REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 49 OF 2013

YACOBO WANYAMA

ENOCK KWANUSU

GLADYS AUMA NDEGE

EVERLINE INDEKWA JOSEPHAT

NORAH WANYAMA..... PLAINTIFFS

VERSUS

CHARLES BARASA MANABA..... DEFENDANT

JUDGEMENT

This is the application of Yakobo Kiwake Wanyama, Enock Kwanusu, Gladys Auma Ndege, Everline Indekwa, Josphat and Norah Wanyama, who claim to be entitled to land parcel Kakamega/Chekalini/556 by virtue of adverse possession for the determination of the following questions and issuance of orders that:-

1. The defendant's title over Land Parcel No. Kakamega/Chekalini/556 has been extinguished by virtue of lapse of time pursuant to the doctrine of adverse possession.

2. The plaintiffs have obtained title and ownership over land parcel No. Kakamega/Chekaline/556 by virtue of the doctrine of adverse possession.

3. Consequently, upon the foregoing a vesting order, be issued vesting land parcel No. Kakamega/Chekalini/556 in the plaintiffs and a title deed to be issued to the plaintiffs as the proprietors.

4. The Land Registrar, for the time being in possession of the register where title over parcel No. Kakamega/Chekalini/556 is registered, do delete the name of the defendant and enter the names of the plaintiffs in the register as the proprietors.

5. The plaintiffs be awarded costs of the proceedings.

It is based on the grounds that the plaintiffs have been continuously, openly, peacefully and without interruption in exclusive possession of land parcel No. Kakamega/Chekalini/556 since 1st January, 1964, nec clam, nec, nec precario. The title of the obtained by defendant has been extinguished by virtue of section 38 Limitation of Actions Act, Cap 22 Laws of Kenya. The defendant's title stood extinguished by virtue of Limitation of Actions Act.

Charles Barasa Manaba, the defendant stated in his replying affidavit that the suit land was allocated to his father Marko Nabwera Manaba. That the plaintiffs have not exhibited documentary evidence in support of the allegation that the land was given to their father. That it was necessary for them to exhibit an allotment letter. That by 1964 the plaintiffs were squatters of the Settlement Fund Trustee who was the proprietor of the land; therefore, Adverse Possession was not available to the plaintiffs against the Settlement Fund Trustee. That the plaintiffs have not exhibited their titles to support the allegation in paragraph 9 of the supporting affidavit that the land was demarcated and distributed to them. That by 1978 the land belonged to the Settlement Fund Trustee, therefore, the father of the plaintiffs was buried on the land as a squatter and not the proprietor. That by 1988 and 1992 there was Civil Suit No. 74 of 1985 against the 5th plaintiff for trespass and eviction of herself and her family who claimed under her; therefore, burial of Florence and Wafula on the land was in furtherance of Trespass (Annexed is a copy of the plaint of civil suit No. 74 of 1985 marked as C.B.M. 1). That the burial of Aineah on the land was done under his protest (Annexed is a copy of his lawyer's letter marked as exhibit C.B.M. 2). That the plaintiffs were squatters from 1964 until 1983 when the land was allocated to his father against whom they became trespassers and his father filed Civil Suit No. 74 of 1985 for trespass and

eviction. Therefore, their occupation of the land was not peaceful. That when he inherited the land by Succession Cause No. 415 of 1997 he filled Civil Suit No. 186 of 2000 seeking to evict the plaintiffs from the land (Annexure CBM4) when the suit was dismissed for lack of court jurisdiction. He filed Land Dispute No. 6 of 2003 at the Lugari Land Disputes Tribunal and the 5th plaintiff was summoned to appear before the Tribunal (Annexed is a copy of the summons marked CBM5). He then brought civil suit No. 219 of 2012 (Annexed 1 a copy of the plaint marked CBM6). Therefore, the plaintiffs have hardly had peaceful enjoyment of the suit land. That this suit is sub-judice in view of the pendency of Civil Suit No. 219 of 2012 before this honourable court.

