



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
ENVIRONMENT AND LAND COURT
HCC. 103 OF 2010

JACKSON ALI WABOMBA.....1ST APPLICANT

BENSON SIMIYU MUMELO.....2ND APPLICANT

VERSUS

JAFETHER ALI WABOMBA.....RESPONDENT

JUDGMENT

[1]. The applicants Jackson Ali Wabomba and Benson Simiyu Mumelo filed this originating Summons against the respondent Jafether Ali Wabomba claiming to have acquired a total of 4.45 acres and 3.35 acres respectively comprised in Title Numbers Bokoli/Bokoli/1122 & 1166 registered in the name of Jafether Ali Wabomba by adverse possession and for the determination of whether they have acquired the said parcels by way of adverse possession and whether the occupation of the said parcels or any part thereof for a period of over 30 years has been open continuous and without force and finally whether the respondents should be ordered to transfer a total of 7.8 acres to the respondents respectively.

[2]. The first applicant swore a supporting affidavit on 15th October 2010 and stated that he swore the affidavit on behalf of the 2nd respondent. He swore that the land was purchased from Timothy Wanyama Mose by the respondent in 1976 who is his brother and that he gave him 7,000/= as purchase price for 4.65 Acres and that he started living on the land from December 1976 to date. He averred that his ancestral place is Khalumuli. He averred that his co applicant gave 5,000/= to the respondent in 1976 and that the respondent purchased for him land measuring 3.35 Acres from Land Parcel Bokoli/Bokoli/1122 and 1166 from the same proprietor in the year 1976 and that instead of registering the land in the applicants names he registered them in his own names. He said that his father died in August 1984 and was buried at Miendo on the 2nd applicant's land.

They state that they have always occupied the suit land and have built houses and have been planting crops and have done extensive developments therein and have been on the land for 30 years now. For these reasons they claim to have acquired the lands by adverse possession.

[3]. The respondent filed a replying affidavit and stated that he is the registered proprietor of land parcels Bokoli/Bokoli/1122 and 1166 to the exclusion of any other persons. He denied that the applicants have been in open and uninterrupted occupation of the said land for a period of over 30 years or at all. That there has been peaceful stay for a period of 12 years. He denied ever receiving any money from the

applicant to purchase any land for them. The applicant stated that, the applicants and himself are brothers and that when Nzoia Sugar Company acquired their ancestral lands which was owned by their father, he used the compensation money to purchase the suit lands while the applicants who were equally compensated chose to squander their money on leisure. He states that in the year 2002 the applicants lodged a complaint at the Tribunal vide Tribunal Case No. 15/2001 and the award was adopted as the order of the court on 20/9/01. That by Judicial proceedings he filed in the High Court vide MISC. APPL. NO. 86/2002 and Application Number 198/01 all the proceedings before the Tribunal were stayed. That this proves there has been a protracted battle between the parties for a long time. He averred that the proceedings are defective and offend the limitations of actions Act.

[4]. On the 18th May 2012, the applicant swore a Supplementary affidavit and stated that they had acquired land by adverse possession that they have been on the land for 30 years and that the respondent has never cultivated or put up a single house on the above parcel since 1976. That they have been living peacefully as a family for 12 years. The applicants stated that they did not give their money to Timothy Wanyama but that the respondent took their money from Webuye Kenya Commercial Bank with Timothy Wanyama Muse and that both entered D.O's Office Webuye and filled the Land Forms. They conceded that they filed a suit in the Lands Disputes Tribunal. They swore that the respondent was holding land in trust for them since purchase.

[5]. During the hearing, the first applicant relied on his statement dated 15/5/2012. He stated that in 1961 their father Mumelo gave them land at Khamoto Khamuli area and that they were moved by Nzoia Sugar Company and that the respondent who is their elder brother was tasked with the job of looking for land to buy because they were young and in school. That the respondent got land from one Timothy Wanyama Muse for the applicants and that they came to this land in 1976 together with their father Mumelo who later passed away in 1974. That they have been in occupation of the land since 1974. The 1st applicant said that he lives on 1122 and that his brother lives on 1126 where he alleged they have lived for 41 years.

On cross – examination by M/s Nanzushi learned Counsel for the respondent, he said that in 1975 he was 25 years. He admitted that he was compensated by Nzoia Sugar Company for the compulsory acquisition of his 1.5 acres. He admitted he was paid Kshs.7,000/= while the 2nd applicant was paid Kshs.5,000/=. He said that the respondent was also compensated with Kshs.14,000/=. He alleged that the money they were compensated with they purchased land. The second applicant said that they had lived in Kongoli around Nzoia Sugar Company on their father's land. He alleged that Nzoia Sugar Company gave a cheque but he does not know how much. He admitted that he was given his cheque as well. He alleged that his cheque was given to his father. He said that the land was purchased in two places. Miendo and near Kongoni and that it was purchased by a person called Salasa but he did not know from whom. He said he was not there when their ancestral lands were taken over by Nzoia Sugar Company and he does not know how the lands were brought in Miendo.

