

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 229 OF 2017

HAMISI JUMA MBAYA.....APPLICANT

VERSUS

ASMAN AMAKECHO MBAYA.....RESPONDENT

JUDGEMENT

The Amended Originating Summons herein dated the 14th day of August 2013 is Supported by two affidavits sworn by the Applicant on the 14th and 5th days of August and September 2013 respectively. By his claim the Applicant seeks to be registered as the proprietor of half of L.R No. South Wanga/Lureko/706 (Plot 706) by way of Adverse Possession. The parties herein are siblings. According to the Applicant and his witness Mwajuma Indeke Mbaya (PW2) who is also a sister to the parties, their late father was the proprietor of 2 parcels of land at the time of his demise, being Plots 706 and 485.

That at his death bed their father distributed Plot 485 to other brothers namely, Hatibu Mbaya and Shaban Nandwa Mbaya ;and Plot 706 was to beshared out equally between the Applicant and Respondent. That however, the Respondent registered himself as the sole proprietor of Plot 706 as seen by the Certificate of Search (PEx 2) dated the 16th day of July 2013 and proceeded to sub-divide it into various portions as shown by the Certificate of Register (PEx1) thereof. That as the Respondent had declined to share out Plot 706 with the Applicant the latter brought the fact of the dispute to the attention of the local administration as illustrated by the letters (PEx 3 (a), (b) &(c)) to that effect. That the dispute eventually went to litigation wherein the Applicant was awarded half of Plot 706 via Decision of Mumias Land Disputes Tribunal (Tribunal) vide Claim No 14 of 2011 which was adopted as a Judgment of the Magistrate's court namely, Mumias Misc. Award No 1 of 2012. However, this Decision of the Tribunal was set aside following a successful appeal launched by the Respondent being Kakamega High Court Civil Appeal No 33 of 2012. The Respondent traversed the suit by way of a replying affidavit sworn on the 26th day of August 2013 wherein he depones that Plot 706 is no longer in existence as he sub-divided the same into various portions. That the Applicant is entitled to a share of Plot 485 being the portion of land belonging to their late father. However, the Applicant was granted leave to utilize part of Plot 706 but now claims that half of it belongs to him as the same was their father's. The Respondent adduced into evidence the Judgment of the High Court annulling the Decision of the Tribunal as DEx 2. That Plot 3700 where both parties herein reside is a derivative of Plot 706 as shown by the Certificate of Search (DEx 1). That the Respondent has been willing to transfer the portion within Plot 3700 under the occupation of the Applicant to him as shown by the Complaint (DEx 3) vide Kakamega ELC Case No 160 of 2013.

The respondent submitted that, although the Applicant claims a portion from L.R No South Wanga/Lureko/706, such land is no longer in existence. That L.R No South Wanga/Lureko/706 was registered in his name as he had purchased the same through his sweat. That the applicant is his brother and their ancestral land where he rightfully has his share is L.R. No. South Wanga/Lureko/485. That the applicant requested him to let him reside and utilize a small portion of his land while he organized funds to purchase his own parcel of land and he agreed. That however, after some years he started becoming a nuisance claiming that his parcel of land was their father's and that he was entitled to half of the same. That he held a meeting with his family and it was decided that since he had occupied the portion he had handed over to him for quite a while, he was to have ownership of the same. That he decided to sub-divide LR No South Wanga/Lureko/706 into various portions and distribute them to his off-spring and thus remained with LR No South Wanga/Lureko/3700. That LR No South Wanga/Lureko/3700 comprises of the portion occupied by the Applicant and he has agreed to let the Applicant have ownership of the area he had permitted him to occupy and use. That the Applicant filed Claim No 14 of 2011 before the Mumias Land Disputes Tribunal and had an Award made in his favour which was eventually adopted as a Judgment of the Mumias Law Courts vide Miscellaenous Award No 1 of 2012. That he however challenged both the decision of the Mumias Land Disputes Tribunal and the Award as adopted in the Lower court through HCCA No 33 of 2012 at Kakamega and both the decision of the Tribunal and Adoption of the same by the Lower court were set aside as shown by the PEx 4 & 5. That thereafter he filed a suit before this Honourable Court to have the portion which he had permitted the Applicant to occupy and use to be transferred to him in order to end unnecessary wrangles vide Land Case No 160 of 2015 as can be seen from the Complaint DEx 3. That the pleadings of the Applicant are invalid as he has failed to display the extract of the certificate of register of the land which he claims to have acquired by Adverse Possession.

This court has considered the applicants' 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 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.

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 claiming to be registered as the proprietor of half of L.R No. South Wanga/Lureko/706 (Plot 706) by way of Adverse Possession. The parties herein are siblings. According to the Applicant and his witness Mwajuma Indeke Mbaya (PW2) who is also a sister to the parties herein, their late father was the proprietor of 2 parcels of land at the time of his demise, being Plots 706 and 485.

That at his death he distributed Plot 485 to other brothers of the parties herein, namely, Hatibu Mbaya and Shaban Nandwa Mbaya; and Plot 706 was to be shared out equally between the Applicant and Respondent. That however, the Respondent registered himself as the sole proprietor of Plot 706 as seen by the Certificate of Search (PEx 2) dated the 16th day of July 2013 and proceeded to sub-divide it into various portions as shown by the Certificate of Register (PEx1) thereof. That as the Respondent had declined to share out Plot 706 with the Applicant the latter brought the fact of the dispute to the attention of the local administration as illustrated by the letters (PEx 3 (a), (b)&(c)). That the dispute eventually went to litigation. The Applicant admitted during cross-examination that he does not occupy and/or use half of Plot 706 but rather that he is in occupation and use of a certain portion within it which the Respondent has stated is in fact comprised within Plot 3700 which is a sub-division of Plot 706. Therefore, the Applicant is only entitled to that portion which is under his occupation and use which portion in fact the Respondent has admitted that he is ready to surrender to him. Thus, the claim by the Applicant of half plot 706 by way of Adverse Possession must fail. The plaintiff's said occupation and use of half plot 706 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 and each party to bear its own costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 24TH DAY OF JULY 2018.

N.A. MATHEKA

JUDGE