The 1st plaintiff, PW1 testified that his father was called Solomon Wanyama Nabuora (deceased). The late Marko Nabwera Manaba was allocated an option to ballot for land to buy in the Chekalini Settlement Scheme before balloting was carried out in the year 1963. However, he gave his father his option to ballot and his father refunded him the money in full. His father then balloted using the name of Marko Nabwera Manaba as shown in the annexed picture. After balloting, his father was allotted land parcel No. Kakamega/Chekalili/556 measuring approximately 27.25 acres (10.9 hectares) but it was in the name of Marko Nabuora Manaba. His late father settled his family on the entire said parcel of land by 1st January, 1964. The family of the late Solomon Wanyama Nabuora consists of Norah Nanyama (widow), Yakobo Kilwake Wanyama (son), Enock kwanusu (son), Everline Indekwa Josphat (daughter-in-law), Gladys Auma Ndege (daughter-in-law), several grandchildren and great grandchildren.

He stated that the family built several homes and settled. The homes were built between the year 1994 to date. There are a total of 16 houses for each of the plaintiffs, their sons and livestock. They have been in possession since the year 1964. The title deed was issued in 1982 which they have in possession. The defendant never evicted them. The defendant filed Kakamega Civil Case No. 219 of 2012 which was dismissed. The current plaintiff apparently obtained title after the demise of his father.

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 defendant is registered proprietor of Land Parcel No. Kakamega/Chekalini/556. A photo copy of the green card was produced as PEx1. The issue is whether or not the defendant 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 Sergon J in the case of Gerald Muriithi vs Wamugunda Muriuki & Another (2010) eKLR while referring to the case of Wambugu vs 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.*
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> *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 - vs- 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 -vs - 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 plaintiffs 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 stated that, the defendant's father the late Marko Nabwera Manaba was allocated an option to ballot for land to buy in the Chekalini Settlement Scheme before balloting was carried out in the year 1963. However, he gave his father his option to ballot and his father refunded him the money in full. His father then balloted using the name of Marko Nabwera Manaba. After balloting, his father was allotted land parcel No. Kakamega/Chekalili/556 measuring approximately 27.25 acres (10.9 hectares) but it was in the name of Marko Nabuora Manaba. His late father settled his family on the entire said parcel of land by 1st January, 1964 to date. The defendant then transferred the land in 2000 to his name after succession. The defendant in his affidavit stated that the plaintiffs were squatters from 1964 until 1983 when the land was allocated to his father against whom they became trespassers and his father filed civil suit No. 74 of 1985 for trespass and eviction. They have filed numerous cases trying to evict them ever since.

I find that from 1964 until 1983 the plaintiffs and their family had stayed peacefully on the suit land. It is also in evidence that the defendant has never resided there. The plaintiffs have built several homes and settled. There are a total of 16 houses for each of the plaintiffs and their sons and they also keep livestock. They have been in possession since the year 1964. Their peaceful existence from 1964 until 1983 is a period of 19 years. For these reasons, I find that the plaintiffs have established their case on a balance of probabilities that they has been in exclusive, continuous and uninterrupted possession, occupation and open use of the said suit land for a period in excess of 12 years. I find that the plaintiffs have established their case on a balance of probabilities against the defendant and make the following orders;

1. A declaration that the defendant's right over title land parcel No. Kakamega/Chekalini/556 got extinguished by adverse possession.

2. A declaration that upon expiry of 12 years the defendant held and currently holds the said piece of land in trust for the plaintiffs.

3. That the plaintiffs/applicants be declared the owners of land parcel No. Kakamega/Chekalini/556 and to which they is entitled to by virtue of adverse possession and which the defendant/respondent is ordered to transfer the said suit land to the plaintiffs/applicants within the next 90 (ninety) days from the date of this judgement and in default the Deputy Registrar to sign the transfer documents.

4. No orders as to Costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 22ND JUNE 2021.

N.A. MATHEKA

JUDGE