



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAKAMEGA

ELC CASE NO. 118 OF 2015

REUBEN KOTWA MEDA ALAIS.....PLAINTIFF

VERSUS

NORA KOLE

HENRY ANGATIA KOLE..... DEFENDANTS

JUDGEMENT

This is the application of Reuben Kotwa Meda who claims land parcel No. Kakamega/Bushu/489 measuring approximately 11.79 acres or thereabouts, by virtue of adverse possession and trust for the determination of the following questions;

1. Whether the applicant is entitled to land parcel No. Kakamega/Bushu/489 by virtue of adverse possession and trust, or,
2. Whether the applicant should be registered as proprietor of land parcel No. Kakamega/Bushu/489, or
3. Whether the registration of Kole Inzaniaji as the sole proprietor of land parcel No. Kakamega/Bushu/489 should be cancelled and the respondents being the administrators of the estate of Kole Inzaniaji do transfer the said land to the applicant, or
4. Whether one Kole Inzaniaji (deceased) held the said land parcel No. Kakamega/Bushu/489 in trust for the applicant.
5. Whether Kole Inzaniaji (deceased) proprietary rights are extinct by virtue of effluxion.

He seeks the following orders;

1. A declaration that the applicant is entitled to land parcel No. Kakamega/Bushu/489 measuring approximately 11.79 acres or thereabouts by virtue of adverse possession.
2. A declaration that the applicant should be registered as the sole proprietor of land parcel No. Kakamega/Bushu/489 instead of the deceased.
3. A declaration that Kole Inzaniaji's (deceased) registration as the sole proprietor of land parcel No. Kakamega/Bushu/489 be cancelled and the respondent's being the administrators of the deceased estate do transfer the said land to the applicant, and in default, the Executive Officer of this honourable court do sign all relevant transfer documents in favour of the applicant to effect the transfer.
4. A declaration that Kole Inzaniaji's (deceased) upon expiry of 12 years held the said land No. Kakamega/Bushu/489 in trust of the applicant.
5. A declaration that upon expiry of 12 years Kole Inzaniaji's (deceased) interest in land parcel No. Kakamega/Bushu/489 got extinct.
6. An order under section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya, that the applicants be registered as the proprietor of land parcel No. Kakamega/Bushu/489 instead of the deceased.
7. An order for costs.

PW1, Reuben Kotwa Meda testified that he bought Land Parcel No. S. Kabras/Bushu/489 from Daniel Makokha Bwoya and Joseph Matsasio in 1985. He instead got title for Land Parcel No. S. Kabras/Bushu/488. He discovered the same when he wanted to subdivide the land. It is registered in the name of Kole Inzaniachi as per the green card and search PEx 3&4. Land Parcel No. S. Kabras/Bushu/488 belongs to someone else and he does not use it. PW2 Joseph confirms that Land Parcel No. S. Kabras/Bushu/489 belonged to their father and they sold it to the plaintiff. PW3 &4 corroborated the plaintiff's evidence.

DW1 the defendant testified and/or stated that she knows Reuben Kotwa as a neighbor. That he has his separate Land Parcel No. Kakamega/Bushu/1399 where he lives. That she got married to the late Kole Inziani in 1962 and settled on Land Parcel No. Kakamega/Bushu/489 and was blessed with eight (8) children. That it is true that the plaintiff Reuben Kotwa Meda purchased Land Parcel No. S. Kabras/Bushu/488 from Daniel Makokha Bwoya and another and there was no mistake on the agreement and he is therefore the registered owner of land parcel No. S. Kabras/Bushu/488 as per an official search certificate annexed and marked as 'NK1'. That Daniel Makokha Bwoya and Joseph Matsasio are her brothers' in-law. That Daniel Makokha Bwoya and Joseph Matsasio are brothers. That the plaintiff/applicant has his own Land Parcel No. S. Kabras/Bushu/488 which is 6 acres and he is using Land Parcel No. S. Kabras/Bushu/489 wrongfully. That at the time he buried his wife and child, the registered owner of Land Parcel No. S. Kabras/Bushu/489 who is her husband was long dead and there was no administrator of her late husband's estate and therefore she could not go to court for any court order. That the applicant herein has utilized Land Parcel No. S. Kabras/Bushu/489 wrongfully and he had no right to so utilize and the orders sought cannot be granted. That the portion the applicant is utilizing wrongfully and illegally is not 11.79 acres as the truth is that it is less than 2 acres and that even the said acreage cannot reap cane proceeds to the tune he claims. That the applicant's rights are not legally entitled to Land Parcel No. S. Kabras/Bushu/489 and the application herein should be dismissed. DW2 testified that the plaintiff does not live there but his children have homesteads there. DW3 stated that the plaintiff bought Land Parcel No. S. Kabras/Bushu/488 and not the suit land.

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 the registered owner of the suit land is Kole Inzaniachi as per the green card and search PEx 3&4. 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 Sergon 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 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 he bought the suit Land Parcel No. S. Kabras/Bushu/489 from Daniel Makokha Bwoya and Joseph Matsasio in 1985. He instead got title for Land Parcel No. S. Kabras/Bushu/488. He discovered the same when he wanted to subdivide the land. That it is registered in the name of Kole Inzaniachi as per the green card and search PEx 3&4. Land Parcel No. S. Kabras/Bushu/488 belongs to someone else and he does not use it. PW2 Joseph confirms that Land Parcel No. S. Kabras/Bushu/489 belonged to their father and they sold it to the plaintiff. That he took possession in 1985 and his children live there to date. It is a finding of fact that the plaintiff took possession of the suit land in 1985 and his wife is buried there. The 1st defendant in her testimony admits that the plaintiff lives there and her husband had no problems with it. That his wife is buried there and she does not know when he moved there. That they started telling him to vacate in 2014. I find her evidence inconsistent and unreliable. I find that the plaintiff has 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 from 1985 to 2014. I am satisfied that he bought the suit land and took possession but discovered later the title was of a different parcel. PW2 Joseph confirms that Land Parcel No. S. Kabras/Bushu/489 belonged to their father and they sold it to the plaintiff. I find that the plaintiff has established that his 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. I find that the plaintiff has established his case on a balance of probabilities against the defendants and I grant the following orders;

1. A declaration that the applicant is entitled to land parcel No. Kakamega/Bushu/489 measuring approximately 11.79 acres or thereabouts by virtue of adverse possession.
2. A declaration that the applicant should be registered as the sole proprietor of land parcel No. Kakamega/Bushu/489 instead of the deceased.
3. A declaration that Kole Inzaniachi's (deceased) registration as the sole proprietor of land parcel No. Kakamega/Bushu/489 be cancelled and the respondent's being the administrators of the deceased estate do transfer the said land to the applicant within the next 90 (ninety) days from the date of this judgement, and in default, the Executive Officer of this honourable court do sign all relevant transfer documents in favour of the applicant to effect the transfer.
4. No orders as to Costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE