



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 80 OF 2018

RECHO MAMBALASI LUMITI.....PLAINTIFF

VERSUS

BEATRICE ISABARI ICHINGWA.....DEFENDANT

JUDGEMENT

This is the application of Recho Mambalasi Lumiti who claims to be entitled to half portion of land parcel L.R. Isukha/Shirere/3813 by adverse possession and that the respondent holds half of the aforesaid part parcel of land in trust for determination of the following issues:-

- (i) Whether the applicant/plaintiff has been in occupation and/or possession of half portion of land known as L.R. Isukha/Shirere/3813 since 1972 for a period of over 12 years or more, openly, peacefully, quietly, and continuously and without force.
- (ii) Whether the applicant/plaintiff is entitled to half portion of the suit land being her entitlement as the widow to Christopher Lumiti Litembekho.
- (iii) Whether the applicant herein has acquired half portion of the suit property herein by adverse possession.
- (iv) Whether the applicant has acquired half portion by operation of the law.
- (v) Whether the respondent holds the said land in trust for the applicant.
- (vi) Who should be condemned to pay costs of this suit.

It is supported by the affidavit of the applicant herein Recho Mambalasi Lumiti filed and seeks for orders as follows;

1. An order that the applicant has acquired by operation of the law half portion of the suit property L.R. Isukha/Shirere/3813.
2. An order that the respondent be condemned to pay costs of this suit.

PWI stated and testified that she is the widow and administrator of the estate of Christopher Lumiti Litembekho deceased who died on 3rd May, 2004 a copy of Grant Ad-Litem was produced PEx4. That the suit property herein is L.R. Isukha/Shirere/3813 was curved out of original land parcel L.R. Isukha/Shirere/28 a copies of Green Card were produced as PEx 1&2. That her husband Christopher Lumiti Litembekho was a son to Joshua Litembekho Akhomelela who was father in law and Perus Shinyanzwa Litembekho who was her mother in-law. That her father in-law Joshua Litembekho Akhomelela was the first registered proprietor of land parcel L.R. Isukha/Shirere/28. That her said father in-law Joshua Litembekho Akhomelela died sometime in the hear 1975 or thereabout leaving his widow Perus Shinyanzwa to succeed him. That vide succession cause Kakamega High Court 318 of 1991, Estate of Joshua Litembekho Akhomelela, her mother in-law did succeed the estate of her late husband in order to distribute the same to her four sons who included her husband. That her late husband's portion out of the original land parcel L.R. Isukha/Shirere/28 was designated L.R. Isukha/Shirere/3913, which the suit property herein. That her mother in-law Perus Shinyanzwa Litembekho was physical challenged as she was blind. That it is not possible that she voluntarily and or knowingly sold the respondent herein land meant for her son Christopher Lumiti Litembekho. That her husband Christopher Lumiti Litembekho was polygamous and left behind two widows surviving him and six children surviving him. PW2 her brother in law stated that the plaintiff had no house there when his brother died and that she went to work in Nairobi.

The defendant testified that land title number Isukha/Shirere/3813 was a subdivision of former Isukha/Shirere/28, the property of Perus Shinyanzwa Litembekho alias Peris Shinyanzwa Litembeko alias Peris Kenyanzwa registered thus on 25th July, 1995. That the said title Isukha/Shirere/3813 was held by the said Perus Shinyanzwa Litembekho for her son Christopher Lumiti Litembekho, as his inheritance from the father, one Joshua Litembekho Ahomelela. That the said Christopher Lumiti Litembekho became ill and requested his mother, the said

