REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 5 OF 2016

PETER OMUKA TU ESILABI.....PLAINTIFF/APPLICANT

VERSUS

ZEDEKIAH ONDELE OMUHONJIA..DEFENDANT/RESPONDENT

JUDGEMENT

The originating summons application is by one Peter Omukatu Esilabi and he claims the ownership of the property known as L.R. West Bunyore/Embali/269 by way of adverse possession and for the determination and grantingof the following question and orders:-

1. Whether the applicant is entitled to the entire L.R. West Bunyore/Embali/269.

2. Whether the Respondent is the registered owner of the suit land herein.

3. Whether the applicant acquired the said property by way of adverse possession.

4. Whether the applicant has been in actual effective use and occupation of LR. West Bunyore/Embali/269 for more than twelve years 12 years.

5. Whether upon expiry of 12 years since the applicant was in possession of LR West Bunyore/Embali/269, the respondent's right over the land got extinguished byoperation of the law.

6. Whether the respondent is to execute all subdivision and transfer documents and inevent of default, the Deputy Registrar of this court is empowered to execute the same togive effect to the foresaid orders.

7. Whether the respondent holds the entire parcel of the said land in trust for the applicant.

8. Whether the cost of this suit is borne by the respondent and further relief/order as this court may deem fit.

The Applicant submitted that he is the administrator of his grandfather's estate moved this court by wayof originating summons dated 5th November 2015 claiming the ownership of half property known as LR WEST BUNYORE/EMBALI/269 by way of adverse possession. They submit that the Applicant is entitled to a portion of LR West Bunyore/Embali/269.PWl, PW2 and PW3 testified that they have been living on aportion of the said parcel for over 60 years and the same has become ancestral to them.

Adverse possession was distinctively deliberated on and defined in the case of MTANALEWA VERSUS KAHINDI NGALA AAWAGANDI CIVIL APPEAL N0.56 ,OF 2014 COURT OFAPPEAL NO. 56 OF 2014. Some ofthe major elements alluded to therein are that adversepossession must be for 12 years and more, actual possession, the possession must be uninterrupted, public, peaceful and continuous. It is our humble submission that the Applicant's grandfather herein was initially the proprietor of the land in contention. That upon which the Respondent fraudulently acquired a title in 1993 of the said parcel an issue that was dealt with during the land tribunal dispute as per PE3.In the circumstances the applicant and his family have been peacefully, publically and continuously been using the said piece of land to which the Respondent holds the title for more than 60 years uninterrupted.

They submit that the applicant and his family been in actual effective use and occupation of West Bunyore/Embali/269 for more than 12 years. The Applicant gave evidence that him and his family have been in occupation of a portion of the said land for approximately 6o years. PW 2 more so gave evidence on oath and noted that she hasbeen staying on the land with her deceased husband Omukatto Esilaba Emmanuel since the 1950's. The same has been their homestead and area of settlement on which they have made effective use by cultivating and constructing on their homesteads.

They submit that Respondent being the proprietor of LR West Bunyore/Embali/269 on which the Applicant has had adverse possession they

pray that this honourable court do issue orders compelling the Respondent to execute all subdivision and transfer documents and in event of default the Deputy Registrar of this court be empowered to execute the same to give effect to the foresaid orders. The same follows the fact that theApplicant has proved adverse possession.

They submit that indeed the Respondent holds in trust a portion of West Bunyore/Embali/269. This is evident from paragraph 4 of the Applicant's supporting affidavit dated 5th November 2015 as he denotes that "the agreement we had at the time of registration was to hold half a portion of LR West Bunyore/Embali/269 in trust for me."Moreso, the land is being held in trust for the Applicant by the Respondent as it isregistered and a certificate was issued thereto on the 10th of March 1993 as per PEI. Their submission is premised on the case of Mtana Lewa Versus Kahindi Ngala Mwagandi Civil Appeal No.56 of 2014 Court of appeal no. 56 of 2014 where court noted that "Sections 37and 38 of the Limitation of Actions act stipulate that if the land is registered under one of the registration Acts then the title is not extinguished, but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him."

This court has considered the applicants' case and submissions herein. The respondent was served but failed to attend court or file any defence.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.*
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> *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.*
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> *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 has been established that the applicant/plaintiff and his brothers have established their homestead on a portion of the said parcel of land. The entitlement of Applicant to the said land was also further expounded on by the Assistant Chief's letter dated 20th March 2015 PEx4 and land dispute tribunal council Luanda proceedings as PEx3.PWlwho has ad litem orders (PEx2) testified that the land was originally in his grandfather's name (Esilaba Mandobo) and the same was fraudulently transferred into the name of the Respondent on the 30th day of October 1969. That it was agreed that the same be subdivided between the Applicant and Respondent but all in vain as the Respondent deliberately evaded the same hence institution of this suit and claim.

It is evident that the Respondent herein is the registered owner of the said parcel LR West Bunyore/Embali/269 as per P.ExI. A copy of the green card that shows the Respondent herein as the registered owner of LR WEST BUNYORE/EMBALI/269 as of the 10th day of March 1993. I find that the Applicant has proved his case on a balance of probability.The Applicant has satisfied all ingredients for adverse possession.A portion of LR West Bunyore/Embali/269 is the only source of livelihood the Applicant and his family have. The Applicant's possession and occupation of a portion LR West Bunyore/Embali/269 has been adverse to the proprietary interests of the Respondent. And I grant the following orders;

> 1. A declaration that the defendant's/respondent'ssole proprietary interests in the said land have been extinguished by virtue of the plaintiff's/applicant's adverse possession of the same.
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> 2. Thatthe defendant/ Respondent to execute all subdivision and transfer documents of a portion of land parcel No. LR West Bunyore/Embali/269 occupied by the applicants and in event of default the Deputy Registrar of this court be empowered to execute the same to give effect to the foresaid orders.
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> 3. That costs to be borne by the defendant.

It is so ordered.

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

N.A. MATHEKA

JUDGE