



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 354 OF 2017**

**KAMALI JIGUA NZIZE**

**Alias KHAMALI ICHINGUA.....PLAINTIFF**

**VERSUS**

**STANLEY IMBALI.....DEFENDANT**

**JUDGEMENT**

The plaintiff avers that at all material times the parcel of land known as Kakamega/Shisejeri/74 is duly registered in the name of the plaintiff as the sole absolute proprietor. The plaintiff avers that vide an agreement dated 17<sup>th</sup> October, 1990 and subsequent acknowledgements dated 3<sup>rd</sup> January, 1991 and July, 1991 the plaintiff received from the defendant's late father Adrian Muteshi Imbali a sum of Ksh. 17,500/= out of the agreed purchase price of Ksh. 22,500/= on the understanding that the plaintiff would upon receipt of the agreed purchase price sell and give vacant possession and transfer to the defendant's late father the Adrian Muteshi Imbali a portion of land out of the plaintiff's parcel of land known as Kakamega/Shisejeri/74. The plaintiff avers that the defendant's late father Adrian Muteshi Imbali did not pay the whole of the agreed purchase price to the plaintiff as agreed. The plaintiff avers that the defendant's late father Adrian Muteshi died before the said transaction was finalized. The plaintiff avers that the plaintiff stays at Rongai and the defendant has used this as an advantage to use the said parcel of land forcefully by commencing construction work thereon without the plaintiff's permission and/or consent. The plaintiff's claim as against the defendant is for a declaration that the said transaction is null and void and the defendant be ordered to receive refund of the monies the defendant's late father deposited with the plaintiff and the defendant be ordered to remove the structures erected on the suit parcel of land. The plaintiff avers that the defendant has unlawfully and without any justifiable cause, lodged a caution against the plaintiff's title aforementioned. The plaintiff's claim against the defendant is for an order that the said caution be removed forthwith for being unlawful and unjustified. The plaintiff prays that judgment be entered in favour of the plaintiff as against the defendant for:-

- (a) A declaration that the aforesaid transaction is null and void and the defendant be ordered to receive refund of the monies the defendant's father deposited with the plaintiff and the defendant be ordered to remove to the structures erected on the suit parcel of land.
- (b) That the caution registered against the parcel of land known as Kakamega/Shisejeri/74 in favour of the defendant be removed forthwith.
- (c) Costs of this suit.
- (d) Any other relief this honourable court may deem just to grant.

The plaintiff called two witnesses who corroborated his evidence.

The defendant admits that the plaintiff is the registered owner of land parcel number Kakamega/Shiseseri/74 and that he sold the same to the defendant's father. The defendant avers that the plaintiff granted vacant possession to the defendant's father who immediately developed the land. The defendant avers that the plaintiff had let the defendant/his father/agents and employees use the land for a period now exceeding 12 years and that the defendant has gained title by adverse possession. The defendant avers that the land has been developed to the tune of Ksh. 4,000,000/= and that the plaintiff has always known the developments and consented to the developments. The defendant avers that the plaintiff had been paid the entire purchase price and that his title was extinguished by effluxion of time. The defendant now uses the land for business purposes and the plaintiff is aware of the use. The defendant avers that he has instituted an application in the High Court to have the land declared his and shall pray that the same be heard together with this suit. The plaintiff prays for the dismissal of the plaintiff's case with costs. DW2 confirmed that the defendants father bought the land and moved there in 1991. This suit was consolidated with suit number 21 of 2012 an originating summons which the defendants claim adverse possession.

This court has carefully considered the evidence and submissions therein. This case is one of determination of title to land with a counter claim of adverse possession. 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. Kakamega/Shisejeri/74 is registered in the name of the plaintiff. The issue is whether or not he holds a good title by virtue of the defendant'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 avers that vide an agreement dated 17<sup>th</sup> October, 1990 and subsequent acknowledgements dated 3<sup>rd</sup> January, 1991 and 27<sup>th</sup> July, 1991 the plaintiff received from the defendant's late father Adrian Muteshi Imbali a sum of Ksh. 17,500/= out of the agreed purchase price of Ksh. 22,500/= on the understanding that the plaintiff would upon receipt of the agreed purchase price sell and give vacant possession and transfer to the defendant's late father the Adrian Muteshi Imbali a portion of land out of the plaintiff's parcel of land known as Kakamega/Shisejeri/74. The plaintiff avers that the defendant's late father Adrian Muteshi Imbali did not pay the whole of the agreed purchase price to the plaintiff as agreed. The defendant admits that the plaintiff is the registered owner of land parcel number Kakamega/Shiseseri/74 and that he sold the same to the defendant's father. The defendant avers that the plaintiff granted vacant possession to the defendant's father who immediately developed the land. The defendant avers that the plaintiff had let the defendant/his father/agents and employees use the land for a period now exceeding 12 years and that the defendant has gained title by adverse possession. It is not in dispute that the defendant took possession of the land in 1991 and his family has been in possession ever since

and has developed the same. I am satisfied that he did indeed purchase the suit land. However in the originating summons the defendant claims to be occupying a plot of 40m x 25m. This is in the originating summons filed in court on 5<sup>th</sup> December 2012. For these reasons, I find that the defendant 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 1991. I find that the defendant 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. The plaintiff has failed to prove his case and I dismiss it. I find that the defendant has established his case on a balance of probabilities against the plaintiff and I grant the following orders;

1. That the defendant be declared the owner of a portion of land parcel known as Kakamega/Shisejeri/74 measuring 40mx25m and which they occupy and to which they are entitled to by virtue of adverse possession and which the plaintiff be ordered to transfer the said portion of land to the defendant within the next 30 days from the date of this judgement.
2. That in default of the plaintiff 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 defendant.
3. No orders as to Costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 5<sup>TH</sup> NOVEMBER 2019.**

**N.A. MATHEKA**

**JUDGE**