



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 297 OF 2015

AINEA MUDANYA ONZORE.....PLAINTIFF

VERSUS

KENNETH SIMIDI OTWELE *sued as the administrator and legal representative of the estate of* **AGNES LUKUSA (DECEASED).....DEFENDANT**

JUDGEMENT

The application is of Ainea Mudanya Inzore who claims to have acquired title to the whole of land parcel No. Kakamega/S. Maragoli/Kegoye/1126 containing by measurement approximately 0.16 hectares as he has purchased and lived on, occupied, utilized and used the whole of the said parcel of land exclusively, peacefully, continuously, openly and uninterrupted from 1974 to date, a period of over 40 years. The applicant has since been entitled to the said parcel of land by virtue of adverse possession having occupied and used the same exclusively, openly, quietly and uninterrupted for a period of over 12 years and prays that the honourable court does determine and order as follows:-

- (a) That the applicant be declared the owner of the whole of land parcel No. Kakamega/S. Maragoli/Kegoye/1126 which he purchased, lives on, occupies and uses and to which he is entitled by virtue of adverse possession and the respondent be ordered to transfer title to the said parcel of land to the applicant.
- (b) That the court issues a declaration that the deceased Agnes Lukusa and subsequently the respondent is holding title to land parcel No. Kakamega/S. Maragoli/Kegoye/1126 in trust for the applicant and the respondent be ordered to transfer title to the said parcel of land to the applicant and in default of the respondent transferring the same voluntarily the court do make an order authorizing the Deputy Registrar of the High court of Kenya at Kakamega to execute all the documents necessary to effect the transfer of title to the parcel of land aforesaid into the name of the applicant.
- (c) The respondent pays the costs of this originating summons to the applicant.
- (d) That the honourable court does make further orders or grant any other relief deemed fit and just.

This originating summons is grounded on the annexed supporting affidavit of Ainea Mudanya Onzore. The plaintiff testified that he bought the land in 1974 from Agnes Lukusa also known as Agnes Vugutsa Kibiriti who was the registered proprietor of the Land parcel No. South Maragoli/Kegoye/1126 and her daughter Josina Rumadi was present. He let them stay on the land until they died and were buried there. It is in evidence that Agnes Lukusa also known as Agnes Vugutsa Kibiriti died intestate the year 1992 and her daughter Josina Rumadi died the year 2004 and were buried there. PW2 the assistant chief states that the plaintiff proved that he had bought the land. PW3 and PW4 testified that the plaintiff bought the land in 1974 and started using it.

The defendant testified and submitted that the late Agnes Lukusa also known as Agnes Vugutsa Kibiriti was his grandmother and that was the registered proprietor of the Land parcel No. South Maragoli/Kegoye/1126. That the late died intestate on 8th December, 1992 while in the said estate at Kegoye village, Kegoye sub location and left his mother Josina Rumadi the only child who also died interstate 23rd October, 2004. Both his grandmother and his mother after their deaths were buried on this land parcel No. South Maragoli/Kegoye/1126. That the applicant claims to have purchased the said land parcel the year 1974, a period of 40 years, whereas the proprietor, his grandmother Agnes Lukusa also known as Agnes Vugutsa Kibiriti died intestate the year 1992 and his late mother Josina Rumadi died the year 2004, a period of 18 years and 30 years respectively. The applicant did not file any burial dispute against the deceased to protect his purchased interest. It is now 25 years and 13 years after the death of both his grandmother and his mother. That the plaintiff has never had vacant exclusive, peaceful open and continuous occupation of the land parcel No. South Maragoli/Kegoye/1126 as alleged. He had never had any house or home thereon. It is evident that he also never at any time appeared Land Control Board for necessary legal approval and consent letters for the last 40 years as per his false purchase claims. That the plaintiff had hired earlier a portion of land parcel before the official land demarcation from his grandmother Agnes Vugutsa, after the death of his grandfather Mzee Kibiriti for the applicant to use for farming inputs/purposes in the year 1969. That when the official land adjudicators or demarcators came on the ground, they automatically registered

