



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 28 OF 2017

ESINASI KAIZA AZERE :::::::::::::::::::::APPLICANT/PLAINTIFF

VERSUS

SIMON KITOTO MUGWANG'A :::::::::::::::::::::RESPONDENT/DEFENDANT

JUDGEMENT

This matter was brought by way of originating summons under order 36 rule 3C, Section 27 and 28 of the Law of Limitation Act Cap 22 Laws of Kenya. In the application Esinasi Kaiza Azere claims to have acquired a portion of land measuring approximately 1.5 acres and/or thereabouts comprised in that parcel of land better known as L.R NO. SOUTH MARAGOLI/MAHANGA/304 by adverse possession and for determination of the following questions.

1. WHETHER OR NOT the applicant has been in peaceful, continuous and exclusive possession of the aforesaid portion of land.
2. WHETHER OR NOT the occupation as been for more than twelve (12) years.
3. WHETHER OR NOT the respondent holds the portion of land in trust for the applicant.
4. WHETHER OR NOT the respondent should be ordered to transfer the portion of the land to the applicant.
5. Who is to bear the costs of this application?

The applicant prays for a declaration that the applicant has acquired the portion of land measuring approximately 1.5 Acres comprised in that parcel of land better known as L.R. SOUTH MARAGOLI/MAHANGA/304 by adverse possession. A declaration that the respondent holds a portion of land measuring approximately 1.5 acres and/or thereabouts comprised in land parcel of land L.R. NO. SOUTH MARAGOLI/MAHANGA/304 in trust for the applicant. And an order for transfer for a portion of land measuring approximately 1.5 acres and/or thereabouts comprised in land parcel L.R. NO. SOUTH MARAGOLI/MAHANGA/304 from the respondent to the applicant.

PW1 testified that she is the legal widow to the late Christopher Azele Ambenge – Deceased. (copy of the death certificate is marked (PEx3). The deceased had a beneficial interest in a portion of land better known as L.R. N. SOUTH MARAGOLI/MAHANGA/304. Her late husband's beneficial interest had existed long before the land adjudication process in South Maragoli area. In the year 1971, her late husband filed a case vide KAKAMEGA HCCC NO. 23 of 1971, which was determined in favour of her husband (copy of the judgment PEx 4) At the commencement of the aforesaid proceedings, the parcel of land better known as L.R. NO. SOUTH MARAGOLI/MAHANGA/304 was then registered in the names

of Joseph Mungwang'a– Deceased who was the father of the respondent. The said registered owner Joseph Mungwang'a is deceased. The respondent/defendant herein is therefore the legal and personal representative of the estate of the deceased as appointed via KAKAMEGA HC SUCC. NO. 82 OF 2011. The deceased went to court of appeal at Kisumu vide Kisumu MISC. APPL. NO. 172 of 1989 seeking for leave to appeal out of time against the judgement but his application was dismissed (copy of the ruling marked PEx5). That she has been in quiet, peaceful, continuous occupation and use of the portion of land during the lifetime and after her husband's death. That she has therefore been in occupation for period of over 12 years.

PW2, states that he is a neighbor and that the land needs to be surveyed again and subdivided as it belonged to both the plaintiff's husband and the defendant's father.

PW3 testified that PW1 is his mother and that his parents used to till the said land even though they lived elsewhere.

DW1, stated that he is an administrator of the estate of Joseph Mugwang'a (deceased). That his father Joseph Mungwang'a now deceased is the registered proprietor of the land parcel No. S/MARAGOLI/MAHANGA/304 in Kakamega and it is approximately 1.5 hectares. (copy of the title deed and copy of official search PEx 3 &4). That, the applicant/plaintiff lost her interest in the land when his father compensated the applicant's husband's interest in land by depositing in court Ksh. 20,000/= vide judgment of the High Court Civil Case No. 23 of 1971. The money was payment for the tilling and looking after of the land in contention in the absence of their father. (Court receipt in proof of the said payment marked PEx 5). That the applicant/plaintiff herein does not stay on the said land or even use it as alleged in the supporting affidavit. She stays at Chavavo village on the land that was her husbands which she has had since then and has developed and established her homestead together with her children. PW1 testified that, upon his father's demise and with the consent of his family members he embarked on getting letters of administration vide Succession Cause No. 82 of 2011. That however, the applicant/plaintiff herein, objected to his petition on grounds of having an interest in the estate of the deceased. The court declined the applicant's/plaintiff's interest. PW1 was granted letters of administration on the 14th of November, 2016 vide Succession Cause No. 82 of 2011. (copy of Letters of Administration as was issued and marked DEx1). That however, the applicant/plaintiff's incessant intermeddling in the estate of his father is frustrating and negating his endeavours to efficiently and effectively administer the estate as was entrusted upon me.

DW2, a village elder testified that they demarcated the land and agreed that the applicant/plaintiff's would be compensated as the land belonged to the defendant's father.

This case has carefully considered both the plaintiff's and the defendant's case and the submissions therein. The respondent/defendant in his submissions relied on the case of Wilson Kazungu Katana & 101 Others v Salin Abdalla Bakshwein & Anor Civil Appeal No. 11 of 2014 and submitted that it is trite law a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner.

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, L.R. No. SOUTH MARAGOLI/MAHANGA/304 is registered in the names of Joseph Mungwang'a- Deceased who was the father of the respondent/defendant. The said registered owner Joseph Mungwang'a is deceased. The respondent/defendant herein is therefore the legal and personal representative of the estate of the deceased as appointed via KAKAMEGA HC SUCC. NO. 82 OF 2011. (copy of the Grant of Letters of Administration intestate marked DEx1). The respondent's/plaintiff's husband the late Christopher Azele Ambenge disobeyed the orders granted in KAKAMEGA HCCC 23 of 1971 until his death, that is, to vacate the said land. The deceased went to the court of appeal at Kisumu vide Kisumu MISC. APPL. No. 172 of 1989 seeking for leave to appeal out of time against the judgment but his application was dismissed (PEx 2). That applicant/plaintiff has not been in quiet, peaceful, continuous occupation and use of the portion of land during the lifetime and after her husband's death due to the numerous cases filed in this matter. On perusal of the documents adduced as evidence I find that, the plaintiff/applicant lost her interest in the land when the respondent's/ defendant's father compensated the applicant's husband's interest in land by depositing in court Ksh. 20,000/= vide the judgment of the High Court Civil Case No. 23 of 1971. Monies being payment for the tilling and looking after the land in contention in the absence of the respondent/defendant's father (court receipt in proof of the said payment marked DEx5). The plaintiff/applicant and/or her deceased husband were licensees. That applicant/plaintiff herein does not stay on the said land. She stays at Chavavo village on the land that was for her husbands which she has had since then and has developed and established her homestead together with her children. The respondent/defendant upon his father's demise and with the consent of his family members he embarked on getting letters of administration vide Succession Cause No. 82 of 2011. That however, the applicant/plaintiff herein, objected to his petition on grounds of having an interest in the estate of the deceased. That the court declined the applicant's interest. (Copy of judgement is DEx 2). He was granted letters of administration on the 14th of November, 2016 vide Succession Cause No. 82 of 2011. (copy of Letters of Administration as was issued DEx 1). I find that the applicant's claim of adverse possession must fail as it has not met any of the principles prescribed by law. The plaintiff has failed to prove her case on a balance of probabilities and I dismiss this case with costs.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 12TH DAY OF OCTOBER 2017.

N.A. MATHEKA

JUDGE