



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 326 OF 2013

ROSALIA MASABAKWA ABWIBA.....1ST APPLICANT

JOHN MASABAKWA ABWIBA.....2ND APPLICANT

ERNEST MASABAKWA ABWIBA.....3RD APPLICANT

NICHOLAS CHIBOLE ABWIBA.....4TH APPLICANT

VERSUS

FRANCIS WALUMBE S/O JOSEPH MAPESA.....1ST RESPONDENT

ACTION FOR CHILD DEVELOPMENT TRUST.....2ND RESPONDENT

JUDGEMENT

The originating summons herein is by the applicants ROSALIA MASABAKWA ABWIBA, JOHN MASABAKWA ABWIBA, ERNEST MASABA KHWA ABWIBA, NICHOLAS CHIBOLE ABWIBA , who claim to have acquired title to the WHOLE of land parcel L.R. BUTSOTSO/ SHIKOTI/1449 measuring 0.5 acres, by adverse possession for ORDERS and for determination of the following questions:-

1. WHETHER the Applicants have acquired ownership of the WHOLE of land parcel L.R. BUTSOTSO/SHIKOTI/1449 by adverse possession.
2. WHETHER the Respondent's title on the suit land got extinguished on the expiry of 12 years from the time the Applicant started occupying and or using the land since first registration.
3. WHETHER the Respondents should be ordered to transfer to the Applicant the land parcel by executing all documents of transfer in respect of land parcel in favour of the Applicant.
4. WHO should be condemned to pay costs of this case.

The 1st applicant testified that, she is the widow to ARNOLD MASABAKHWA ABWIBA deceased and the 2nd, 3rd and 4th applicants are her biological children and equally the biological children of the said ARNOLD MASABAKHWA ABWIBA - deceased. She got married to the said ARNOLD MASABAKHWA ABWIBA in the year 1946 and was blessed with seven children two are deceased and five are alive. That she has lived on the suit land herein L.R. BUTSOTSO/SHIKOTI/1449 from the day she got married till to date as that where her matrimonial home stands. Her husband ARNOLD MASABAKHWA ABWIBA died in the year 1979 and was buried on the suit property. All children including the 2nd, 3rd and 4th Applicants were born on the suit property and have lived all marriage life therein since 1946 undisturbed. She has very recently come to know that the 1st Respondent was registered as proprietor of the suit property on 17/05/1975. Surprisingly the respondent has since being registered as proprietor of the suit property has, never shown up to claim his land despite him knowing well that she has been in peaceful occupation of the suit property. She and her children have lived on the suit land uninterrupted and peacefully. She has constructed permanent residential houses which have been on the plot for the past 30 years. Sometime in September 2013 she started receiving strange visitors to her home. They decided to make a report to the area Assistant Chief Sub Location and investigate and know the real intentions of the said strange visitors to my home. The 1st Respondent was summoned to the Assistant Chief's office he came and produced a title deed in respect of the suit property herein and laid claim to the suit land herein. He said he bought the subject land from my late husband ARNOLD MASABAKHWA ABWIBA in 1972 and was issued with a title deed. Soon thereafter the 1st Respondent sold the suit property to the 2nd Respondent. That her late husband inherited original land parcel L.R. BUTSOTSO/SHIKOTI/225 from which the suit land herein was allegedly carved from, from his late father and was also the first registered owner of the said original land parcel L.R. BUTSOTSO/SHIKOTI/225.

The 1st defendant/respondent testified that, he has been the registered owner of that parcel of land known as Butsotso/Shikoti/1449 measuring approximately 0.5 Acre since the 26th of October 1974 to 18th September 2013 when he sold the said land and transferred it to the 2nd respondent. (DEX 6 being a copy of the title deed) He legally acquired the said parcel of land by purchasing the same from one Arnold Masabakhwa Abwiba in the year 1974 where upon the said seller facilitated the transfer of the said parcel to him. (DEX 2 a & b is a copy of the letter of consent from the land registrar) The said land parcel no. Butsotso/ Shikoti/1449 was curved out of that land parcel Known as Butsotso/ Shikoti/225 measuring approximately 2.0 acres whereby he purchased 0.5 out of the same, and after obtaining a consent for transfer and subdivision the same was subdivided and which gave rise to land parcels No. Butsotso/ Shikoti/1449 and land parcel No. Butsotso / Shikoti/1448. The seller, the said Arnold Masabakhwa Abwiba duly signed the transfer form which was witnessed by the land registrar and one of his sons John Masabakwa Abwiba who is also the 2nd applicant herein.

This court has carefully considered the plaintiff/applicants' and the defendants/respondents' cases and the submissions herein. The applicants' case is that, they have been in occupation of the suit land since first registration continuously, openly, uninterrupted, peacefully and without force. The Applicants who are the widow and children of ARNOLD MASABAKHWA ABWIBA have houses on the suit land besides planting food crops and numerous mature trees. The 1st Respondent has secretly sold the suit land to the 2nd Respondent and has threatened to evict the Applicants from the suit property. 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 the instant case the applicants state that they do not know how the said original land parcel L.R. BUTSOTSO/SHIKOTI/225 was subdivided by the 1st Respondent to create plot no. BUTSOTSO/SHIKOTI/1449. Their late husband and father has never sold any land to the 1st Respondent or any other person. The Respondent must have been fraudulently registered as proprietor of the suit property. The Respondents claim to the suit property has been extinguished by operation of the law and the applicants' have acquired the whole of the suit property by adverse possession and should therefore be registered as the proprietors of the same.

It is the 1st defendant/respondent testimony that, he has been the registered owner of that parcel of land known as Butsotso/Shikoti/1449 measuring approximately 0.5 Acre since the 26th of October 1974 to 18th September 2013 when he sold the said land and transferred it to the 2nd respondent. (DEX 6 being a copy of the title deed). He legally acquired the said parcel of land by purchasing the same from one Arnold Masabakhwa Abwiba in the year 1974 where upon the said seller facilitated the transfer of the said parcel to him. (DEX 2 a & b is a copy of the letter of consent from the land registrar) The said land parcel no. Butsotso/ Shikoti/1449 was curved out of that land parcel Known as Butsotso/ Shikoti/225 measuring approximately 2.0 acres whereby he purchased 0.5 out of the same, and after obtaining a consent for transfer and subdivision the same was subdivided and which gave rise to land parcels No. Butsotso/ Shikoti/1449 and land parcel No. Butsotso / Shikoti/1448. The seller, the said Arnold Masabakhwa Abwiba duly signed the transfer form which was witnessed by the land registrar and one of his sons one John Masabakwa Abwiba who is also the 2nd applicant herein. I do not see any elements of fraud in this matter. 1st respondent states that he had a semi permanent house there and only moved out in 2013 when he sold the land. I believe the 1st Respondent and I find that the plaintiffs' have failed to prove their case on a balance of probabilities. I find the same has no merit and dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 28TH DAY OF JUNE 2018.

N.A. MATHEKA

JUDGE