



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 371 OF 2013**

**JOSEPH SHIKANDA CHUMA.....PLAINTIFF/APPLICANT**

**VERSUS**

**MOHAMMED OMOLLO KHAYUNDI.....DEFENDANT/RESPONDENT**

**JUDGEMENT**

This is the application of Joseph ShikandaChuma who claims to be entitled to the land parcel No. MARAMA/LUNZA/1188 by adverse possession. The ownership of No. MARAMA/LUNZA/1188 is claimed by the applicant and for the determination of the following;

1. Whether the applicant has been in occupation, use and or in possession of Land Parcel No. MARAMA/LUNZA/1188 measuring 2.4 Hectares whose boundaries are clearly demarcated on the ground openly, peacefully, continuously and exclusively since 1962.
2. Whether the respondent being the current registered owner of Land Parcel No. MARAMA/LUNZA/1188 measuring 2.4 Hectares holds the said title which is in use by the applicant in trust for the applicant.
3. Whether the respondent title over Land Parcel No. MARAMA/LUNZA/1188 measuring 2.4 Hectares in use by the applicant became extinguished upon expiry of a period of 12 years from 3<sup>rd</sup> August 1988.
4. Whether the applicant has now acquired title to the said Land Parcel No. MARAMA/LUNZA/1188 by virtue of adverse possession.
5. Whether the Respondent should be compelled to execute the transfer of the whole of the parcel which is in actual occupation of the Applicant thereof to the applicant and in default the Deputy Registrar of this court to be empowered to do so.
6. Who should pay the cost of these summons.

PW1 the plaintiff testified that since he was born he has been residing with his family on Land Parcel No. MARAMA/LUNZA/1188 measuring 2.4 Hectares. The land belonged to his father one Musa Juma Omukami. His father died in April 2013 and he went to the Land Registry to procure copies of the register in order to file succession proceedings to and his surprise he found the land had been registered in the name of the respondent on the 3<sup>rd</sup> August 1995 (PEX1). PW2 the plaintiff's mother corroborated PW1 she states that she also lives on that land. PW3 the brother to the deceased confirmed that his brother Musa Juma Omukami never sold the land to anyone.

The 1<sup>st</sup> defendant/ respondent, DW1 testified that, he bought the land from the applicant's father. He states that his brother handles his crops there and he has built structures and that the plaintiff does not live on this land. DW2 states that the plaintiff lives on plot 1192 and not on the suit plot. DW2 a brother to the plaintiff states that his father sold the land to the defendant who took possession. DW3 confirms he was the defendant's caretaker on the suit land.

This court has considered the applicant's and the respondent's evidence and submissions herein. 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 Serгон 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.

The court was also guided by the case of Francis Gicharu Kariri - v- Peter Njoroge Mairu, Civil Appeal No. 293 of 2002 (Nairobi) the Court of Appeal approved the decision of the High Court in the case of Kimani Ruchire -v - Swift Rutherfords & Co. Ltd. (1980) KLR 10 where Kneller J, held that:

*"The plaintiffs have to prove that they have used this land which they claim as of right: nec vi, nec clam, nec precario (no force, no secrecy, no persuasion)"*.

So the plaintiff must show that the defendant had knowledge (or the means of knowing actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it by way. In applying these principles to the present case, the plaintiff brought this suit against the defendant by way of originating summons dated 6<sup>th</sup> June 2013 claiming to be entitled to the land parcel No. MARAMA/LUNZA/1188 by adverse possession. Both the plaintiff and defendants gave viva voce evidence and called witnesses.

It is not in dispute that land parcel MARAMA/LUNZA/1188 is registered in the name of the Defendant herein, Mohammed Omollo Khayundi. In his testimony the plaintiff stated that since he was born he has been residing with his family on Land Parcel No. MARAMA/LINZA/1188 measuring 2.4 Hectares. The land belonged to his father one Musa Juma Omukami. His father died in April 2013 and he went to the Land Registry to procure copies of the register in order to file succession proceedings to his surprise he found the land had been registered in the name of the respondent on the 3<sup>rd</sup> August 1995 (PEx1). The 1<sup>st</sup> defendant/respondent DW1 testified that, he bought the land from the applicant's father. He states that his brother handles his crops there and he has built structures and that the plaintiff does not live on this land. DW2 states that the plaintiff lives on plot 1192 and not on the suit plot. DW2 a brother to the plaintiff states that his father sold the land to the defendant who took possession. DW3 confirms he was the defendant's caretaker on the suit land. It is the respondent's case that the plaintiff does not reside on land parcel No MARAMA/LUNZA/1188 but resides on land parcel No. MARAMA/LUNZA/1192 which belongs to the plaintiff's family as per the official search certificate DEX 3. This leaves doubt in my mind as to whether the plaintiff lives on land parcel No MARAMA/LUNZA/1188 or land parcel No. MARAMA/LUNZA/1192. From the evidence on record it would appear that the plaintiff resided on land parcel No. MARAMA/LUNZA/1192. PW2 confirmed that their houses are on land parcel No. MARAMA/LUNZA/1192 where his father in law was buried. The plaintiff's said occupation and use of the property has not been established to have been peaceful, open, uninterrupted, quiet and exclusive for a period of over 12 years. I find that the plaintiff has failed to establish his case on a balance of probabilities and I dismiss it with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26<sup>TH</sup> DAY OF JULY 2018.**

**N.A. MATHEKA**

**JUDGE**