[6]. The defendant stated on oath that the applicants are his brothers. That he got land from his father 2.6 acres and that his land was compulsory acquired by the Government in 1976. That he was paid Kshs.14,078/= for the whole land. That he went to Bokoli and got Bokoli/Bokoli 1122 and 1166 and he then bought the two pieces of Land which were abutting each other for Kshs.11,642/=. He attended the Land Control Board and got the Consent. He said that his brothers the applicants were each given their compensation Cheques. He said further that he gave one of the pieces to his parents to live in. The applicants came and requested their parents for permission to stay there before they bought their land since they were being chased out of the ancestral land by the Government. They stayed on until their parents died. Thereafter the applicants filed a suit at the Land Disputes Tribunal claiming that the Respondent should give them land. They got orders in the Land Dispute Tribunal, and he applied to set the orders aside in the High Court and a stay was granted. Then they brought this case. He stated that his other four brothers had bought land elsewhere and that the respondents refused to buy their own land.

[7]. The issue for determination is whether the question raised in the Originating Summons dated 18th October 2010 can be answered in the affirmative. The applicants alleged that they gave the respondent Kshs.7,000/= and Kshs.5,000/= to purchase the suit parcels of land. The applicants produced no

document in writing to prove such arrangement. They never presented any witness to prove that such money was ever paid to the respondent. The applicant admitted that their ancestral lands at Khalumuli were compulsorily acquired by the Government for Nzoia Sugar Company and that their land which was in the name of their father, who had given them shares was compensated. Each one of them was given his share of compensation for their respective acres as follows;

<i>Khisa Mumelo</i>	<i>1.5 acres</i>
<i>Wanyonyi Mumelo</i>	<i>1.5 acres</i>
<i>Khama Mumelo</i>	<i>1.7 acres</i>
<i>Mulongo Mumelo</i>	<i>5.0 acres</i>
<i>Biketi Mumelo</i>	<i>0.9 acres</i>

The defendant produced his letter from the Government of Kenya showing that he was paid Kshs.14,078 in respect of his interest in plot No. 195/Khalumuli. The land is shown as comprising of 2.6 ha whose value was Kshs.12,242/= and the total compensation shown as Kshs.14,078. He also produced a list showing that his other four brothers were compensated for their lands.

[8]. In his evidence, he produced Title deeds for Bokoli/Bokoli/1122 and 1166 the Consent of the Land Control Board and a copy of the register for both parcels. Land parcels Bokoli/Bokoli 1122 was registered in the names of the respondent on 28th July 2000 while Bokoli/Bokoli/1166 was registered on 28th of July, 2000. All were registered on the same day. This Originating Summons was filed on 18th October 2010. From the time the lands were registered in the name of the respondent to the filing of the suit was approximately 9 years 9 months.

No time for adverse possession could run against the respondent prior to his registration as a proprietor. The required 12 year period for adverse possession had not run out. Further, the applicants in their further affidavit state that this land was held by respondent as a trustee. Consequently, they claim the land as of right, yet their suit is for adverse possession. Adverse possession presupposes an entry that is through trespass and without any permission. Entry that has persisted as against the registered owner for a period of 12 years or more. Not entry that is alleged to be through trust, license and/or permission. Or entry through sale that becomes void and one that has been persisting for 12 years since it became void. In all cases the entry must be peaceful and without notice to vacate by the registered proprietor having been issued. Such notice is required to be by filing a suit to vacate.

[9]. The applicant admit in this case that they have had a Land Disputes Tribunal Case filed on 26.01.2001 where orders were issued. The respondent filed Senior Resident Magistrate Miscellaneous Application number 15 of 2001 and a Bungoma High Court Miscellaneous application that stayed the tribunals orders in this case.

It is apparent that the applicants occupation has never been peaceful. It is clearly apparent that the questions in the Originating Summons cannot be answered in the affirmative. To the Contrary, the lands subject to this Originating Summons belong to the respondent who has resisted the applicants effort to snatch the suit Lands from him.

This Originating Summons has no merits and it is dismissed. The parties to the suit are brothers. I will therefore make no order as to costs.

Judgment read in open Court in the presence of the advocates and parties.

DATED at BUNGOMA this 23rd day of **May, 2017**.

S. MUKUNYA

JUDGE

In the presence:

Joy/Gladys: Court Assistant

M/s Mumalasi - Holding brief for M/s Nanzushi

Mr. Juma for the Applicants