



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 648 OF 2014**

**SHADRACK OBADI OMBIMA.....PLAINTIFF**

**VERSUS**

**THOMAS MUSOTSI**

**JAPHET BULUKA.....DEFENDANTS**

**JUDGEMENT**

This application is brought by Shadrack Obadi Ombima who claims to be entitled to title Nos. Nyang'ori/Gimarakwa/216 and 217 by adverse possession and seeks the following orders:-

1. A declaration that the defendants' right over title Nos Nyang'ori/Gimarakwa/216 and 217 got extinguished by adverse possession.
2. A declaration that upon expiry of 12 years the defendants held and currently hold the said pieces of land in trust for the plaintiff.
3. An order under section 38 of the Limitation of Actions Act Cap. 22 of the Laws of Kenya that the plaintiff herein be registered as owner of title Nos. Nyang'ori/Gimarakwa/216 and 217.
4. An order that the defendants be condemned to pay the costs of this suit.

PW1 testified and submitted that the defendants are his step brothers. That the titles involved are Nyang'ori/Gimarakwa/216 registered in the joint names of the plaintiff and the 1<sup>st</sup> defendant Nyang'ori/Gimarakwa/217 registered in the name of the 2<sup>nd</sup> defendant. Photo copies of the relevant green cards were produced as PEx 1, 2&3. That he bought ½ of title No. Nyang'ori/Gimarakwa/216 from the 1<sup>st</sup> defendant herein and the whole of title No. Nyang'ori/Gimarakwa/217 from the 2<sup>nd</sup> defendant herein in 1978 at the consideration of Ksh. 7,800/= which sum he paid to the defendant in full. That he took possession of the said pieces of land in the year 1978 and started cultivating the same. That he used the two pieces of land as one and there is a boundary now separating the said titles. That he lives on the said piece of land together with his wife and 6 children. That he has 300 coffee trees on the said pieces of land. That he has 50 mature banana stems and other fruit trees on the said pieces of land. That he also has 700 mature gum trees all planted by him. That he has 1 acre of Napier grass on the said piece of land. That he has one permanent house, two semi-permanent houses and three grass thatched houses on the said pieces of land. That he has fenced the pieces of land with euphorbia plants. That the cultivation and other farming operations effected on the said pieces of land have been done with the full knowledge of the defendants. That ever since the year 1978 he has been exercising all rights or ownership over the said pieces of land. That he has been in open continuous, notorious and exclusive possession of the said pieces of land since the year 1978. PW2 produced the sale agreements and translations as PEx 4, 5&6. PW3 a family member corroborated the plaintiff's case and confirms that the defendants returned in 1992 and put up their houses on plot No 218.

The 1<sup>st</sup> defendant testified and submitted that the 2<sup>nd</sup> defendant is his brother. That the land parcels in dispute are Nyang'ori/Gimarakwa/216 registered in the name and that of the plaintiff and Nyang'ori/Gimarakwa/217 registered in the name of the 2<sup>nd</sup> defendant. That these land parcels before subdivision belonged to their late father. That upon subdivision the land was divided into three portions vide Nyang'ori/Gimarakwa/216, 217 and 218. That at no stage have they sold their land portions or any part of it to the plaintiff as alleged and neither do they have any intentions to do so. That at no stage did they receive the sum of Ksh. 7,800/= as alleged by the plaintiff. That no oral or written agreement for transfer of ownership of the said land parcels has ever been entered as alleged by the plaintiff. That sometimes in 1978 they went to a scheme in Nandi where they acquired land and started farming. That they allowed the plaintiff to cultivate their land. That in the process of cultivating the land parcels he neglected to maintain the boundaries which existed to separate the said titles. That in the process of cultivating the land parcels he planted various crops. That the said 700 gum trees on the land were not planted by him as alleged but had been planted by their late father in effect therefore each of them is entitled to them. DW2, the 2<sup>nd</sup> defendant corroborated the 1<sup>st</sup> defendant's evidence. He went to Nandi but returned in 1992 and wanted his land back. That the agreements were a forgery.

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 Nyang'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 title is Nyang'ori/Gimarakwa/216 registered in the joint names of the plaintiff and the 1<sup>st</sup> defendant and Nyang'ori/Gimarakwa/217 is registered in the name of the 2<sup>nd</sup> defendant. Photo copies of the relevant green cards were produced as PEx 1, 2&3. The issue is whether or not the defendants hold 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 Sergon 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 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, the plaintiff stated that, he bought ½ of title No. Nyang'ori/Gimarakwa/216 from the 1<sup>st</sup> defendant herein and the whole of title No. Nyang'ori/Gimarakwa/217 from the 2<sup>nd</sup> defendant herein in 1978 at the consideration of Ksh. 7,800/= which sum he paid to the defendants in full. That he took possession of the said pieces of land in the year 1978 and started cultivating the same. PW2 produced the sale agreements and translations as PEx 4, 5&6. PW3 a family member corroborated the plaintiff's case and confirms that the defendants returned in 1992 and put up their houses in plot No 218. The defendants deny ever selling the land to the plaintiff's. I find that from the evidence on record the defendants indeed sold their parcels to the plaintiff in 1978 and moved to the scheme in Nandi only to return in 1992 during the tribal clashes and lay claim over the same. This matter was filed way back in 1994. For

these reasons, I find that the plaintiff has established his case on a balance of probabilities that he 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 from 1978 to 1992. I find that the plaintiff has established his case on a balance of probabilities against the defendants and make the following orders;

1. A declaration that the defendants' right over title Nos Nyang'ori/Gimarakwa/216 and 217 got extinguished by adverse possession.
2. A declaration that upon expiry of 12 years the defendants held and currently hold the said pieces of land in trust for the plaintiff.
3. That the plaintiff/applicant be declared the owner of land parcel Nos. Nyang'ori/Gimarakwa/216 and 217 and to which he is entitled to by virtue of adverse possession and which the defendants/respondents 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.
4. No orders as to Costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 24<sup>TH</sup> MARCH 2021.**

**N.A. MATHEKA**

**JUDGE**