



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 200 OF 2019(OS)

- 1. KANZE SAFARI NDUNGO**
- 2. JENIFA DOO MUNG'ABWA**
- 3. BENARD KALAMA NGWARU**
- 4. PRISCILLA USHENGA NGALA.....PLAINTIFFS**

AND

- 1. ABDUL NASSIR SALIM NAAMAN**
- 2. HARIF IQBAL KHAN**
- 3. THE OCS MTWAPA POLICE STATION.....DEFENDANTS**

JUDGMENT

This is the application of the plaintiffs who claim to be owners of plot subdivision No. 4098 (original No. 3241/53/111/MN) by adverse possession for the determination of the following questions;

- 1) Whether the plaintiffs are entitled to proprietorship of Plot Subdivision No. 4098 (Original No. 3241/53/III/MN) by adverse possession.
- 2) Whether the plaintiffs' proprietorship of Plot Subdivision No. 4098 (Original No. 3241/53/III/MN) by adverse possession has extinguished the legal and/or beneficial interests of the 1st and 2nd defendants in the said property.
- 3) Whether the Honourable Court should order that the 1st, 2nd, 3rd, and 4th plaintiffs be registered as the proprietors of Plot Subdivision No. 4098 (Original No. 3241/53/III/MN).
- 4) Whether the Honourable Court should issue an order of permanent injunction restraining the defendants and their agents, servants, heirs and/or any person acting through them from evicting the plaintiffs and their families from Plot Subdivision No. 4098 (Original No.3241/53/III/MN) and/or from threatening, harassing, intimidating; - vaulting, brutalizing, or in any way interfering with the plaintiffs' quiet enjoyment and possession of Plot Subdivision No. 4098, (Original No.3241/53/III/MN).
- 5) Whether the Honourable Court should order the defendants jointly and severally to compensate the 1st, 2nd, 3rd and 4th plaintiffs for the value of the loss resulting from the destruction and demolition of the plaintiffs' properties caused by the defendants and/or their agents or workers.
- 6) Whether the Honourable Court should order the defendants jointly and severally to compensate the 4th plaintiff for the loss of business and income.
- 7) Whether the Honourable Court should award the plaintiffs general and exemplary damages for malicious damage to property, assault, wrongful imprisonment, harassment and intimidation to be borne by defendants jointly and severally.
- 8) Whether the costs of the suit should be borne by the defendants jointly and severally.

PW1, the 1st plaintiff testified that she bought the suit parcel 26 years ago from one Abdul Salim Naaman through an agent and paid Kshs. 300,000/- leaving a balance. Other houses were demolished and hers was not. PW2, the 2nd plaintiff states that she sells alcohol and does not remember when she started living on the suit property. Their houses were demolished in 2018 and she suffered loss. She purchased the land and paid Kshs. 110,000/=. PW3, the 3rd plaintiff stated that he was born on the suit property and his parents lived there. He suffered damage after the demolition and seeks compensation. PW4, the 4th plaintiff testified that she operated a club on the suit property since 1996. Their village and her club was demolished and she seeks damages. Her parents purchased the plot for kshs.110,000/= she lived there with her parents and PW2 is her mother.

DW1, the 1st defendant testified that he is the registered owner of the suit property vide a certificate of title issued to him dated 18th May 2004 Dex1. That before he was issued with the title there was only one person on his suit property by name Kassim Mbona alias Maona who he approached and asked him to vacate form his land in 1998 when he was constructing a structure on his land. That the applicants/plaintiffs were not on his suit property at all. That in 2009 he filed ELC Civil Suit No. 51 of 2009 against Kassim Maona who was on his property and demanded that he vacates from his suit property. That the defendant failed to respond to the case and a judgment was entered against him but later the defendant filed an application and the said judgment was subsequently set aside. That Mr. Kassim Maona was allowed to defend the suit, as a result he filed his statement of defence and a counter claim dated 12th July 2010. That in the counter claim Mr. Maona maintained that he and his family were living on the suit property since 1950s and he asked the court to give him a title of the suit property. That defendant's case was dismissed and the court delivered a judgment in my favour and eviction orders and permanent injunction orders were issued against the defendant. That Mr. Kassim Maona invited so many people to the suit property just to cover him and by the time the judgment was delivered the whole land was included the occupied by strangers who applicants/plaintiffs. The applicants were always aware of ELC Civil Case No. 51 of 2009, himself Versus Kassim Maona. They are aware that the judgment was delivered on 31st October 2014 but they have never done anything either to set aside the judgment or apply to be interested parties. That the applicants have well stated in their evidence that there was trouble on the suit property in 2017 when eviction process was commenced from the suit property which is proof that they knew that the land was not theirs. That the execution process is completed and all the trespassers including the squatters and the applicants were evicted.

This court has carefully considered the evidence and submissions therein. 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 Plot Subdivision No. 4098 (Original No. 3241/53/III/MN) is the 1st 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 Seron J in the case of Gerald Muriithi vs 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 vs 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 vs 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 plaintiffs 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, PW1, the 1st plaintiff testified that she bought the suit parcel 26 years ago from one Abdul Salim Naaman through an agent and paid Kshs. 300,000/- leaving a balance. PW2, the 2nd plaintiff states that she sells alcohol and does not remember when she started living on the suit property. She purchased the land and paid Kshs. 110,000/=. PW3, the 3rd plaintiff stated that he was born on the suit property and his parents lived there. He suffered damage after the demolition and seeks compensation. PW4, the 4th plaintiff testified that she operated a club on the suit property since 1996. Their village and her club was demolished and she seeks damages. Her parents purchased the plot for kshs.110,000/= she lived there with her parents and PW2 is her mother. No genuine documentary evidence has been shown of this purchase and no reasons given as to why it was not transferred to them. PEx5 a purported sale agreement produced by PW2 is with a third party Ngoka Hassan on behalf of the 1st defendant. I reject the same. I find the plaintiffs are not being truthful and the PW2 does not even remember when she moved onto the suit land. Indeed the defendant has testified how there has been disputes and court cases on the suit land. PW3 testified that he went away to study and returned in 1997. PW4 states she never lived there throughout but used to travel. From the evidence before me, I find that the plaintiffs have not been in exclusive, continuous and uninterrupted possession, occupation and open use of the said portion of land for a period in excess of 12 years. I find that the plaintiffs have failed to establish that 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 plaintiffs have failed to establish their case on a balance of probabilities against the defendants and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 18TH JANUARY 2022.

N.A. MATHEKA

JUDGE