



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 630 OF 2014

CHARLES MUNYENDO OLINGO.....PLAINTIFF

VERSUS

SALIM CHETECHI MAKOKHA

GREGORY MACHANJA WAMERE.....DEFENDANTS

JUDGEMENT

This originating summons is brought by the applicant Charles Munyendo Olingo who claims a right over the parcel of land known as E/Wanga/Eluche/97 arising out of purchase and occupation of the whole of the said land for the determination of the following issues;

1. Whether or not the applicant father called John Mashemo Olingo duly purchase the whole of the suit land from the original owner, AURA MATETE, now deceased and has been in actual possession thereof since 1966.
2. Whether the 1st respondent has any right over the suit land as against the applicant.
3. Whether the 1st respondent obtained title to the suit land in 2001 from the late Aura Matete lawfully without filing a succession cause when the said Aura Matete had died in 2000.
4. Whether Aura Matete is the same person as Gregory Machanja Wamere.
5. Whether the 1st respondent had legal capacity to transfer the suit land to the 2nd respondent.
6. Whether the applicant being the legal administrator of the Estate of his late father John Mashemo Olingo should be registered as proprietor of the suit parcel of land in place of the 2nd respondent.
7. Whether the respondent should be condemned to pay the costs of this suit.

The plaintiff/ applicant testified that, he is the legal administrator of the estate of his late father John Mashemo Olingo (PEx 4 copy of certificate of a grant of letters). That the parcel of land known as E/Wanga/Eluche/97 was at 16th November, 1966 registered in the names of Aura Matete. (PEx 1 is a photocopy of the certified true copy of the original register). That his late father John Mashemo Olingo bought the whole of the parcel of land known as E/Wanga/Eluche/97 from the Aura Matete in 1966 vide a written sale agreement dated 6th February, 1966 (PEx 2 a & b is a certified true copy of the original sale agreement.). That his late father paid the whole of the purchase price. That his late father took possession of this whole of the suit land in 1966 and he has been using it openly, continuously and uninterrupted since then. That he has have been brought up on the suit land and he has been using it openly, continuously and uninterrupted for a period over 35 years. That the 1st respondent Salim Chetechi Makokha, and the late Aura Matete were father and son respectively. That the late Aura Matete died in 2000 before transferring the suit land in favour of his late father. That upon the death of the late Aura Matete, the 1st respondent Salim Chitechi Makokha misrepresented that he was also known as Aura Matete and accordingly changed names at the lands office to this effect. That after changing the names the 1st respondent transferred the suit land to the 2nd respondent Gregory Machanja Wamere unlawfully, therefore got registered as the proprietor of the suit land. That in light of the foregoing misrepresentation the 1st respondent had no title deed to transfer to the 2nd respondent. That none of the respondents use nor stay on the suit land. That when the 1st respondent made all these misrepresentations and transferred the suit land to the 2nd respondent was well aware of his interest over the property.

PW2, 3 and 4 all collaborated the plaintiff's evidence that his father bought the suit land from the 1st defendant's father. PW4 stated that the plaintiff and his family live on the parcel of land known as E/Wanga/Eluche/86 and not E/Wanga/Eluche/97.

DW1, the 1st defendant testified that, his father Aura Matete lived on the suit land from 1962 with his family and the land was registered in his name. His father moved out of the land in 1997 and left him behind and he continued to use the land. He later also moved out but continued tilling the land until he sold it to the 2nd defendant DW2. The land was transferred to him by his father in 2001 long before he died in 2002. The plaintiff's father has never lived on this land but lived on his land namely Land Parcel E. WANGA/ELUCHE/86. DW2 corroborated the 1st defendant's evidence.

DW3 Francis Inzovu Akwayi testified that, he resides at Bumini sub location, Manyasa village, Mumias East Constituency. He knows the 2nd defendant (Gregory Machanja Wamere) as his employer. He does the shamba work and tills for him in his farms. He knows Salim Chitechi Makokha as the person who sold Gregory Machanja Wamere Land Parcel E. WANGA/ELUCHE/97. He has been working and tilling on this land since 2001 cultivating maize, beans, vegetables and grazing animals for Gregory Machanja Wamere the 2nd defendant. He remembers sometime 2004, Charles Olingo forcefully tried to enter the land as this case was pending in court. His employer moved to court and obtained an order restraining him from entering or trespassing into the said land. The said Charles Olingo has never used this land nor does he have any developments or houses on this land.

DW4 testified that his land is E. WANGA/ELUCHE/989 which borders land parcel E. WANGA/ELUCHE/988 which belongs to his late father and next to it is land parcel E. WANGA/ELUCHE/97. That land parcel E. WANGA/ELUCHE/97 was since registration being used by Aura Matete (deceased) together with his family particularly Salim Chitechi has been cultivating on the said land until 2001 when he saw Gregory Machanja Wamere starting to cultivate the said land. Todate the said land is being used by Gregory Machanja. Charles Munyendo Olingo who is his neighbour has never used this land E. WANGA/ELUCHE/97. Charles Munyendo lives on land parcel E. WANGA/ELUCHE/86 which he utilizes and belongs to his late father John Mashemo. It is Gregory Machanja who has been cultivating this land.

This court has carefully considered both the plaintiff's and the defendants' cases and the 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 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.

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 parcel of land known as E/Wanga/Eluche/97 is registered in the name of the 2nd respondent/defendant Gregory Machanja Wamere. The plaintiff/ applicant testified that, he is the legal administrator of the estate of his late father John Mashemo Olingo (PEX 4 copy of certificate of a grant of letters). That the parcel of land known as E/Wanga/Eluche/97 was at 16th November, 1966 registered in the name of Aura Matete. (PEX 1 is a photocopy of the certified true copy of the original register). That his late father John Mashemo Olingo bought the whole of the parcel of land known as E/Wanga/Eluche/97 from the Aura Matete in 1966 vide a written sale agreement dated 6th February, 1966 (PEX 2 a & b is a certified true copy of the original sale agreement.). That his late father paid the whole of the purchase price. That his late father took possession of this whole of the suit land in 1966 and he has been using it openly, continuously and uninterrupted since then. That he has have been brought up on the suit land and he has been using it openly, continuously and uninterrupted for a period over 35 years. However during his testimony the court clearly noted that the plaintiff was lying that he was in possession of the suit land and his witness stated that his house was in the neighboring plot and not the suit land. Even if it were true that his father purchased the suit land I find that it has not been established that he has been in possession of the same it openly, continuously and uninterrupted for a period over 12 years. The defendant has adduced documentary evidence that the suit land was transferred to him before the father died and he in turn sold it to the 2nd defendant who took possession. DW3 and DW4 confirm that the 2nd defendant has been utilizing the land. DW3 confirmed that he has been working and tilling on this land since 2001 cultivating maize, beans, vegetables and grazing animals for Gregory Machanja Wamere the 2nd defendant. The plaintiff has not proved on a balance of probabilities that the defendants have been dispossessed of the suit land for a continuous period of twelve years as to entitle the plaintiff to title to the land by adverse possession. I find that the plaintiff has failed to prove his case for those reasons and I dismiss his case with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 12TH DAY OF JULY 2018.

N.A. MATHEKA

JUDGE