



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 112 OF 2017

SAMSON OKOA OIGO.....PLAINTIFF

AND

MOSES ATSULU MAYOKA

JACKLINE DORICA NDAKALA AURA.....DEFENDANTS

JUDGEMENT

This is the application of SAMSON OKOA OIGO who claims to have acquired the whole land parcel number KISA/WAMBULISHE/1627 measuring 0.41 Ha by adverse possession for the determination of the following issues:-

1. Whether the applicant has acquired title to the whole of L.R. NO. KISA/WAMBULISHE/1627 by adverse possession.
2. Whether the 2nd respondent holds title to L.R. NO. KISA/WAMBULISHE/1627 in trust for the applicant.
3. Whether the title of the 1st respondent in respect to L.R. NO. KISA/WAMBULISHE/1627 was long extinguished at the time he purported to transfer the land to the 2nd respondent.
4. Whether the 1st respondent had no or good title to pass to the 2nd respondent on 4th September 2012 or at any other time after the expiry of 12 years after the applicant went into adverse possession thereof.
5. Whether the 2nd respondent's name should be cancelled from the register and the whole of L.R. NO. KISA/WAMBULISHE/1627 measuring 0.41 Ha or thereabouts registered in the applicant's name as the proprietor thereof.
6. Whether the Deputy Registrar of this Honourable Court should be empowered to sign all relevant forms to enable L.R. NO. KISA/WAMBULISHE/1627 registered in the applicant's name should the 2nd respondent decline to do so.
7. Who should bear the costs of and incidental to the proceedings herein?

The plaintiff prays for orders that;

- a. A declaration that the respondent's right over the whole of L.R. No. KISA/WAMBULISHE/1627 measuring 0.41 Ha or thereabouts got extinguished by adverse possession upon expiry of twelve (12) years when the applicant was in possession.
- b. A declaration that upon the expiry of twelve (12) years when the applicant was in possession of L.R. No. KISA/WAMBULISHE/1627, the whole of the land was held and is currently held in trust for the applicant.
- c. A declaration that the title of the 1st respondent was long extinguished at the time of purported transfer of the parcel of land known as KISA/WAMBULISHE/1627 to the 2nd respondent hence had no or good title to pass to her on 4th September 2012.
- d. An order that the whole of land parcel No. KISA/WAMBULISHE/1627 measuring 0.41 Ha or thereabouts vests in the applicant's name and that he should be registered as the owner thereof under Section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya.
- e. An order that the 2nd respondent do sign all relevant documents to facilitate transfer of the whole of land parcel No. KISA/WAMBULISHE/1627 measuring 0.41 Ha or thereabouts to the applicant and that in default, the Deputy Registrar of this

Honourable Court to sign the same.

f. An order that the respondents be condemned to pay costs of this suit.

PW1 the plaintiff testified that he has been in occupation of the suit land exclusive to the respondents continuously, openly, without force and adverse to the respondents interest since January, 2000. That the 1st respondent's title to the suit land got extinguished in January, 2012 and he had, therefore, no or good title to pass to the 2nd respondent on 4th September 2012. That at the time of purported acquisition of title by the 2nd respondent from the 1st respondent, the 1st respondent had no good title to the said land. That the applicant has established his home on the parcel of land and been cultivating it by planting food crops, trees continuously to date. That the respondents have never stayed, occupied and/or used any part of the land measuring 0.41 Ha or thereabouts. That the applicant has acquired the whole of L.R. KISA/WAMBULISHE/1627 by operations of the law.

The 1st defendant testified that the plaintiff wanted to buy the land in 2013 and never paid the full purchase price. He confirms selling the land to the 2nd defendant and he transferred the title to her.

The 2nd defendant testified that she purchased one and a half acres of land out of land parcel No. KISA/WAMBULISHE/1561 from the 1st defendant/respondent who was the registered owner of the whole of that land on the 1st May, 2011 and paid consideration of Kenya Shillings One hundred and forty thousand on diverse dates (PEX1(a) and 1(b) are copies of the agreement). That she did her due diligence including visiting the land and confirming from the neighbourhood and the area chief that the same was good for sale and also obtained a search from the Land Registry that confirmed the same (PEX 2 is a copy of the official search). That the said land was thereafter mutated to bring about land parcel number KISA/WAMBULISHE/1627, which the 1st respondent processed transfer in her favour and the title was issued (PEX3 & 4 are copies of the green card and title deed). That in the year 2013, she was informed that a stranger had started to build on her purchased portion. That she made a report at the CID office at Butere and at the Butere Police Station OB No. 32/29/04/2015 and 28/6/01/2016. That the applicant was summoned and agreed to leave the said land and even made an undertaking in writing.

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 2nd defendant is the proprietor of parcel of land known as KISA/WAMBULISHE/1627. The issue is whether or not she 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 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.

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 defendants 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 states that he has been in occupation of the suit land exclusive to the respondents continuously, openly, without force and adverse to the respondents interest since January, 2000. That he bought the land 31/2 acres from the 1st defendant in 2000 and made the agreement in 2002 PEx2. That he has put up his homestead there. That his last payment was in 2006. I have perused the said land sale agreement and it is not clear what land is being purchased. The dates seem to have been altered. There is a purported payment date of 2001 and yet in evidence the plaintiff states the agreement was made in 2002. The plaintiff testified he bought 31/2 acres from the 1st defendant but land parcel number KISA/WAMULISHE/1627 is only 1 acre. The 2nd defendant testified that she purchased one and a half acres of land out of land parcel No. KISA/WAMBULISHE/1561 from the 1st respondent who was the registered owner of the whole of that land on the 1st May, 2011 and paid consideration of Kenya Shillings One hundred and forty thousand on diverse dates (PEx1(a) and 1(b) are copies of the agreement). That in the year 2013, she was informed that a stranger had started to build on her purchased portion. That she made a report at the CID office at Butere and at the Butere Police Station OB No. 32/29/04/2015 and 28/6/01/2016. That the applicant was summoned and agreed to leave the said land and even made an undertaking in writing. I find her evidence truthful and that she is a bonafide purchaser for value. I find that the plaintiff moved onto the suit land in 2013 and not 2000. This matter was filed in court in 2017. It is in evidence that the 2nd defendant registered a caution on the said land way back in 2012 claiming purchasers interest to safeguard her interest and to warn anyone from purchasing the same (PEx 3 is a copy of the register). I find that the plaintiff has not 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 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 as in 2012 there was a caution placed on the suit land. I find that the plaintiff has failed to established his case on a balance of probabilities against the defendants and I dismiss it with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 29TH JULY 2021.

N.A. MATHEKA

JUDGE