Perus Shinyanwa Litembekho, to sell part of the said title Isukha/Shirere/3813 to meet his treatment and as his house had been burnt, to use part of the proceeds of sale to build another house. That that part of the said title Isukha/Shirere/3813 was sold to Agneta Lungazo Agamera who inadvertently and without intent to defraud got registered as owner of the whole parcel on 23rd January, 2001. That the said Agneta Lungazo Agamera had no intention to defraud as she showed her her portion on the ground and seemed to believe that was what comprised title Isukha/Shirere/3813. The same was properly fenced by barbed wire and was under cultivation by herself. That the said title Isukha/Shirere/3813 was consequently transferred and registered in her name on 16th April, 2002, certified copy of the register was produced as DEx 2. That she took immediate possession and have been cultivating maize and vegetables thereon since purchase to date. That she has since learnt that title Isukha/Shirere/3813 is bigger than what she has on the ground and that it includes two other distinct portions one each for the applicant and her co-wife Noheli Ilego Shumila. That the applicant left her said husband in 1986 and went to Nairobi with three children leaving behind one child who opted to stay with Perus Shinyanwa Litembekho, his grandmother. That the applicant's said husband then married the said Noheli Ilego Shumila with whom he lived in the grass thatched house that the applicant left. That the said house subsequently got burnt hence part of the reason for sale of part of the land as already explained. That the applicant and her children have never returned to settle in the home and only visit during functions like funerals. That Perus Shinyanwa Litembekho who died on 11th May, 2008. She was strong and had her eye-sight. She was not blind a copy of permit for burial was produced as DEx 3. That Christopher Lumiti Litembekho died on 3rd May, 2004 and she attended the burial. That neither Christopher Lumiti Litembekho nor his son who had died earlier in 2002 before she bought the land were buried on her portion. That through the area assistant-chief, the applicant sought to be given her share of what was left of her husband's land following his death. That the Assistant-chief directed his village elder one Isaiah Muyuka who on 24th February, 2011 divided the aforesaid portion between the applicant and her co-wife and the applicant endorsed the document evidencing the division expressing her satisfaction a copy of the said document was produced DEx 4. That the applicant again elected to take the matter to the then Land Disputes Tribunal, Municipality Division. That the tribunal deliberated the same between September, 2011 and December, 2011 not alive to the fact that the tribunals had been abolished on 31st August, 2011. That the tribunal's proceedings and award were therefore not accepted for filing and adoption by the court. That the applicant even went further and using rowdy men on 5th March, 2013 uprooted her fence which matter she reported to the police at the Kakamega Police Station even though they did not take any decisive action a copy of OB was produced as DEx6. That her portion, still remains distinct on the ground from that of the applicant and her co-wife. That on the ground are three distinct portions and not two as alleged by the applicant. That the applicant doesn't use her portion in any way. The same is vacant and has no house or home. That she is ready and willing to have the title sub-divided into three so that the applicant and her co-wife get their rightful shares while she retains hers. That in fact survey and sub-division was done and new numbers created following the tribunal's recommendation but the process has been blocked by a caution lodged on the title by the applicant on 4th April, 2011 a copy of mutation form, consent for sub-division and application for consent were produced as DEx 7. DW2 the plaintiff's co wife corroborated the defendants evidence. She confirms that her mother in law sold a portion of the land for her husband's medical expenses. The plaintiff never came back to the suit land after her house was burnt down. DW3 the plaintiff's sister in law confirms that the defendant is a bona fide purchaser.

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 Land Parcel No. Isukha/Shirere/3813 is registered in the name of the defendant. The issue is whether or not she 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 Serгон J in the case of Gerald Muriithi v 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 - v- 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 -v - 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 states that she bought the suit Land Parcel No. Isukha/Shirere/3813. That the said title Isukha/Shirere/3813 was held by the said Perus Shinyanwa Litembekho for her son Christopher Lumiti Litembekho, as his inheritance from the father, one Joshua Litembekho Ahomelela. That the said Christopher Lumiti Litembekho became ill and requested his mother, the said Perus Shinyanwa Litembekho, to sell part of the said title Isukha/Shirere/3813 to meet his treatment and as his house had been burnt, to use part of the proceeds of sale to build another house. That part of the said title Isukha/Shirere/3813 was sold to Agneta Lungazo Agamera who inadvertently and without intent to defraud got registered as owner of the whole parcel on 23rd January, 2001. DW2 the plaintiff's co wife corroborated the defendants evidence. She confirms that her mother in law sold a portion of the land for her husband's medical expenses. The plaintiff never came back to the suit land after her house was burnt down. DW3 the plaintiff's sister in law confirms that the defendant is a bona fide purchaser. I find that the defendant is a bonafide purchaser for value to a portion of the suit land. From the evidence on record I find that the plaintiff has established that her 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 from 1972 until 2006 when she left and her house was burnt down. I find that the plaintiff has established her case on a balance of probabilities. I am satisfied that she is a beneficiary of the estate of her late husband and that the defendant holds a portion of the suit land in trust for the said beneficiaries. However as to what portion, this can only be determined by a succession court and therefore I grant the following orders;

1. A declaration that Beatrice Isaberi Ichingwa registration as the sole proprietor of land parcel No. Isukha/Shirere/3813 be cancelled and the same revert to the name of Perus Shinyanwa Litembekho and be subjected to succession proceedings.

2. No orders as to Costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 21ST APRIL 2021.

N.A. MATHEKA

JUDGE