



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 192 OF 2014**

**THOMAS SHIUNDU MUKALAMA.....PLAINTIFF**

**VERSUS**

**MWANZO OBAYE ..... DEFENDANT**

**JUDGEMENT**

This is the application of Thomas Shiundu Mukalama who claims to be the occupier of Land parcel No. Kakamega/Malava/443 measuring 2.6 Ha for the determination of the following questions;

1. The plaintiff has been in possession of Land parcel No. Kakamega/Malava/443 measuring 2.6 Ha and has developed and lived on the land aforesaid for a period of over thirty (30) years.
2. That the plaintiff was born on the said parcel of land and has continued to be in adverse possession of the said land for a period of over thirty (30) years and that an order that he be registered as the proprietor of the land in terms of section 7, 17 and 38 chapter 22 of the Laws of Kenya as the title of the proprietor had been extinguished by the operation of the provisions of section 17 Chapter 22 of the Laws of Kenya aforesaid.
3. That even if the land parcel No. Kakamega/Malava/443 is currently registered in the name of the defendant, the defendant is not in occupation of the aforesaid land and the same should be registered in the name of the plaintiff who has been in adverse possession peacefully, uninterrupted and without evasion on secrecy ever since 1975.
4. That the costs of this originating summons be awarded.
5. That any other order be made as this honourable court may deem fit and just to grant.

The plaintiff testified that his father bought the suit land and he has lived on this land from 1975. He has built there houses three plus a toilet. The defendant is his uncle and was to hold the land in trust. He produced a copy of the title deed to confirm that the defendant is the registered proprietor PEx1. He produced letters from the chief stating that the defendant has never lived on that land and he was to hold it in trust for the plaintiff PEx 3 and 2.

The defendant testified that the plaintiff lives on that land and as refused to vacate. The land is his as he was allocated the same. He lives elsewhere in Malaba.

This court has considered the application 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 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.

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.

It is not disputed that the suit land is registered in the defendant's name. It is also not disputed that the defendant has never resided or used the land. The plaintiff testified that he has lived on the suit land since 1975. He lives there to date. He has built a home there. The land was registered in the defendant's name to hold it in trust for the plaintiff. The defendant is the plaintiff's uncle. I find from the evidence adduced that, the applicant has been in possession and occupation of the parcels of land for period in excess of 12 years in an open, peaceful and uninterrupted manner. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. A declaration that the plaintiff/applicant is the owner of the whole of land parcel No. Kakamega/Malava/443 having lived on, occupied and used the said parcel of land from 1975 to-date and the applicant is hence entitled to the said parcel of land by virtue of adverse possession and the respondent is ordered to transfer title to the said parcel of land to the applicant.
2. A declaration that the respondent is holding title to land parcel No. Kakamega/Malava/443 in trust for the applicant and the respondent is ordered to transfer title to the said parcel of land to the applicant and in default of the respondent transferring the same voluntarily the Deputy Registrar to execute all the documents necessary to effect the transfer of title to the aforesaid parcel of land into the name of the applicant.
3. The respondent to pay the costs of this originating summons to the applicant.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 21<sup>ST</sup> DAY OF NOVEMBER 2018.**

**N.A. MATHEKA**

**JUDGE**