



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 361 OF 2017

DAVID WEKESA WANYONYI

KENNEDY WANYONYI.....PLAINTIFFS

VERSUS

BERO OGARO.....DEFENDANT

JUDGEMENT

The application of David Wekesa Wanyonyi and Kennedy Wanyonyi who claim to have become entitled or acquired title to parcel of land known as S/Kabras/Shamberere/1340 by adverse possession for the determination of the following questions.

1. Whether the plaintiffs have acquired title to or become entitled by adverse possession to land parcel No. S. Kabras/Shamberere/1340.
2. Whether the defendant holds title to parcel of land S. Kabras/Shamberere/1340 in trust for the plaintiffs.
3. Whether the plaintiffs have been in possession of parcel of land known as S. Kabras/Shamberere/1340 continuously, openly, peacefully, without force and uninterrupted for a period exceeding 12 years.
4. Whether the defendant has ever raised any claim of ownership over the land for the period running from 1980 to date.
5. Whether the plaintiffs should be registered as the proprietor of the parcel of land S. Kabras/Shamberere/1340 in place of the defendant.
6. Whether the plaintiffs are entitled to costs of this application.
7. Whether the plaintiffs are entitled to any further or other reliefs against the defendant.

PW1 David Wekesa Wanyonyi testified that he was born in 1968 and his co-plaintiff his brother in 1969 and were bred on land parcel No. S. Kabras/Shamberere/1340 which parcel of land belonged to their father Paul Wanyonyi. That sometime in 1974 or thereabouts their grandfather transferred to their father and he got registered as the proprietor of parcel of land title No. S. Kabras/Shamberere/1340. That from 1968 and 1969 to date they have been in continuous, open, peaceful possession and use of land S. Kabras/Shamberere/1340 without force and without interruption from any person. That all along he knew the land was registered in the name of their father as the proprietor until sometime in March, 2011 when they wanted the same subdivided amongst themselves that they realized that the land was registered in the name of the defendant in 1980. PEx1 is a true copy of the certificate of official search. That since the registration of the defendant as the proprietor of the land title No. S. Kabras/Shamberere/1340 they have been in occupation, possession and use thereof for a period of more than 30 years and they are still and continue being in possession and use of the land without any claim of ownership by the defendant. That owing to the foregoing they have become entitled by adverse possession to land known as S. Kabras/Shamberere/1340. PEx2 is a copy of the extract of the title (Green Card) to the land. That it is therefore just and fair in the circumstances that they should be registered as the proprietors of the land in place of the defendant herein. That the land subject matter was ancestral land and their families have extensively developed the same and they know of no other land other than the land they are settled on S. Kabras/Shamberere/1340. PEx3 are photographs of the buildings and or developments put upon the land by them.

This court has carefully considered the evidence and submissions therein. The defendant was served but failed to file a defence or offer any 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 defendant is the proprietor of parcel of land known as S. Kabras/Shamberere/1340. 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 vs Wamugunda Muriuki & Another (2010) eKLR while referring to the case of Wambu 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 PW1 David Wekesa Wanyonyi testified that he was born in 1968 and his co-plaintiff his brother in 1969 and were bred on land parcel No. S. Kabras/Shamberere/1340 which parcel of land belonged to their father Paul Wanyonyi. That sometime in 1974 or thereabouts their grandfather transferred to their father and he got registered as the proprietor of parcel of land title No. S. Kabras/Shamberere/1340. That from 1968 and 1969 to date they have been in continuous, open, peaceful possession and use of land S. Kabras/Shamberere/1340 without force and without interruption from any person. That all along he knew the land was registered in the name of their father as the proprietor until sometime in March, 2011 when they wanted the same subdivided amongst themselves that they realized that the land was registered in the name of the defendant in 1980.

He also produced the photographs and the green card of the suit property. I find the plaintiff's evidence is consistent and reliable. His evidence has not been controverted. I find that the plaintiffs have 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 1968 and 1969 to date. Their evidence was not challenged. I find that the plaintiffs have established 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. I find that the plaintiffs have established their case on a balance of probabilities against the

defendant and I grant the following orders;

1. A declaration that the defendant's right over the whole of land parcel No. S. Kabras/Shamberere/1340 has been extinguished by adverse possession upon expiration of 12 years when the plaintiffs were in possession.
2. A declaration that upon expiration of 12 years when the plaintiffs were in open, peaceful and continuous occupation and use of the whole of land parcel No. S. Kabras/Shamberere/1340 was held and is currently held in trust for the plaintiffs.
3. That the whole of land parcel No. S. Kabras/Shamberere/1340 vests in the plaintiffs and that they be registered jointly under section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya.
4. That the defendant is hereby ordered to sign all relevant documents to facilitate transfer of the whole of land parcel No. S. Kabras/Shamberere/1340 to the plaintiffs jointly within the next 30 (thirty) days from the date of this judgement and that in default, the Deputy Registrar of this honourable court be at liberty to sign the same.
5. No orders as to costs as the suit was undefended.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 27TH JULY 2021.

N.A. MATHEKA

JUDGE