



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 52 OF 2014**

**WALLACE AIRO LAWI**

**HARRISON MUMIA SHIUNDU**

**JACKSON MALIKA LAWI:.....PLAINTIFFS**

**VERSUS**

**LYSTONE AMBUNDO:.....DEFENDANT**

**JUDGEMENT**

This application is by Wallace Airo Lawi, Harrison Mumia Shiundu and Jackson Malika Lawi and who claim to be in adverse possession of the whole land measuring 1.6 acres registered as parcel No. KISA/MUNDEKU/633 for the determination of the following issues:-

1. Whether the applicants have lived openly on the suit land No. KISA/MUNDEKU/633 since 1975.
2. Whether the applicants are entitled to be registered as proprietor of the suit land having acquired the title by adverse possession.
3. Whether the suit land is registered in the name of the respondent.
4. Whether the registration of the respondent as absolute proprietor of the suit land should be cancelled.
5. Who should be condemned to costs.

This originating summons is supported by the affidavit of Wallace Airo Lawi, Harrison Mumia Shiundu and Jackson Malika Lawi.

The plaintiffs submitted that, they have been living on LR. No. KISA/MUNDEKU/633 for over 12 years. That they have built a home and all the neighbours and villagers know this land as their land. That they have been living on this land for over 30 years. That this land is registered in the name of the respondent herein and he needs to transfer this title to themselves. That they pray that LR. NO. KISA/MUNDEKU/633 should be transferred to the applicants herein. That should the respondent fail to transfer this land the Deputy Registrar of this court should be allowed to sign the relevant documents so that they can obtain title. PW1 in his testimony confirms he has not been living there but his brothers PW2 and PW3 moved there in the 1980's after their brother died. PW3 states that he had signed an admission that he was there illegally but has not moved out.

The defendant testified that, he was approached by one Emilly Muhambe sometime in December, 2013 she informed him that she had land which she would like to sell to him, land parcel No. KISA/MUNDEKU/633 which was hers. That he proceeded to do a search which indicated that the land was in her name and she gave a copy of the title deed. PEx1 is a copy of title deed. That on 5<sup>th</sup> January, 2014 they entered into an agreement of sale of land and he purchased the land from her. PEx2 is a copy of the agreement. That he proceeded to transfer the land and he got a title on 29<sup>th</sup> January, 2014 PEx3 is a copy of the title. That sometime in the year 2014 when he wanted to transact in the land he was informed that a caution had been put on the land by one Harrison Mumia and Jackson Malika claiming beneficiary interest so he applied for a copy of the green card to trace the title history. That he asked Emelly Natite who the cautioners were and she informed him they were her uncles who had no interest at all in her land which she had inherited from her father through Kakamega High court Succession Cause No. 213 of 1985 wherein the grant was confirmed on 25<sup>th</sup> November 1987 and she was given the land and hence the transfer to her name. That the said Emelly Natite also informed him that the grant was also upheld on 11<sup>th</sup> June, 2015 when the court made a ruling that she was and is the only heir of her deceased father and entitled to his property. That from the time he was registered on the land on 27<sup>th</sup> January, 2014 to the time the applicants filed this originating summons on 26<sup>th</sup> February, 2014 it was only one month that had lapsed. That he has never allowed them to enter his land nor given the consent to till the land they are mere trespassers and even so 12 years have not lapsed to given them locus to apply for orders sought herein. That he has also been informed by Emilly Natite Muhambe that even if the applicants claim any right over the land, she had sued them in vide Kakamega CMCC No. 191 of 2005 for injunction against entering the land and the

applicants filed and admission in the file on 18<sup>th</sup> May, 2005 admitting the claim. That the applicants are aliens and/or trespassers on his land who have no colour of right and should be removed from the land immediately and they are not in the land with his permission. DW2 the said Emilly Natite Muhambe corroborated the defendant's case.

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 Serگون 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 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs submitted that, they have been living on LR. No. KISA/MUNDEKU/633 for over 12 years. That they have built a home and all the neighbours and villagers know this land as their land. That they have been living on this land for over 30 years. That this land is registered in the name of the respondent herein and he needs to transfer this title to themselves. The defendant testified that, he was approached by one Emilly Muhambe (DW2) sometime in December, 2013 she informed him that she had land which she would like to sell to him land parcel No. KISA/MUNDEKU/633 which was hers. That he proceeded to do a search which indicated that the land was in her name and she gave a copy of the title deed. PEx1 is a copy of title deed. That on 5<sup>th</sup> January, 2014 they entered into an agreement of sale of land and he purchased the land from her. PEx2 is a copy of the agreement. That he proceeded to transfer the land and he got a title on 29<sup>th</sup> January, 2014 PEx3 is a copy of the title. Indeed the litigants admit that they have been having disputes concerning the said land. It is a finding of fact that the plaintiffs moved into the suit land after their brother died. The latter was the DW2's father. The 2<sup>nd</sup> defendant admitted that he had signed an admission that they were residing there illegally and that they would move out. I find that the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiff's stay on the land has not been open, peaceful and uninterrupted for a period of 12 years. The 1<sup>st</sup> plaintiff has said he does not live on the suit land. I find that the plaintiffs have failed to prove their case on a balance of probabilities and I dismiss the same. Since the parties are relatives there will be no orders as to costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 25<sup>TH</sup> DAY OF SEPTEMBER 2018**

**N.A. MATHEKA**

**JUDGE**