



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 65 OF 2019

ABEDNEGO OTUNDO AYUKU.....PLAINTIFF

VERSUS

LABAN MASINJIRA.....DEFENDANT

JUDGEMENT

This is the application of Abednego Otundo Ayuku who claims to be entitled to the whole of that piece of land known as Idakho/Shikulu/12 measuring more or less 2.2. Ha by adverse possession. The ownership of the whole of land title number Idakho/Shikulu/12 is claimed by the plaintiff for reasons set out in his affidavit, the affidavit of his father Jared Abednego Ayuku and other reasons to be adduced at the hearing of this summons and for the award of the following orders;

1. An order that the defendant's right over the piece of land known as Idakho/Shikulu/12 got extinguished by adverse possession.
2. An order that upon expiry of 12 years since 1970 when the plaintiff's father was in possession for the plaintiff and 1999 when the plaintiff took and continued possession from his said father of the whole of the said piece of land known as Idakho/Shikulu/12, the defendant held and currently holds the said piece of land in trust for the plaintiff.
3. An order under section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya that the plaintiff be registered as owner of the said piece of land known as Idakho/Shikulu/12.
4. An order that the defendant do sign all transfer documents in favour of the plaintiff to give effect to the order sought in above failing which the Deputy Registrar of this honourable court be empowered to sign the same on behalf of the defendant.
5. An order that the defendant be condemned to pay the costs of this suit.
6. Such further order or relief the honourable court may deem fit to grant.

PW1 testified that he resides on the suit land and has built his home. That his grandfather purchased the land from the defendant but he does not have the sale agreement. That he has lived there from 1999. PW2 the plaintiff's father testified that his father purchased the suit land from the defendant in 1970. He fenced the land and put up a semi permanent house and used it until 1999 when he gave it to PW1. PW3 testified that the plaintiff is using the land. He has lived near the suit land since 1970. PW4 gave evidence that the plaintiffs bought the land from the defendant. The plaintiff moved there in 1999.

The DW1 stated that he did not sell his land Idakho/Shikulu/12 to either the plaintiff Abednego Otundo Ayuku nor to his father Jared Otundo Ayuku nor to the plaintiffs' deceased grandfather Abednego Otundo Ayuku nor to the deceased brother of Jared Abednego Ayuku namely Rev. Habbakuk Abednego Ayuku nor anybody else. That he bought the land Idakho/Shikulu/12 in the year 1953 before registration of land came to their area from one Musa Indagai in Imbale Village, Shikulu sub-location. That registration of land came to their area about 1969 and land title number Idakho/Shikulu/12 was arbitrated upon by land adjudication committee of their area and registered in the land adjudication registers and time was allowed for parties to inspect the adjudication register and raises objection. That neither the plaintiff Abednego Otundo Ayuku nor his father Jared Otundo Ayuku nor plaintiff's grandfather nor Habbakuk Otundo ayuku raised any objection. That land title number Idakho/Shikulu/12 was registered at the Kakamega District Land Registry on 19th June, 1973 and Land Title Deed was issued to him on 10th November, 1973, a copy of the title was produced as PEx1 and search PEx2. That he has held land title Idakho/Shikulu/12 for forty one years (41) years without challenge to it from any quarter. That the plaintiff is a trespasser on his land Idakho/Shikulu/12. That the caution was filed on his land Idakho/Shikulu/12 in the year 2007 which is now seven years or so, neither plaintiff Abednego Otundo Ayuku, nor his father Jared Abednego Ayuku have earned adverse possession. That he has all along been using his land since he purchased in 1953 and his wife is buried there. DW2 testified that, he was working in a school adjacent to the suit land and he never saw the plaintiff's father there. He used to see a worker there in 2008 and there was a small structure there. He however does not know if the defendant sold the land to the plaintiff.

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 defendant is registered proprietor of Land Parcel No. Idakho/Shikulu/12. Photo copies of the title and search certificate were produced as PEx 1 & 2. The issue is whether or not the defendant 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 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 resides on the suit land and has built his home. That his grandfather purchased the land from the defendant but he does not have the sale agreement. That he has lived there from 1999. PW2 the plaintiff's father testified that his father purchased the suit land from the defendant in 1970. He fenced the land and put up a semi permanent house and used it until 1999 when he gave it to PW1. PW2 stated that the plaintiff has put up his home on the suit land and lives there with his wife and other relatives. It is clear from the land register that the plaintiff placed a caution way back in 2007 claiming purchaser's interest. PW4 testified that he was present during the land sale negotiations and he is a neighbour. It is in evidence that the plaintiff has planted trees, Napier grass and eucalyptus trees on the suit land. The defendant states that he obtained his title in 1973 and that the defendants are trespassers. One wonders why he has not attempted to evict them from 1970. I find that from the evidence on record the defendant indeed sold the suit land to the plaintiff in 1970. The plaintiff's family took possession and has been on the land to date. 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. I find that the plaintiff has established his case on a balance of probabilities against the defendant and make the following orders;

1. A declaration that the defendant's right over title Nos Idakho/Shikulu/12 got extinguished by adverse possession.
2. A declaration that upon expiry of 12 years the defendant held and currently holds the said piece of land in trust for the plaintiff.
3. That the plaintiff/applicant be declared the owner of land parcel No. Idakho/Shikulu/12 and to which he is entitled to by virtue of adverse possession and which the defendant/respondent is 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 21ST APRIL 2021.

N.A. MATHEKA

JUDGE