



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 501 OF 2014

MARY KHASONA SHIBIRO.....PLAINTIFF

VERSUS

BOAZ MINYATA

AYAGA SANGALE.....DEFENDANTS

JUDGEMENT

This is the application of Mary Khasoha Shibira also known as Esinasi Kasoha who claims to be entitled to a portion of the original land parcel known as Tiriki/Shamakhokho/198 which upon partition was registered as land parcel known as Tiriki/Shamakhokho/1103 measuring approximately 0.10 Hectares through adverse possession and specifically for the determination of the following;

1. Whether the plaintiff has occupied and used a portion of land parcel known as Tiriki/Shamakhokho/198 currently registered as Tiriki/Shamakhokho/1103 peacefully and uninterrupted from the year 1978.
2. Whether, as of the year 1995, the plaintiff had been in continuous and uninterrupted occupation and use of the land for a period of 12 years or more.
3. Whether by the year 1995 the title of the original owner to land parcel Tiriki/Shamakhokho/198 namely Shitoko Livoywa had been extinguished in favour of the plaintiff.
4. Whether the transfer of the land parcel Tiriki/Shamakhokho/198 to the defendants and others by transmission on the 16th December, 1996 pursuant to Kakamega High Court Succession Cause No. 589 of 1995 was a disruption of the plaintiff's peaceful occupation and use of the land.
5. Whether after the land was transferred to the defendants and others on 16th December, 1996 the plaintiff remained in occupation and continued to enjoy free and uninterrupted use and possession of the land.
6. Whether the partition of the original land parcel Tiriki/Shamakhokho/198 in the year 1999 to create land parcels Tiriki/Shamakhokho/1103-1106 had any effect on the right of plaintiff's possession, use and occupation of the original parcel.
7. Whether the portion which the plaintiff occupies and has been occupying and using is Tiriki/Shamakhokho/1103 created after the partition of the original parcel Tiriki/Shamakhokho/198.
8. Whether the transfer of land parcel Tiriki/Shamakhokho/1103 and issue of title deed to the 2nd defendant on the 2nd June, 2009 deprived the plaintiff of the right to the land acquired through adverse possession.
9. Whether Hamisi District Land Disputes Tribunal and Western Provincial Land Disputes Appeals Committee to which the plaintiff first went to pursue her claim to land parcel Tiriki/Shamakhokho/1103 in case No. 3 of 2009 and 102 of 2009 respectively were competent and seized of the necessary jurisdiction to determine the plaintiff's right and whether in filing those disputes the plaintiff's right in these proceedings was disturbed and or defeated.
10. Whether, if there was any sale transactions between the defendants over land parcel known as Tiriki/Shamakhokho/1103, the 2nd defendant can claim to be a bonafide purchaser for value without notice of the plaintiff's occupation and use of the said land.
11. In view of the foregoing to determine whether the 2nd defendant has good and indefeasible title to land parcel Tiriki/Shamakhokho/1103 and on the basis thereof whether it will be just, human or fair to displace the plaintiff from the said land.

That is, whether the plaintiff has proved her claim for title to land parcel known as Tiriki/Shamakhokho/1103 by adverse possession and entitled to be registered as proprietor and be issued with title deed in place of the 2nd defendant in which case the plaintiff prays for orders that:-

1. The plaintiff be registered the proprietor of land parcel known as Tiriki/Shamakhokho/1103.
2. The entries No. 2 & 3 dated 2nd June, 2009 through which the 2nd defendant was registered as proprietor of the said land and title deed issued be cancelled.
3. The 2nd defendant do surrender the original title deed to court or the Land Registrar on being so directed within a specified period for cancellation failing of which the title deed be deemed cancelled.
4. The plaintiff be issued with a title deed to the suit land.
5. The defendants do pay costs of the suit.

The 2nd defendant submitted that on the basis of a willing seller and a willing buyer and in an overt market he and the 1st defendant and he negotiated on the purchase consideration of all that parcel of land known as Tiriki/Shamakhokho/1103 and mutually settled at Ksh. 160,000/=. That he conducted due diligence and established that the said parcel of land was registered in the name of Boaz Minyata Shitoko and the sale and proprietor of the absolute interests on the same and that the said land was free from any encumbrances before agreeing to acquire the same. That upon payment of the agreed purchase consideration in full, they duly applied for the consent of the Land Control Board which application was heard and a consent was duly granted for the transfer of the parcel of land to his name. That upon the grant of the consent by the Tiriki East Land Control Board for the transfer of the said parcel of land from the vendor to him, he had the land duly transferred on the basis of which he obtained a title deed in his name That he is the current registered owner and proprietor of all that parcel of land known as Tiriki/Shamakhokho/1103 and entitle to exercise his rights under the relevant provisions of the Registered Land Act to the exclusion of any other person including the plaintiff herein. That upon the adoption of the decisions of the aforesaid tribunals as judgments of the court, he moved the Resident Magistrate's Court at Hamisi by way of a Notice of Motion seeking that the plaintiff herein be ordered to vacate his said parcel of land and in default, she be evicted.

