



**REPUBLIC OF KENYA**

**IN THE ENVIROMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 398 OF 2014**

**PASCAL NETIA NAIKA.....PLAINTIFF**

**VERSUS**

**JAMES NALIANYA WANGATIA.....1<sup>st</sup> DEFENDANTS**

**ANDREW MBAYAKI MAKOKHA.....2<sup>nd</sup> DEFENDANTS**

**JUDGMENT**

The plaintiff's case is that, on or about 28<sup>th</sup> December 1998, the plaintiff entered into sale of land agreement with the 1<sup>st</sup> defendant wherein the 1<sup>st</sup> defendant sold L.P. Nos Bunyala/Budonga/1808 and Bunyala/Budonga/929 measuring 2 acres and 3.5 acres respectively. The plots lie adjacent to each other and the plaintiff then paid the agreed amount of Kshs.302,500 albeit in instalments. That the same year, the plaintiff took physical possession of the total sum of 5.5 acres of land and has peacefully used same ever since. That at the time of entering the agreement, the 1<sup>st</sup> defendant agreed to transfer the plots into plaintiff's names once a "succession" he said he had filed was concluded. Sometimes in early 2012, the plaintiff now wary of waiting decided to conduct some searches in the land registry where he was surprised to find that the two plots had infact been transferred into the 2<sup>nd</sup> defendant's names following a succession cause Kakamega Succession Cause No. 205 of 2010. That Kakamega Succession Cause No.205 of 2010 exists and does not involve the parcels of land in this suit and the parties are not as those in this and hence a fraud had been committed intended to rob the plaintiff of his hard-earned asset. No credible transfer was conducted.

The particulars of fraud where, purporting to conduct succession of L.P No. Bunyala/Budonga/26 into the 2<sup>nd</sup> defendant's names when the then registered holder (1<sup>st</sup> defendant) is still alive today. Making the whole scenario appear like the 2<sup>nd</sup> defendant bought land from 1<sup>st</sup> defendant when there was no credible sale but a plot by 1<sup>st</sup> defendant assisted by 2<sup>nd</sup> defendant to defraud plaintiff his land. Purporting to conduct a succession of L.P No. Bunyala/Budonga/1808 from the then holder of the same land the 1<sup>st</sup> defendant herein who is alive today into the 2<sup>nd</sup> defendant's name through Kakamega Succession Cause No. 205/2010. 1<sup>st</sup> defendant failing to disclose to the plaintiff that the piece of land subject in this suit was in the year 2010 in his name to enable a successful transfer into his names (plaintiffs) as the current genuine holder. By purporting that the succession cause No. Kakamega Succession Cause No. 205 of 2010 was the legal instrument used to transfer the 2 plots herein into the 2<sup>nd</sup> defendant's names knowing too well, that cause was filed by one PENINA ONDONDO in a land piece that is not subject in this suit.

That plaintiff has continuously and peacefully used the plots subject in this suit for over 13 years and has since alternatively acquired same by adverse possession. That all efforts made by the plaintiff to regularize the position has fallen on deaf ears and notices of demand have been ignored. The plaintiff's claim against the defendant is for an order of this court declaring him the bonafide owner of land parcels No. Bunyala/Budonga/1808 measuring 3.5 acres and 2 acres respectively and hence have him registered as such. The cause of action arose within the jurisdiction of this honourable court. The plaintiff prays for judgment against both defendants for;

a) Order declaring him (plaintiff) the owner of L.P Nos. Bunyala/Budonga/929 and Bunyala/Budonga/1808 measuring 3.5 acres and 2 acres respective, hence the same be transferred to him by the defendants.

b) Costs of this suit.

c) Interests.

PW1 testified that, that sometimes in the year 1998, December 28<sup>th</sup>, he entered into sale of land agreement with the 1<sup>st</sup> defendant in this case (sale agreement PEx1). The 1<sup>st</sup> defendant sold him Land Parcel Nos. Bunyala/Budonga/929 and Bunyala/Budonga/1808. These pieces measure 3 ½ acres and 2 acres respectively and they are adjacent to each other. He paid the agreed amount of Kshs.302,500 albeit

installments. He immediately took possession and he has been using them since till sometimes early this year that he sensed that the 1<sup>st</sup> defendant was not honest in failing to transfer the pieces of land to one (BUNYALA/BUDONGA/929) and the other was still in somebody else names. So he kept convincing him that he be patient till he acquires title to the other plot so that he transfers both of them and have them merged into the plot. So early 2012, he decided to conduct searches at the land registry at Kakamega. He found the two piece of land had been transferred into the names of the 2<sup>nd</sup> defendant by the 1<sup>st</sup> defendant immediately he acquired title to the land portion in 2011.

He has used these portions of land for over 13 years without interruption and am not ready to relinquish ownership. I have cultivated sugarcane on it for all these years and the crop on land is still in his name to date. Now armed with the true facts, with his family members (1<sup>st</sup> defendant is his relative) convened a meeting on 10<sup>th</sup> March 2012 which he attended. He in fact admitted he had sold the portions to somebody else and that he would settle with him within two weeks. On 24<sup>th</sup> March 2012, he convened another meeting and he remained adamant and refused to delve on the issue at all. He stands to loose and he seeks to have the two titles revoked as the information filed with Land Registrar indicate or show that the titles passed from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant through Kakamega High Court succession vide cause number 205 of 2010.

