



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO.97 OF 2020

ALI WANJE ZIRO.....APPLICANT

VERSUS

ABDULBASIT ABEID SAID

SAID ABEID.....RESPONDENTS

JUDGEMENT

The Plaintiff/applicant filed an application for adverse possession under Sections 7,13,17,37 and 38 of the Limitation of Actions Act, Chapter 22, Laws of Kenya, Sections 1 A, 1 B, 3 & 3 A of the Civil Procedure Act, Chapter 21, Laws of Kenya, Under Order 1 Rules 12 & 13, Order 37 Rules 7, 14, 15,16,17,18, &, 19 of the Civil Procedure Rules 2010 Act (Cap 21) Laws of Kenya and seeks the following orders;

1. That the Respondents' interest in MN/I/6768 measuring 0.0435 ha has been extinguished
2. That the Applicant be registered as the proprietor of all that parcel of land MN/I/6768 measuring 0.0435 ha which said piece of land is comprised in a Certificate of Title in the District Land Registry at Mombasa in place of Respondents reason of the fact that the Applicant has become entitled to the said land by adverse possession.
3. That the orders referred to in paragraph 1 and 2 above be registered against the title MN/I/6768 measuring 0.0435 ha which said piece of land is
4. That the costs of this Originating Summons be provided for.

It is based on the grounds that the Applicant has been in uninterrupted exclusive physical occupation of MN/I/6768 measuring 0.0435 ha for a continuous period of over 24 years which is more than the 12 years required by the law. That the Respondents have shown no interest in this plot neither has he given any notice to vacate from the suit land to the Applicant. That the Respondents', rights and/or interest in all parcel of land known as MN/I/6768 measuring 0.0435 ha vis-a-vis those of the Applicant have been extinguished. That it is fair and just that the Applicant be registered as the owner of land known as MN/I/6768 measuring 0.0435 ha so he together with his family members can live in peace without fear of losing the said land, which is their only home. That the Applicant testified that he has peacefully exercised proprietary rights over the suit property for over 24 years and lay claim to it by law to acquire a legal right over the suit property. That the Applicant has no other place to call home but the suit property.

This court has carefully considered the evidence and submissions therein. The Defendant/Respondents were served through advertisement in the Daily newspaper but failed to enter appearance or file a defence and the matter proceeded exparte. 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.”

The Plaintiff/Applicant has produced a title PEx1 for land parcel NO. MN/1/6768 measuring 0.0435 ha in the name of the Defendants/Respondents. The issue is whether or not they hold a good title by virtue of the plaintiff's claim of adverse possession assuming they are still the registered owners. 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 Serگون 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, testified that he has been in uninterrupted exclusive physical occupation of MN/1/6768 measuring 0.0435 ha for a continuous period of over 21 years and no one has evicted him. That the Respondents have shown no interest in this plot neither has he given any notice to vacate from the suit land to the Applicant and he has put up semi permanent houses and lives with his family. That the Respondents', rights and/or interest in all parcel of land known as MN/1/6768 measuring 0.0435 ha vis-a-vis those of the Applicant have been extinguished. That it is fair and just that the Applicant be registered as the owner of land known as MN/1/6768 measuring 0.0435 ha so he together with his family members can live in peace without fear of losing the said land, which is their only home. The plaintiff did not provide any evidence to corroborate his story. Secondly no certificate of search was produced on the title to show the current status of the ownership. The title PEx1 states that the property was transferred to the Defendants/Respondents in 1996. From the evidence before me, I find that the plaintiff has 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 plaintiff has 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. They have also not established who the current registered proprietor of the suit land is. I find that the plaintiff has failed to established his case on a balance of probabilities against the defendant and I dismiss it with no orders as to costs as the same was undefended.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23RD DAY OF MARCH 2022.

N.A. MATHEKA

JUDGE

