



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 110 OF 2019

SAULO GABRIEL TSALIA

TOM TSALIA MBOYA.....PLAINTIFFS

VERSUS

SAMSON LUTATWA MUNANGA

GRACE KHEBELI MUNANGA.....DEFENDANTS

(Being sued as administrators of the estate of the late Musa Munanga (deceased))

JUDGEMENT

This is the application by Saulo Tsalia and Tom Tsalia who claim to have acquired 4 acre portion of Land parcel Butso/Indangalasia/349 by way of adverse possession, having continually utilized the same, and stayed on the same peacefully and uninterrupted for a period of 32 years, openly and exclusively and therefore pray that the honourable court determines as follows:-

1. That applicants herein be declared owners of 10 acre portion of land parcel Butso/Indangalasia/349 which they occupy and are entitled to by virtue of adverse possession and the administrators of the estates of Musa Munang'a deceased be ordered to transfer the said 10 acre portion to the plaintiffs.
2. A declaration that the ownership rights of the 10 acres parcel of the suit land has extinguished by operation of law and that the administrators of the said estate, are holding the said portion in trust for the applicants.
3. The administrators herein be compelled to execute the relevant transfer documents to facilitate transfer of a 10 acre portion of land parcel.
4. Costs of this suit be borne by the defendants/respondents.
5. Any other orders that are just and expedient in the circumstances.

PW1 submitted that they are the sons of the late Tsalia Lutatwa who is deceased. That their father Tsalia Lutatwa was a blood brother to Musa Munanga the father and husband respectively to the defendants herein. That both of them were the sons to Lutatwa now deceased who was the original owner of that entire land parcel known as Butso/Indangalasia/349 and 350. That in 1957 via judgment in the Divisional Court at Lurambi, Land Case 48 of 1957 the land parcels now known as Butso/Indangalasia/349 and 350 were one single piece of 42.5 acres and was subdivided into two portions. That one portion 349 was registered in the name of Musa Munanga while the second portion 350 was registered in the name of their father Tsalia Lutatwa. That their father died in 1982. That in 1987, they took possession of the 10 acre portion that was due to their father and they have occupied and used the same peacefully for over 30 years now. That they occupy, utilize and graze on the said portion which is openly known to belong to them, and that is their only source of livelihood. That they have not had peace over the said land. PW2 and PW3 both confirm that the dispute has been there since 1957.

DW1, Samson Lutatwa Munanga testified that they are son and widow respectively of the late Musa Munanga. That they are both joint administrators of the estate of the late Musa Munanga as per the annexure marked S.G.1. That in the judgment delivered in Kakamega High Court Succession Case No. 125 of 2003 the court made a finding that since the applicants had filed in court case No. 112 of 2009 in Kakamega ELC Court the applicants would better ventilate their claim if any through that case. That the Kakamega High Court ELC Case No. 112 of 2009 filed by the applicants as against the respondents by way of originating summons in respect of the same parcel of land was on 7th July, 2015 dismissed for want of prosecution (annexture marked S.G.3). That it is an abuse for the court process for the applicant to have filed the instant case instead of applying to have the case No. 112 of 2009 re-instated, and further not disclosing to this honourable court that there was case No. 112 of 2009 in between the same parties over the same subject matter and that the same had been dismissed for want of prosecution. That there was a dispute between the father of the applicants, Talia Lutatwa, and their late father/husband Musa Munanga, in

the year 1957 when it was decided that their late father/husband Musa Munanga gets land No. Butso/Indangalasia/349 and the father of the applicants Tsalia Lutatwa gets land No. Butso/Indangalasia/350. That the said dispute between Musa Munanga and Tsalia Lutatwa which ended in the year 1957 was settled and the applicants should not raise it any further since no appeal had been preferred. That the plaintiffs have land No. Butso/Indangalasia/350 (DEX3) and that this is where they live and cultivate. DW2 corroborated DW1's evidence.

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 Land parcel Butso/Indangalasia/349 is registered in the name of Munanga Olutatwa now deceased of which the defendants are the administrators. 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 1st plaintiff states that in 1957 via judgment in the Divisional Court at Lurambi, Land Case 48 of 1957 the land parcels now known as Butso/Indangalasia/349 and 350 were one single piece of 42.5 acres and was subdivided into two portions. That one portion 349 was registered in the name of Musa Munanga while the second portion 350 was registered in the name of

their father Tsalia Lutatwa. That their father died in 1982. That in 1987, they took possession of the 10 acre portion that was due to their father in land parcel number Butso/Indangalasia/349 and they have occupied and used the same peacefully for over 30 years now. I find that their stay has never been peaceful since 1957 when there was the first dispute. In Kakamega High Court Succession Case No. 125 of 2003 the plaintiffs had filed objection proceedings and in case No. 112 of 2009 in Kakamega ELC Court the plaintiffs filed a claim as against the respondents/defendants by way of originating summons in respect of the same parcel of land which was on 7th July, 2015 dismissed for want of prosecution. The disputes have been continuous since 1957. Indeed some of the permits for cultivating sugar cane produced to prove occupation seem to relate to a different parcel of land. I find that the plaintiffs have 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 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 and their witnesses PW2 and PW3 confirmed this in their oral testimonies saying they have never lived in peace. I find that the plaintiffs have failed to establish their case on a balance of probabilities against the defendants and 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