any interest therein nor even stepped and or insisted the same said land parcel to-date. That in view of the foregoing the respondent's interests and or any rights in the said land parcel No. Butso/Indangalasia/248 have automatically been extinguished by operation of the law by virtue of the applicant's adverse possession. That the respondent's interests and or rights in the said land parcel have been extinguished by operation of law through the applicant's adverse possession he is entitled to be registered as the absolute proprietor of the said same land should be cancelled and or revoked and the same be transferred and registered in my names thereafter.

The plaintiff submitted that, he was the original registered owner of land parcel Butso/Indangalasia/248. That sometimes in 1974 he agreed to sell 7 ½ acres to one James Thomas Andafu at an agreed purchase price of Ksh. 6,000/= PEx1 is a copy of a sale agreement dated September, 5, 1974. He paid at that time a deposit of Ksh. 3,000/= leaving a balance of Ksh. 3,000/=. At that time when he was buying he was in the company of the Chief by then Festus Muhanda Bitinyu together with an officer from the lands. They signed various documents including the application of consent and transfer forms on an understanding that when he will pay him the remaining balance of Ksh. 3,000/= they will proceed to the land control board for consent for transfer of the land into his names. After sometimes without communication about payment of the purchase price balance he made several follow-ups for him to pay but he declined. The said James Andafu (purchaser) went and never brought to him the remaining balance as he wanted to buy another land elsewhere. Since he took long to give him the balance he decided to return back to him on various dates the deposit he had paid to him through post office registered mail via money order through his address on various dates in 1981 copies of the receipts PEx2 a & b.

That he has never appeared to the land control board for consent but the defendant (Thomas James Andafu) proceeded to the lands office and

fraudulently acquired the title deed for his land PEx3 is a copy of the green card. That when he discovered that he had transferred the land into his names he told him that since he had not paid him the remaining balance and he returned him the deposit he should have the land reverted into his names but he declined.

That the fact that he has the title deed of his land he has never utilized the said land as he stays in Bunyore with his family and he is the one still cultivating and utilizing the land herein which he has extensively developed as he has stayed thereon with hisfamily since 1943 uninterrupted. He is requesting his registration as the owner/proprietor of his land be cancelled and revert back to him.

PW2, Alphonse Tsikhungu Murunga, corroborated the plaintiff's evidence. He knows Joseph Makokha Akhulunya the plaintiff as his neighbour who resides on land known as Butsotso/Indangalasia/248 which is the ancestral land he inherited from his father. That he resides on land known as Butsotso/Indangalasia/240 which borders his land. The plaintiff's homestead has about 7 semi-permanent houses constructed on this land parcel where he lives with all his entire family and he carries out farming on the whole of that land parcel where he has planted sugarcane, trees (blue gum) avocado, mangoes, potatoes, cassava, bananas, vegetables, yams, maize and Napier grass etc. He has a permanent latrine on the said land.

PW1 had even buried one of his wives and other several family members who have also been buried on this land. He came to know about the defendant; James Thomas Andafu when Joseph Makokha approached and told him that he has a case against James Thomas Andafu who has fraudulently transferred his land into his names. PW1, Joseph Makokha Akhulunya had the intention of selling to him his land sometimes back in 1974 but he failed to pay the whole purchase price and he returned to him his deposit of Ksh. 3,000/= through post office via money order on various dates in 1981 and he showed the registered postage copies he retained.

That said defendant, James Thomas Andafu has never constructed a house or utilized this land and he has never seen or heard the defendant coming to stop the farming and the burial of Joseph Makokha's family members on this land since Luhya customs does not allow one to bury the body of the deceased who is not of his blood. He has never heard or seen the said James Thomas Andafu come to Joseph Makokha seeking him to vacate so as to give him vacant possession of his land which he has a title and this shows that the title was obtained in a dubious means.

The defendant was served but failed to attend court and give evidence and the court has relied on his replying affidavit. The respondent submitted that, the applicant has failed to disclose that land parcel No. BUTSOTSO/INDANGALASIA/248 previously owned by him was transferred to him by himself by an agreement as willing seller willing buyer after payment of consideration. That the applicant cannot turn around and claim adverse possession having willingly sold and transferred the land to him. That when he was purchasing the suit land the applicant was already residing on it with his family and pleaded for sufficient time to move out to some other parcel of land. That the applicant's every move to reverse the ownership of the suit land has been thwarted and such attempt through the district Land Disputes Tribunal and Provincial appeals Committee was dismissed. That he made an application to the Chief Magistrate's court at Kakamega Miscellaneous number 65 of 2000 for adoption of the verdict of the Provincial Appeals Committee as the final judgment of the court. That this suit is not properly before this honourable court and the same is res judicata.

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 Sergon 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 not disputed that the registered owner of land parcel Butsotso/Indangalasia/248 is the defendant one James Thomas Andafu. It is also not in dispute that sometimes in 1974 he agreed to sell 7 ½ acres to one James Thomas Andafu at an agreed purchase price of Ksh. 6,000/= PEx1 is a copy of a sale agreement dated September, 5, 1974. The plaintiff testified that the defendant paid a deposit of Ksh. 3,000/= leaving a balance of Ksh. 3,000/=. The Plaintiffs testimony is that he made up follow-ups for payment of the balance but the same was not forthcoming and after long follow-up and none payment of the said balance, the Plaintiff decided to cancel the sale agreement and the amount he had deposited as down payment of the purchase price. The Plaintiff produced copies of money order to show the said refund sent to the Defendant (PEx2). The plaintiff has since the alleged sale, continued to live on the said land with his family as he continues to carry on agricultural activities without any interruption from the defendant. The Plaintiff has continued to develop the said land and has constructed various houses on it, has food crops such as bananas, beans, maize, sugarcane fruits, trees and vegetables which his family uses. The Plaintiff contends that he has never appeared at any land control Board to give consent to transfer the land to the Defendant as he maintains that the balance of the purchase price was never paid and that whatever deposit paid was refunded to the Defendant. Plaintiff has buried some of his deceased family members without any interruption from anybody including the defendant herein.

PW2 confirmed that he is a neighbour and he resides on his land parcel Butsotso/Indangalasia/240 which borders with the plaintiffs suit land

parcel Butsotso/Indangalasia/248. In his testimony he confirmed that it is the plaintiff who resides on the land and that the defendant has never stepped on the said land despite being the registered proprietor.

In the instance case I find that the plaintiff has been in continuous occupation of the suit land from the time he purported to sell the land to the Defendant in 1994 he has continued to remain on the land uninterrupted with the full knowledge of the Defendant who has never occupied the said land despite being the registered proprietor. The Plaintiff has proved from his evidence that he has been in exclusive occupation of the suit land uninterrupted with the full knowledge of the defendant. Where an occupation of property (land) inconsistent with the right of a true proprietor continues for a long period, a reputable presumption arises either that the adverse possessor (trespasser) is the true owner of the land or alternatively that the true owner (proprietor) has abandoned the land. Thus, adverse possession has the effect of either debarring the right of the owner and or converting the adverse possessor into the owner, or of depriving the true owner of his right of action to recover his property by efflux of time. I find that the plaintiff has proved his case on a balance of probabilities. The defendant's/Respondent's right to own the suit land herein has been extinguished by lapse of time and hence the land should be ordered transferred to the plaintiff the title deed held by the Defendant is held in trust for the occupier (Plaintiff). I therefore make the following orders;

1. A declaration that the defendant's/respondent's proprietary interests in the said land have been extinguished by virtue of the plaintiff's/applicant's adverse possession of the same.
2. That the title deed issued in the names of James Thomas Andafu as the sole proprietor of land parcel No. Butsotso/Indangalasia/248 be cancelled and or revoked and the same be transferred to the plaintiff/applicant herein as the sole proprietor.
3. That costs to be borne by the defendant.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 17<sup>TH</sup> DAY OF MAY 2018.**

**N.A. MATHEKA**

**JUDGE**