The 1<sup>st</sup> defendant is still alive and passing land from to the 2<sup>nd</sup> defendant by way of succession is a manifestation of a fraud deliberately intended to make him loose-unfairly. A check at the Kakamega family Division registry, succession cause No. 205 of 2010 has completely no relationship to any of the parties in this case or the two portions of land. He seeks to have the current registration in the names of the 2<sup>nd</sup> defendant cancelled and his names be inserted as he acquired the portions by way of legitimate sale and by adverse possession.

PW2 Alfred E. Kanenje Naika testified that, sometimes in December 1998, the 1<sup>st</sup> Defendant informed him that the land he was tending for him neighbouring his is now the plaintiff's property. He was his caretaker as the land was close to his. When he contacted the plaintiff who is his brother, he confirmed that indeed they had entered a sale of land agreement. PW1 has been using same peacefully till early 2012 when he found out that the 1<sup>st</sup> Defendant had secretly transferred the land to somebody else. They convened a meeting which was held at James home at Shitoto, Shianda. The 1<sup>st</sup> Defendant admitted that he had actually sold the land to someone else. After two weeks they again went to James's home but he did not do anything to settle with Pascal.

The plaintiff submitted that he paid off the entire purchase price but never obtained the consent of the Land Control Board which failure must have rendered the purchase agreement null and void. He however took possession of the suit portions of land which he cultivated sugarcane in contractual arrangement with Mumias Sugar Company for over fifteen years is when the suit land was transferred to the second defendant in the year 2011 and he was consequently kicked out in the year 2013. The doctrine of adverse possession has severally been held by courts to be an operation of the law and factual requirement. The moment a party establishes that there was a continuous, peaceful and uninterrupted occupation for a period of over twelve (12) years, title would have automatically been extinguished by effluence of time. They urge the court to be guided by the Court of Appeal decision in the case of WENSLEY BARASA-VRS-IMMACULATE AWINO ABONGO COURT OF APPEAL AT KISUMU CIVIL APPEAL NO.115 OF 2015.

The defendants were served but failed to attend court and adduce any evidence. Their statements of defence on record are mere denials. This court has carefully considered both the applicant's and the defendants' cases. The Plaintiff sued the Defendant herein in respect of the parcels of land namely BUNYALA/BUDONGA/1808 measuring 2 acres and BUNYALA/BUDONGA/929 measuring 3.5 acres respectively. It was plaintiff's case that he bought the two portions of land and paid the entire purchase price in installments upto a total of Ksh.302,500 (Three Hundred and Two Thousand Five Hundred Shillings). The written agreements were produced in court as exhibits and copies of registration and search certificates. The transactions were entered into sometimes on the 28<sup>th</sup> December 1998. The Plaintiff then took occupation of the said parcels of land and started cultivating sugar cane under the cane contract at the local miller Mumias Sugar Company Limited. The contractual documents to plant cane with the said company were also produced as exhibits in the case (PEX6). The Plaintiff further testified that he remained in such occupation for over 15 years and was later stopped from cultivating in the year 2013. It later occurred to his surprise upon search at the lands office that, in fact the seller had fraudulently and mischievously caused to be transferred the suit portions to a third party allegedly upon succession proceedings. The said third party is the 2<sup>nd</sup> Defendant in this by the name Andrew Mbayaki Makokha. They, from documents exhibited, caused to be transferred the two portions of land herein named by transmission vide succession cause at the Kakamega High Court cause No. 205 of 2010 copies of the green card and official search PEX 2,3,4&5). Upon inquiry and checking of the records the Plaintiff discovered that the succession cause was a citation proceeding between separate entities and parties that were not the Defendants herein PEX.7). The plaintiff has now sought from the honourable court protection of his proprietary interests in the suit portions by declaring him as the bonafide owner of the suit parcels of land and an order of cancellation of false entries to have his names registered or title transferred to him by the 1<sup>st</sup> Defendant. The Plaintiff has also prayed for costs. The defence though served never testified but filed documents of general denial. The defence merely denied or was not ventilated.

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 in that the suit land parcel No. Bunyala/Budonga/1808 and Bunyala/Budonga/929 measuring 2 acres and 3.5 acres respectively are registered in the names of the 2<sup>nd</sup> Defendant Andrew Mbayaki Makokha herein (PEx 2&3 a copy of the certified true copy of the original register). Sometimes on the 28<sup>th</sup> December 1998 PW1 bought the two portions of land and paid the entire purchase price in installments upto a total of Ksh.302,500 (Three Hundred and Two Thousand Five Hundred Shillings). The written agreements were produced in court as exhibits (PEx1). The Plaintiff then took occupation of the said parcels of land and started cultivating sugar cane under the cane contract at the local miller Mumias Sugar Company Limited. PW1 has been using same peacefully till early 2012 when he found out that the 1<sup>st</sup> Defendant had secretly transferred the land to somebody else. They convened a meeting which was held at James home at Shitoto, Shianda. The 1<sup>st</sup> Defendant admitted that he had actually sold the land to someone else. I find that the plaintiff has established that there was a continuous, peaceful and uninterrupted occupation for a period of over twelve (12) years from 1998 to 2012. The defence is a mere denial. I find that the plaintiff has established his case on a balance of probabilities and grant the following orders;

1. Order declaring him (plaintiff) the owner of L.P Nos. Bunyala/Budonga/929 and Bunyala/Budonga/1808 measuring 3.5 acres and 2 acres respective, hence the same be transferred to him by the defendants.

2. Costs of this suit to the plaintiff.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 16<sup>TH</sup> DAY OF MAY 2018.**

**N.A. MATHEKA**

**JUDGE**