



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 3 OF 2015

JOSEPH WAMUKOYA ORACHI:.....:PLAINTIFF

VERSUS

PETER OCHANJI WAMUKOYA:.....:DEFENDANT

JUDGEMENT

This case was brought by way of originating summons of Joseph Wamukoya Orach who claims to be entitled to the whole of land parcel No. East Wanga/Isongo/509 measuring 4.0 acres in area by way of adverse possession for the determination of the ownership of the whole of land parcel No. East Wanga/Isongo/509 measuring 4.0 acres in area together with all the developments thereon claimed by the applicant and for the award of the following orders;

- (a) A declaration that the respondents right over the whole of land parcel No. East Wanga/Isongo/509 measuring 4.0 acres in area got extinguished by operation of law (adverse possession upon expiry of twelve (12) years when the applicant was in possession).
- (b) A declaration that the respondent registration on land parcel No. East Wanga/Isongo/509 was as a trustee and to hold the same in trust for the applicant.
- (c) A declaration upon the expiry of twelve (12) years from the date of the said registration the whole of land parcel No. East Wanga/Isongo/509 was held and is currently held in trust for the applicant.
- (d) An order that the whole of land parcel No. East Wanga/Isongo/509 vests in the applicant and that the applicant should be registered as owner thereof under section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya.
- (e) An order that the respondent do sign all relevant documents including application for consent forms, transfer forms and attend relevant Land Control Board Meetings to facilitate the transfer of the whole of land parcel No. East Wanga/Isongo/509 to the applicant and that in default the Deputy Registrar of this honourable court do sign the same.
- (f) An order condemning the respondent to pay the costs of this suit.
- (g) Such further orders or relief as this honourable court may deem just and reasonable to grant.

The plaintiff/applicant's case is that land parcel No. East Wanga/Isongo/509 is currently registered in the names of Peter Ochanji Wamukoya the defendant/respondent herein (PEX 1 a copy of the certified true copy of the original register). That the suit land parcel No. East Wanga/Isongo/509 is his family land on

which he has stayed since 1972 to-date. That the suit land parcel No. East Wanga/Isongo/509 was bought by his late mother Rosah Nechesa Orach from Wambani Makokha but registered in respondent names in trust for him. That the defendant/respondent is his maternal uncle and it was mutually agreed that he would pass title to him upon attaining the age of majority as he was then a minor. That consequently, he moved onto the suit land the same year and he put up a home as did his mother the late Rosah Nechesa Orach. That he subsequently put up a permanent house on the suit land in which he has stayed to-date. That he has since planted sugar cane on the suit land contracted to M/s Mumias Sugar Company Limited vide Mumias Sugar account No, 5276 (PEx2 is a copy of the sugar cane farming contract). That he also plant maize, bananas, beans and vegetables and many trees of different species on the suit land. That despite the defendant/respondent being registered as the owner he has never ever lived on or used this land parcel No. East Wanga/Isongo/509 measuring 4 acres. That his possession of the suit land parcel No. East Wanga/Isongo/509 has been open, notorious, continuous and exclusive of the defendant/respondent and/or the registered owner. That his possession has been peaceful and as of right and he has and continues to exercise all rights of ownership of the suit land. That since 1984 is a period of 12 years when he was in a peaceful and an interested possession the respondent rights over the suit land got extinguished by operation of law.

The plaintiff/applicant in submissions stated that all was well until 2006 when the plaintiff's mother passed on. That the defendant/respondent held the suit land in trust for the plaintiff is clearly demonstrated by the fact that at no time did the defendant stop the plaintiff from using the suit land as he deemed fit including burial of his children, cultivation of both food and cash crops, construction of structures. In African customs and in particular the Luhya community, one cannot be allowed to bury bodies on land that is not his. These actions only demonstrated that the defendant acknowledged the fact that he held this land in trust for the plaintiff. The fact that the plaintiff's houses were burnt and he was chased away in 2006 does not change the position as the plaintiff had acquired the 12 years period required for a claim for adverse possession to crystallize. The defendant further stated that he did not chase away the plaintiff or burn his houses. That it was done by members of the public. Again this goes a long way in demonstrating the fact that he recognizes the plaintiff as the beneficiary of the suit land. The defendant never cultivated or used the suit land from the time the plaintiff moved on till the year 2006 when he was chased away. The plaintiff's step father died and he was not buried on the suit land. In the same vain if the land did not belong to the plaintiff then the defendant would have stopped him from burying his children's bodies when they died. The defendant's rights over the suit land got extinguished and he is currently holding title in trust for the plaintiff which should be passed over. It is our submission that the plaintiff has proved his case on the balance of probability and the same ought to be allowed as prayed.

