



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 163 OF 2017 (OS)

FRANCIS LUTAWA KIMATUNI.....APPLICANT

VERSUS

DAVID MUNANGA WETENDE.....RESPONDENT

JUDGEMENT

This the application of Francis Lutawa Kimatuni for the determination of the following issues;

- (a) Whether the said Francis Lutawa Kimatuni has acquired title for one (1) acre of land parcel number Kakamega/Lukume/59 by way of adverse possession.
- (b) Whether the said Francis Lutawa Kimatuni bought one (1) acres of land parcel number Kakamega/Lukume/59 legally from the respondent's father Simeon Wetende on the 6th day of October, 1971.
- (c) Whether the said respondent Davidi Munanga Wetende is holding title for one (1) acre of land parcel number Kakamega/Lukume/59 in trust for the applicant.
- (d) Whether the title deed held by the respondent in respect of one (1) acre of land parcel number Kakamega/Lukume/59 should be cancelled and a new title deed be issued in favour of the applicant.
- (e) Whether the title deed held by the respondent in respect of land parcel number Kakamega/Lukume/59 was obtained legally.
- (f) Who shall pay the costs of this application.

It is based on the annexed affidavit of Francis Lutawa Kimatuni. The plaintiff's case is that on the 6th October 1971 he bought one care of land from Kakamega/Lukume/59 from the defendant's father Simeon Wetende PEx1. He took possession and started cultivating on the same. After the seller died the defendant committed himself to honour the agreement after being paid Kshs.1,500/= (PEx 3). The area chief also confirmed the said sale agreement in his letter dated 11th September 2011 (PEx5) and the plaintiff was compensated by KETRACO over the use of the said land (PEx7). PW2 corroborated the plaintiff's evidence.

The defendant submitted that he is the registered owner of land parcel title No. Kakamega/Lukume/59 having inherited the same from his late father Simeon Wetende alias Wetende Kubra. That the plaintiff has not at any one time occupied any portion of his said parcel of land and he is in occupation of the entire parcel. That he has never received a sum of Ksh. 1,500/- or any part thereof. The plaintiff has never planted cane or any other crops on his land. That if the defendant bought land from his late father which fact is denied he never took possession nor obtained land control board consent and his agreement if any is null and void. PW2 the defendant's step mother testified that her husband never sold land to the plaintiff and that they had a boundary dispute.

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 land parcel No. Kakamega/Lukume/59 is the 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 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's case is that on the 6th October 1971 he bought one care of land from Kakamega/Lukume/59 from the defendant's father Simeon Wetende PEx1. He took possession and started cultivating the same. After the seller died the defendant committed himself to honour the agreement after being paid Kshs.1,500/= PEx 3. The area chief also confirmed the said sale agreement in his letter dated 11th September 2011 (PEx5) and the plaintiff was compensated by KETRACO over use of the said land (PEx7). PW2 corroborated the plaintiff's evidence. I believe the plaintiff. The defendant is aware of the sale agreement and the plaintiff's possession and only changed his mind after the death of his father. For these reasons, 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. 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 defendant and I grant the following orders;

1. Declaration that the defendant/respondent holds in trust for the plaintiff/ applicant for portion measuring 1.5 Ha of land parcel No. Kakamega/Lukume/59.

2. That the plaintiff/applicant be declared the owner portion measuring 1acre of land parcel No. Kakamega/Lukume/59 and which he occupies and to which they are entitled to by virtue of adverse possession and which the 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.

3. No orders as to Costs.

It is so ordered.

DELIVERED, DATED AND SIGNED THIS 6TH DAY OF MAY 2020.

N.A. MATHEKA

JUDGE