



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 70 OF 2021

CHRIS IMBALU SHIVATSI.....PLAINTIFF

VERSUS

1. MICHAEL WEILGUNI

2. BRIGITA WEILGUNI KOCIE.....DEFENDANTS

JUDGEMENT

This is the Application of Chris Imbalu Shivatsi who claims to be entitled to ownership of the Plot No. 7752/III/MN (CR.56249) formerly known as Plot No. 682/III/MN (CR. 17962) by virtue of adverse possession for the determination of the following questions:

1. Are the Defendants the registered proprietors of Plot No. 7752/III/MN (CR. 56249) formerly known as Plot No. 682/III/MN (CR. 17962).
2. Has the Plaintiff been in possession since 2006 of the property known as Plot No. 7752/III/MN (CR. 56249) formerly known as Plot No. 682/III/MN (CR. 17962).
3. If so, has the said possession of the Plaintiff been quiet, continuous and adverse to the Title of the Defendants?
4. If so, the Land Registrar, Mombasa District be ordered to have the Plaintiff Chris Imbalu Shivatsi be registered as the absolute proprietor of the property known as Plots No. 7752/III/MN(CR.56249) formerly known as Plot No. 682/III/CR.17962 free from all other encumbrances?
5. What orders as to costs?
6. Are there any further or other reliefs the court may deem just?

This court has carefully considered the evidence and submissions therein. The Defendants were served through advertisement in the Daily newspaper but failed to enter appearance or file a defence and the matter proceeded ex parte. 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 has produced a PEX1&2 a title deed and search certificate for land parcel No. Plot No. 7752/HI/MN (CR. 56249) formerly known as Plot No. 682/HI/MN (CR. 17962) showing it was subdivided into the names of the defendants. The issue for determination 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 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, 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 he moved to the suit land in 2006 and no one evicted him. That the suit land was subdivided in 2011 and they did not remove him. The plaintiff did not provide any evidence to corroborate his story. I find that the suit land was subdivided in 2012 as per the search adduced as evidence and this was an interruption to his stay if at all he was on the suit premises. Secondly no current certificate of search was produced on the title to show the current status of the ownership as the one adduced in court is dated 14th December 2020. 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 establish his case on a balance of probabilities against the defendants 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