



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 89 OF 2019

ANDREW OPONYO MULAMA

EDWARD MAKANJI MULAMA.....PLAINTIFFS

VERSUS

SAMUEL OMULAMA AMAKANJI

VINCENT ANYANGA.....DEFENDANTS

JUDGEMENT

This is the application of Andrew Oponyo Mulama & Edward Makanji Mulama who claims to have acquired by way of adverse possession L.R. Kisa/Emasatsi/83 for determination of the followings questions;

1. Whether the applicants have been in open, use, occupation and notorious possession of L.R. Kisa/Emasatsi/83 measuring 2.0 acres whose boundaries are clearly demarcated on the ground.
2. Whether the respondent's title to L.R. Kisa/Emasatsi/83 became extinguished upon expiry of 12 years from the time the applicants went into possession sometime in 1970's.
3. Whether the respondent has never been in occupation of L.R. Kisa/Emasatsi/83 from the date of transfer 16th July, 1985 to date.
4. Whether the applicants have their permanent residence on L.R. Kisa/Emasatsi/83 with full knowledge and consent of the respondent.
5. Whether the applicants and respondent are step brothers.

The applicants seek orders that;

1. That the respondent's rights over L.R. Kisa/Emasatsi/83 was extinguished by adverse possession upon expiry of 12 years from the date the applicants came into possession of parcel of land and County Land Registrar do make entries to the register to effectuate the same.
2. That the respondents do pay costs of this suit.

The 1st plaintiff, Andrew Oponyo Mulama testified that he has lived on the suit premises with his brother the 2nd plaintiff and their families since 1985 and the 1st defendant his step brother has never lived there. The 1st defendant then sold the land to the 2nd defendant who has since fenced the same. The land was to be divided into three and not two and they now claim the said suit land.

The defendant, Samuel Omulama Amakanji stated that he is an only child of the late Peter Omulama (who died on the 17th day of December, 1984) and Annie Peter Omulama (who died on the 19th day of April, 2014) and who both raised him in the city of Mombasa where they were resident. That his father was initially the registered proprietor of L.R. No. Kisa/Emasatsi/83 measuring approximately 2.0 acres and transferred the same to him on the 10th day of November, 1978. That he came to the suit land in the month of April, 2014 when he came to bury the remains of his mother and it was at this point that he came to learn of the existence of the applicants who are his step-siblings born of a different mother. That there was a determined resistance from the applicants against the remains of his mother being interred on the suit land as they claimed that both he and his mother were strangers and it took the intervention of the local administration and area elders who

ensured that the remains were buried in the suit land. That thereafter, the applicants made all efforts to ensure that he would not settle on the suit land and this standoff compelled a family meeting on the 17th day of April, 2019 where both him and the applicants agreed to share the suit land equally with the applicants getting one-half and him getting the remainder of the other one-half. That contrary to the assertions of the applicants that they have always been residing on the suit land, the applicants were actually resident within their mother's homestead almost 2 km from the suit land before relocating around the year 2013. That it is due to the animosity shown to him by the applicants that he made the decision to dispose of his share of the one-half so that he could peacefully settle elsewhere and thus he sold the same to the 2nd respondent. He however wishes to withdraw his counter-claim for an eviction order against them.

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 Nyang'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 1st defendant was the proprietor of parcel of land known as L.R. Kisa/Emasaiti/83 and has since sold the same to the 2nd defendant. The issue is whether or not they hold 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 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 lived on the suit premises with his brother the 2nd plaintiff and their families since 1985 and the 1st defendant his step brother has never lived there. The 1st defendant then sold the land to the 2nd defendant who has since fenced the same. The land was to be divided into three and not two and they now claim the said suit land. That on the family meeting on the 17th day of April, 2019 where it was agreed to share the suit land equally with the 1st defendant getting one-half and the plaintiffs getting the remainder of the other one-half was not acceptable to him even though he signed the minutes. That the 1st defendant's mother was long divorced from his father and that the 1st defendant went to live in Mombasa. The 1st defendant maintains that his father was initially the registered proprietor of L.R. No. Kisa/Emasatsi/83 measuring approximately 2.0 acres and transferred the same to him on the 10th day of November, 1978. I find the 1st plaintiff's evidence is inconsistent and unreliable. He cannot agree at the family meeting that the land belonged to the 1st defendant then change his mind later. 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 from 1985 when it is clear that this suit land was inheritance of their stepbrother hence they were licensees. I find that the plaintiffs have failed to establish that their 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 1978 there was a dispute on the burial of the 1st defendant's mother as per the evidence adduced. I find that the plaintiffs have failed to established their 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 27TH JULY 2021.

N.A. MATHEKA

JUDGE