DW1, Peter Ochanji Wamukoya, the defendant testified that he purchased the suit land from one Wambani Makhha in the 1970s and he has lived in this land since then. The defendant avers that he allowed the plaintiff and his mother to live there as she was single and the plaintiff's biological father lived in Maragoli and the plaintiff was later allocated land there. The plaintiff was chased away in 2006 and his house burnt after villagers suspected his wife of killing the plaintiff's mother. The defendant prays that the plaintiff's claim be dismissed.

This court has considered both the plaintiff's and the defendant's cases and the submissions herein. The issues for determination are:-

1. Whether or not the plaintiff has had quiet and uninterrupted possession of land parcel No. East Wanga/Isongo/509 for a period of 12 years preceding the filing of this suit.
2. Whether or not the defendant's rights over land parcel No. East Wanga/Isongo/509 measuring 4 acres got extinguished by operation of the law upon expiry of 12 years when the plaintiff was in occupation.
3. Whether the defendant holds land parcel No. East Wanga/Isongo/509 in trust for the plaintiff.
4. Whether or not the whole land parcel No. East Wanga/Isongo/509 vests in the plaintiff.

5. Whether or not the plaintiff is entitled to the relief sought.

The plaintiff submitted that the plaintiff's mother was a sister to the defendant. That she did purchase the suit land through the defendant who got registered as proprietor in 1972. In the year 1972, the plaintiff's mother moved onto the suit land with the plaintiff and they stayed peacefully until the year 2006 when the plaintiff's mother died. There was suspicion that her death was caused by the plaintiff's wife and consequently the plaintiff was chased away. For the entire period that the plaintiff stayed on the land, he developed the same by planting food crops, sugarcane and trees. He put up several houses for himself the last being a permanent house which was burnt down at the instigation of the defendant. The plaintiff had also buried several of his children on this land. It is the plaintiff's submission that the defendant did acknowledge the plaintiff's rights to the suit property by a letter written to the Teachers Service Commission indicating that he was in the process of passing title to the plaintiff. The defendant denied that the plaintiff's mother bought the land through him. That he only allowed the plaintiff's mother to stay on his land.

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 the suit land parcel No. East Wanga/Isongo/509 is registered in the names of Peter Ochanji Wamukoya the defendant/respondent herein (PEx 1 a copy of the certified true copy of the original register). It is also a finding of fact that in the year 1972, the plaintiff's mother moved onto the suit land with the plaintiff and they stayed until the year 2006 when the plaintiff's mother died. There was suspicion that her death was caused by the plaintiff's wife and consequently the plaintiff was chased away. What is in dispute is that the suit land parcel No. East Wanga/Isongo/509 was bought by his late mother Rosah Nechesa Orach from Wambani Makokha but registered in respondent names in trust for him. I find this to be untrue as there was no reason for the plaintiff's mother not to register it in her name. It has been adduced in evidence also that when the plaintiff's step father died he was buried elsewhere not on this land showing clearly that this was not the plaintiff's mothers land.

Whereas it has been established that the plaintiff has been in possession of land parcel No. East Wanga/Isongo/509 for a period of 12 years preceding the filing of this suit. The plaintiff's submitted that the defendant did acknowledge the plaintiff's rights to the suit property by a letter written to the Teachers Service Commission indicating that he was in the process of passing title to the plaintiff (PEx3). The defendant denied that the plaintiff's mother bought the land through him. That he only allowed the

plaintiff's mother to stay on his land. He also wrote the letter so as to enable his nephew, the plaintiff to get owner/occupier allowances from his employer the Teachers Service Commission. I believe the defendant. The plaintiff and/or his deceased's mother were licensees and stayed there with the defendant's permission and at his pleasure. The defendant's rights over land parcel No. East Wanga/Isongo/509 measuring 4 acres did not get extinguished by operation of the law upon expiry of 12 years when the plaintiff was in occupation. The defendant holds land parcel No. East Wanga/Isongo/509 on his own behalf and not in trust for the plaintiff. The plaintiff did not prove on a balance of probabilities that the defendant had been dispossessed of the suit land for a continuous period of twelve years as to entitle the plaintiff to title to the land by adverse possession. I find that the plaintiff has failed to prove his case for those reasons and I dismiss his case with costs.

It is so ordered

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 23RD DAY OF NOVEMBER 2017.

N.A. MATHEKA

JUDGE