both the portions, the one that the applicant hired was registered to him and was numbered as South Maragoli/Kegoye/1124 and the remaining portion left and registered land parcel of Agnes Lukusa also known as Agnes Vugutsa Kibiriti. That if it is true that his grandmother and his mother were illiterate but when they discovered/realized that the applicant Mudanya Onzere was a registered proprietor of their land which the applicant had hired they demanded it from the applicant Aineah Mudanya Onzere who accepted to remain with this land parcel South Maragoli/Kegoye/1124 and made agreement to purchase this land parcel Kegoye/1124 on 3rd December, 1974 and did not indicate this number in their agreement brought before this honourable court. That the plaintiff and his witnesses, prepared another agreement letter and approached the Area Chief Wamuluma location and presented it to him bearing different witnesses from those listed in other agreement made for Land Parcel South Maragoli/Kegoye/1124 seeking the Chief Mr. H.A. Kibunja to witness and certify the agreement which he stamped and endorsed on 28th October, 1996. That his late grandmother Agnes Lukusa alias Agnes Vugutsa Kibiriti who was a registered proprietor of the land parcel south Maragoli/Kegoye/1126 had earlier donated a portion of land parcel South Maragoli/Kegoye/1126 to Hambale Catholic Church. The church utilized their portion of land parcel planting napier grass and trees (Blue gum) still on the land parcel to date. The church built also a house for them to stay until when the Assistant Chief Kegoye and the applicant removed the boundary marks between the two parcels No. Kegoye/1124 and 1126 illegally and uprooted the church napier grass and threatened the church members not to move to that land parcel. That he obtained letters of administration intestate of all the estates of his grandmother Agnes Lukusa alias Agnes Vugutsa Kibiriti on 7th September, 2015 (Grant) which he registered at Vihiga Lands Registry on 14th September, 2015 under RL. 19 and after expiry of 6 months being unopposed the petition was allowed for confirmation of the grant on 22nd March, 2016. He registered the same confirmation of the grant for transfer of the estate to himself and the Hambale Catholic Church. That the application for transfer/sub of the land parcel is pending at the Vihiga Land Control Board that the succession cause was going on. The application for transfer by personal representations was registered on 30th March, 2016 and that all stamp duty registration and title deed paid in respect of land parcel No. South Maragoli/Kegoye/1126.

DW2, the Chairman of the Catholic Church confirms that the church moved to the suit parcel of land in 1975 and that the plaintiff is not using the land. That the plaintiff started using the portion in 2014. DW3 and DW4 corroborated the defendant's evidence.

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 LR No South Maragoli/Kegoye/1126 is the 1st 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 testified that he bought the land in 1974 from Agnes Lukusa also known as Agnes Vugutsa Kibiriti who was a registered proprietor of the Land parcel No. South Maragoli/Kegoye/1126 and her daughter Josina Rumadi was present. He let them stay on the land until they died and were buried there. It is in evidence that Agnes Lukusa also known as Agnes Vugutsa Kibiriti died intestate the year 1992 and her daughter Josina Rumadi died the year 2004 and were buried there. The defendant testified that his late grandmother Agnes Lukusa alias Agnes Vugutsa Kibiriti who was a registered proprietor of the land parcel South Maragoli/Kegoye/1126 had earlier donated a portion of land parcel South Maragoli/Kegoye/1126 to Hambale Catholic Church. The church utilized their portion of land parcel planting napier grass and trees (Blue gum) still on the land parcel to date. DW2 the Chairman of the Catholic Church confirms that the church moved to the suit parcel of land in 1975 and that the plaintiff is not using the land. I find that the plaintiff has not been in occupation of the suit parcel for a period of over 12 years. I also find it curious that one would buy land and let the seller reside there until she died and was buried way back in 1992 and the plaintiff files suit in 2015. For these reasons, I find that the plaintiff has not been in exclusive, continuous and uninterrupted possession, occupation and open use of the said portions of land for a period in excess of 12 years from 1974. Looking at the sale agreement produced in court by the plaintiff it is not indicated which parcel of land he was buying if at all (PEX2). I find that the plaintiff has failed to establish 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 failed to established his case on a balance of probabilities against the defendant and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 5TH NOVEMBER 2019.

N.A. MATHEKA

JUDGE