This court has carefully considered the evidence and submissions therein. The 1st defendant died during the pendency of the suit and the matter proceeded against the 2nd defendant. 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 No. Tiriki/Shamakhokho/1103 is the 2nd defendant. The issue is whether or not he holds a good title by virtue of the plaintiff's 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 vs 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 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. In applying these principles to the present case, the plaintiff states that, she has occupied and used a portion of land parcel known as Tiriki/Shamakhokho/198 currently registered as Tiriki/Shamakhokho/1103 peacefully and uninterrupted from the year 1978. It is her evidence that she got married to one Isaac Shibira (now deceased) who was the grandson of the original owner of the suit land namely Shitoko Livoywa. The transfer of the land parcel Tiriki/Shamakhokho/198 to the defendants and others was by transmission on the 16th December, 1996 pursuant to Kakamega High Court Succession Cause No. 589 of 1995 without her knowledge. The 1st defendant Boaz Minyata Shitoko now deceased was her father in law and has never resided on the suit land. The 1st defendant caused the portion which the plaintiff resides namely, Tiriki/Shamakhokho/1103 to be registered in his name and then transferred it to the 2nd defendant. It was only in 2009 when the 2nd defendant came and attempted to evict her. PW2 who is a neighbour corroborated her evidence. He testified that the 2nd defendant wanted to purchase and move the plaintiff to an alternative parcel of land but never did. The 2nd defendant testified that he was an innocent purchaser for value and had a court order for the plaintiff's eviction. The issue to be determined is whether Hamisi District Land Disputes Tribunal and Western Provincial Land Disputes Appeals Committee to which the plaintiff first went to pursue her claim to land parcel Tiriki/Shamakhokho/1103 in case No. 3 of 2009 and 102 of 2009 respectively were competent and seized of the necessary jurisdiction. The Land Disputes Tribunal Act (now repealed). Section 3 of the Act stipulated as follows-

"3 (1) Subject to this Act, all cases of a civil nature involving a dispute as to-

(a) The division of or the determination of boundaries to, land including land held in common;

(b) A claim to occupy or work land, or,

(c) Trespass to land, shall be heard and determined by a Tribunal established under section 4."

In the instant case, the tribunal meandered beyond its boundaries. In M'Marete v Republic & 3 others, Court of Appeal, Nyeri, Civil Appeal 259 of 2000 (2004) eKLR the court held-

"In our view, the dispute before the Tribunal did not relate to boundaries, claim to occupancy or work the land, but a claim to ownership. Taking into account the provisions of section 3 of the Act and what was before the Tribunal, we are of the view that the Tribunal went beyond its jurisdiction when it purported to award parcels of land registered under [the] Registered Land Act to the appellant. In our view, the Tribunal acted in excess of its jurisdiction."

The tribunals in the present case dealt with title to property and their decision can therefore not stand as they acted in excess of their jurisdiction. It has been adduced in evidence that the 1st defendant went for succession secretly and registered himself as the proprietor. In the case of Twalib Hatayan Twalib Hatayan & Another vs. Said Sagar Ahmed Al-Heidy & Others (2015) eKLR, this Court expounded on the law on trusts as follows:-

"According to the Black's Law Dictionary, 9th Edition; a trust is defined as

"1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary)."

Under the Trustee Act, "... the expressions "trust" and "trustee" extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property..."

In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury's Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. ...

A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee ... This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see Snell's Equity at p.177) (supra)."

In applying the principles to the case before us, all indications are that a constructive trust arose as between the plaintiff and the 1st defendant. It is also strange that the 2nd defendant would go ahead and purchase land when he was well aware that the plaintiff had established her home there for over 30 years! For these reasons, I find that the plaintiff has established her case on a balance of probabilities that she has been in exclusive, continuous and uninterrupted possession, occupation and open use of the said suit land for a period in excess of 12 years. I find that the plaintiff has established her case on a balance of probabilities against the 2nd defendant and make the following orders;

1. That the plaintiff/applicant be declared the owner of land parcel No. Tiriki/Shamakhokho/1103 and which she occupies and to which she is entitled to by virtue of adverse possession and which the 2nd defendant/respondent be ordered to transfer the said suit land to the plaintiff/applicant within the next 90 (ninety) days from the date of this judgement and in default the Deputy Registrar to sign the transfer documents.
2. No orders as to Costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 23RD FEBRUARY 2021.

N.A. MATHEKA

JUDGE