



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 134 OF 2015**

**ESTER ASIKO ESHIUCHI.....PLAINTIFF/APPLICANT**

**VERSUS**

**PATRICK MALOBA ALUKHUYI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**YOHANA T. ALUKHUYI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**FRANCIS M. ALUKHUYI.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**JUDGEMENT**

The application is of one Ester Asiko Eshiuchi who claims that her late husband one Joseph Eshiuchi is entitled to 6 acres of land out of the land No. Butso/so/Esumeyia/772 as he in 1977 purchased 6 acres of land from Alukhu son of Ambururi (deceased) and she and her family have occupied, utilized and/or stayed on the said portion of land exclusively, peacefully and continuously and uninterruptedly from 1977 to date a period exceeding 12 years. The plaintiff has since been entitled to the said portion of 6 acres of land by virtue of adverse possession. Alternatively if the defendants/respondents transferred the suit land in his names then they hold 6 acres out of the aforesaid suit land in trust for the plaintiff/applicant. The plaintiff therefore prays that this honourable court does determine and order as follows:-

- (a) That the plaintiff/applicant be declared the owner of 6 acres out of land parcel No. Butso/so/Esumeyia/772 whose boundaries are clearly marked on the ground and which she occupies with her family and which she is entitled by virtue of adverse possession and the defendant ought to be ordered to transfer the said portion of land to the plaintiff/applicant.
- (b) That in default of the defendants/respondents transferring the same voluntarily the court do make an order authorizing the Deputy Registrar, High Court of Kenya, to execute all documents necessary to effect the sub division and transfer 6 acres of the aforesaid land to the plaintiff/applicant.
- (c) That the honourable courts do make further orders or grant any other relief deemed just and fit.
- (d) That the defendants/respondents be condemned to pay the costs of this summons.

The respondent is not willing to surrender title to 6 acres of land to the plaintiff/applicant thereby rendering this summons necessary.

PW1, the plaintiff testified that, on or about 1977 her late husband purchased 6 acres of land from Alikhu S/O Ambururi now deceased. (PEx1 is a copy of the agreement and translation). That the portion of land that he purchased is contained on land parcel No. Butso/so/Esumeyia/772. (PEx2 is a copy of certified true copy of the Register). That the said Alikhu s/o Ambururi died in the year 2001 before transferring the said portion to Joseph Eshiuchi who is also deceased and she is now the administratrix of his estate vide Kakamega HCC Succ. No. 713/06. (PEx3 is a copy of the grant). That Alikhus/o Ambururi is now deceased and his estate has been administered by the 1<sup>st</sup> defendant/respondent who was his son and who shared the land with his 2 brothers as they called themselves in Mumias SRM Succ. Cause No. 14/06. That her husband and the vendor obtained the consent of the land control board on 17/6/1977. (PEx4 is a copy of the application for and the consent of the land board). She has occupied the land peacefully and continuously and exclusively for a period exceeding 31 years. That she has also settled my family on the land which comprises of children, their wives and grandchildren. PW2, PW3 and PW3 all corroborated the plaintiff's evidence.

DW1 confirms that he is the registered proprietor of all that parcel of land comprised in title number Butso/so/Esumeyia 772. That the said ownership is jointly and severally with my co-respondents. That the applicant's husband never purchased any portion of land from the respondents further or whatsoever. That it is not true that the applicant has moved and freely occupied and utilized the land herein openly and continuously and peacefully. That the applicant and her agents are trespassers on my land and that they cannot be protected by law against them who are the registered proprietors.

This court has considered this case, the 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 defendants 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.

The plaintiff testified that her husband purchased 6 acres of land out of land parcel No. Butso/Esimeyia/772 from Alukhu s/o Ambururi, deceased in 2001. The plaintiff moved onto the land purchase in 1977 and established a homestead thereon. The plaintiff has occupied and utilized the land openly, continuously and peacefully for a period exceeding 30 years. The plaintiff's portion of land is clearly demarcated. The Chief, a pastor and a neighbor all corroborated her evidence that she has and is residing there with her family since 1977. The plaintiff has shown that the defendants had knowledge of the possession or occupation. The possession must be continuous and was never interrupted. The defence is a mere denial and I reject it. I find that the plaintiff has proved her case on a balance of probabilities and I grant the following orders;

1. That the plaintiff/applicant is declared the owner of 6 acres out of land parcel No. Butso/Esimeyia/772 whose boundaries are clearly marked on the ground and which she occupies with her family and which she is entitled by virtue of adverse possession and the defendants to transfer the said portion of land to the plaintiff/applicant.
2. That in default of the defendants/respondents transferring the same voluntarily the Deputy Registrar, to execute all documents necessary to effect the sub division and transfer 6 acres of the aforesaid land to the plaintiff/applicant.
3. Costs of this suit to the plaintiff/applicant.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 16<sup>TH</sup> DAY OF OCTOBER 2018.**

**N.A. MATHEKA**

**JUDGE**