



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 286 OF 2015

KETSIA ANDISI MUSATSI.....PLAINTIFF

VERSUS

JOEL ONGUSO NDOLO

RUTH ASEYO OMINDE.....DEFENDANTS

JUDGEMENT

This is the application of Ketsia Andisi Musatsi who claims to have acquired by adverse possession land parcel No. S/Maragoli/Madzoo/1075 for determination of the following:-

1. Whether the Zedekiah Kisia Kagevera now deceased was the father to Stanley Musatsi Kisia also deceased, purchased land parcel number south Maragoli.Madzoo/1075 from John Onguso Ndolo, the 1st defendant herein.
2. Whether the said Zedekiah Kisia Kagevera was in occupation of land parcel number South Maragoli/Madzoo/1075 from the year 1971 to 1984 when he passed vacant possession to his son one Stanley Musatsi Kisia together with his family.
3. Whether Ketsia Andisi Musatsi together with her family were in occupation of land parcel number South Maragoli/Madzoo/1075 from the year 2013 when the 1st defendant and 2nd defendant forcefully and illegally took vacant possession of the said land from Stanley Musasia Kisia.
4. Whether the taking over of vacant possession of land parcel number South Maragoli/Madzoo/1075 by the 1st and the 2nd defendant was legal.
5. Whether Zedekiah Kisia Kagevera now deceased then Stanley Musatsi Kisia also deceased together with their families were in quiet occupation and use of land parcel number South Maragoli/Madzoo/1075 for a period of 42 years thus from the year 1971 to 2013.
6. Whether the 2nd defendant was aware that the land in question had been brought by the plaintiff's father in law and that the plaintiff's father in law then the plaintiff together with her family had been in use and occupation of land parcel number South Maragoli/Madzoo/1075 for a period of over 42 years.
7. Whether the plaintiff together with her family had acquired land parcel number South Maragoli/Madzoo/1075 by way of adverse possession.
8. Whether the 1st defendant had legal capacity to deal and sale land parcel number South Maragoli/Madzoo/1075 as his own.
9. And who is to pay costs of this originating summons.

The plaintiff seeks orders that;

1. That Ketsia Andisi Musatsi, the plaintiff herein be declared the absolute owner of all that piece of land known as South Maragoli/Madzoo/1075 which land parcel she has cultivated and been in actual possession peacefully, openly and uninterrupted for a period of 29 years since 1984 she be registered as such.
2. That the defendants, their agents, servants and/or assigns restrained by an injunction from interfering with the said parcel of land.

3. That the cost be provided for.

4. That the honourable court be at liberty to grant such further order on relief as it may deem just and fit to grant.

PW1 testified that her father in law bought the land in 1971 from the 1st defendant who then moved to Nandi. Her family used the land until 2013 when they learnt that the 1st defendant sold it to the 2nd defendant. The 2nd defendant has never lived there. PW1 produced the agreement PEx1 & 2, her limited letters of grant PEx3 and the caution she has put on that land. PW2, PW3 and PW4 corroborated her evidence.

The 2nd defendant submitted that, she purchased the land parcel number south/Maragoli/Madzoo/1075 for valuable consideration from one Joel Onguso Ndolo the 1st defendant herein. That at the time of purchasing the said land the applicant herein was not in occupation or using the land. She did my due diligent survey before purchasing the same. The land in question was not even fenced and the applicant herein was not well known by the vendor. That after following the laid down procedure and observing the law, she was registered as the owner of the land on 11/7/2013, subsequently issued with the land Title Deed. At the time she purchased the land she did search in the land office and there was no caution registered on the parcel in dispute as alleged by the applicant. That the applicant is not honest by saying that she has been using the land for a period of 42 years. That before she purchased the land in dispute she visited it severally, nobody was in occupation or using the same. She even inquired from the plaintiff who is immediate neighbour who informed her that the land was available and she can go on with the transaction if she was interested.

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 Seron 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 defendants 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.

This originating summons is supported as the annexed affidavit of Ketsia Andisi Masatsi. The plaintiff testified her father in law bought the land from the 1st defendant in 1971 and gave it to her husband. They utilized the same until 2013 when they learnt it had been sold to 2nd defendant. 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. The defendants/respondents failed to attend court to defend themselves. I find that the plaintiff has proved her case on a balance of probabilities and I grant the following orders;

1. That Ketsia Andisi Musatsi, the plaintiff herein be declared the absolute owner of all that piece of land known as South Maragoli/Madzoo/1075 which land parcel she has cultivated and been in actual possession peacefully, openly and uninterrupted for a period of 29 years since 1984 she be registered as such.
2. That the defendants, their agents, servants and/or assigns restrained by an injunction from interfering with the said parcel of land.
3. The respondents 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 24TH DAY OF OCTOBER 2018.

N.A. MATHEKA

JUDGE