



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 66 OF 2018 (O.S)

ALLOYS MUMIA ANEKEA.....APPLICANT

VERSUS

WAWIRE WAMBONGORESPONDENT

JUDGEMENT

This is the application of Aloys Mumia Anekea whose claim to an entitlement to 3.0 acres of Land Parcel No. Bunyala/Namirama/438 by adverse possession for determination of the ownership of 3.0 acres of land parcel No. Bunyala/Namirama/438 which the applicant claims, and that there be an award for the following orders.

- (a) A declaration that upon the expiry of 12 years, the applicant's right over land parcel No. Bunyala/Namirama/438 got extinguished by/and through operation of law/adverse passion when the applicant was in possession of the said land.
- (b) A declaration that upon the expiry of 12 years 3.0 acres in area of land parcel No. Bunyala/Namirama/438 were and is currently being held in trust for the applicant.
- (c) An order that under section 38 of the Limitation of Actions Cap 22 Laws of Kenya whole of that Land Parcel No. Bunyala/Namirama/438 measuring 3.0 acres in area vests and is the property of the applicant.
- (d) An order that the registration of the respondent as the owner/proprietor of land No. Bunyala/Namirama/438 is unlawful.
- (e) An order that the respondent sign all relevant of documents to facilitate transfer of land parcel No. Bunyala/Namirama/438 measuring 3.0 acres to the applicant and in default thereof the Deputy Registrar of this honourable court do sign the same.
- (f) An order that the respondent be compelled to pay the costs of this suit.
- (g) Any other orders that this honourable court may deem just and appropriate.

The plaintiff states that, on 30th September, 2004 he purchased 3 ½ acres of land parcel No. Bunyala/Namirama/438 from Isaac Ukhebi Waswa at a consideration of Ksh. 297,500/= of which sum he paid in full (PEX1 is a copy of the agreement). That the said Isaac Ukhebi Waswa had purchased land parcel No. Bunyala/Namirama/438 from Wawire Wambongo the respondent herein and title had not been processed in his name (PEX 2 is a copy of the register). That he immediately took vacant possession of the purchased portion and occupied the same where he started staying and using/cultivating on the said portion of which he still does to date, a period of 13 years. That the said Isaac Ukhebi Waswa, now deceased was in possession of the said land at material time of purchase. That he is entitled to be registered as the proprietor of the said land by reason of adverse possession. That since he purchased the said parcel, he has constructed is matrimonial home where he stays with his family and that he has planted sugarcane, maize, cassava and bananas. That he has since the time of purchase in 2004 been in peaceful possession and use of land parcel No. Bunyala/Namirama/438 in full glare and knowledge of the respondent herein and in any event the respondent has in no way ever used it. That since the sale of the portion of land the respondent has never stayed or used land parcel No. Bunyala/Namirama/438 as he has been in total control and dominion of the said land. PW2 testified that he was a witness during the said sale agreement and he signed the same.

This court has carefully considered the evidence and submissions therein. The defendant was served but failed to attend court to adduce oral evidence. 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. Bunyala/Namirama/438 is the defendant. The issue is whether or not he holds a good title by virtue of the plaintiffs’ 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 plaintiffs testified that The plaintiff states that, on 30th September, 2004 he purchased 3 ½ acres of land parcel No. Bunyala/Namirama/438 from Isaac Ukhebi Waswa at a consideration of Ksh. 297,500/= of which sum he paid in full (PEX1 is a copy of the agreement). That the said Isaac Ukhebi Waswa had purchased land parcel No. Bunyala/Namirama/438 from Wawire Wambongo the respondent herein and title had not been processed in his name (PEX 2 is a copy of the register). That he immediately took vacant possession of the purchased portion and occupied the same where he started staying and using/cultivating on the said portion of which he still does to date, a period of 13 years. PW2 testified confirming that the plaintiff resided on the suit land. Their evidence has not been challenged. For these reasons, I find that the plaintiff has 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 2004. 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. That the plaintiff/applicant be declared the owner Bunyala/Namirama/438 and which they occupy and to which they are entitled to by virtue of adverse possession and which the defendant/respondent be ordered to transfer the said portion of land to the plaintiff/applicant within the next 30 days from the date of this judgement.

2. That in default of the defendant/respondent transferring the same voluntarily the court do make an order authorizing the Deputy Registrar of the Court to execute all documents necessary to effect the subdivision and transfer of the portion of the aforesaid land to the plaintiff/applicant.

3. No orders as to Costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE