



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 503 OF 2014

MOSES SHIVANDA AMUKHAYA.....PLAINTIFF

VERSUS

FABIAN LUVEGA AMUKAYA.....DEFENDANT

JUDGEMENT

This is the application of Moses Shivanda Amuhaya, who claims to have acquired title under adverse possession to the suit land totaling 4.2 Ha, registered as land parcel No. South Kabras/Chesero/956 for determination of the following issues:-

1. Whether the applicant has been living on the land for a period of 12 years or more.
2. Whether the applicant has acquired title to the land under adverse possession.
3. Whether the 1st respondent was holding the title in trust for the applicant.
4. Whether the respondent should be ordered to transfer the suit land to the applicant by executing all documents of transfer in respect of the land parcel in favour of the applicant.
5. Whether the applicant should be registered as the owner of that suit land measuring 4.2 Ha currently comprised in South Kabras/Chesero/956.
6. Who should be condemned to pay the costs hereof.

The summons are supported by the annexed affidavit of Moses Shivanda Amuhaya. The plaintiff testified that the defendant is his brother and he moved to that land in 1993. The defendant now wants to sell it and wants him to move away. The defendant had bought the land from their father's terminal benefits. PW2 corroborated the plaintiff's evidence. She stated that they built their home there in 1993. PW1 produced the Chief's letter dated 13th June 2002 confirming that he resided on the suit land.

The defendant in his replying affidavit stated that he became the registered proprietor of the land in question in 1999. That the applicant started trespassing on the land in the year 2001 in his absence which caused him to take out proceedings against him in year 2003. That since the applicant is his brother, their family met and discussed this issue. During the said meeting under the leadership of their late mother which took place in 2007 prior to her demise the applicant was ordered to vacate the land. That the applicant acknowledged that the land in question belongs to him. That it is therefore not true that the applicant's possession has been quiet, peaceful and uninterrupted as alleged by the applicant. That the house on the suit premises was constructed by himself though the plaintiff may have done gratuitous renovations.

This court has carefully considered the evidence and submissions therein. The defendant was served but failed to attend court to adduce oral evidence. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Section 26 (1) of the Land Registration Act states as follows:

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the

person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

This court in considering this matter referred to the case of Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The court in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

It is not in dispute that the registered owner of land parcel LR No. East South Kabras/Chesero/956 is the defendant. The issue is whether or not he holds a good title by virtue of the plaintiffs' claim of adverse possession. Be that as it may, 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. In applying these principles to the present case, the plaintiffs testified that, the defendant is his brother and he moved to that land South Kabras/Chesero/956 in 1993. The defendant who is the registered proprietor now wants to sell it and wants him to move away. The defendant had bought the land from their father's terminal benefits and was to hold it in trust for them. PW2 the plaintiff's wife corroborated the plaintiff's evidence. She stated that she was married in 1986 and they built their home there in 1993. PW1 produced the chief's letter dated 13th June 2002 confirming that he resided on the suit land. Their evidence has not been challenged. For these reasons, I find that the plaintiff has been in exclusive, continuous and uninterrupted possession, occupation and open use of the said portions of land for a period in excess of 12 years from 1993. I find that the plaintiff has established that his possession of the suit land was continuous and not broken for any temporary purposes or any endeavours to interrupt it for a period of 12 years. I find that the plaintiff has established his case on a balance of probabilities against the defendants and I grant the following orders;

1. That the plaintiff/applicant be declared the owner South Kabras/Chesero/956 and which they occupy and to which they are entitled to by virtue of adverse possession and which the defendant/respondent be ordered to transfer the said portion of land to the plaintiff/applicant within the next 30days from the date of this judgement.

2. That in default of the defendant/respondent transferring the same voluntarily the court do make an order authorizing the Deputy Registrar of the Court to execute all documents necessary to effect the subdivision and transfer of the portion of the aforesaid land to the plaintiff/applicant.

3. No orders as to Costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH SEPTEMBER 2019.

N.A. MATHEKA

JUDGE