



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 76 OF 2019**

**STEPHEN F. AMBANI CHAFU.....PLAINTIFF**

**VERSUS**

**SALOME MIDEVA WANGA** (*Being sued as the Administrator of the estate of*

*Vincent Wanga Kasaja (deceased)*.....**DEFENDANT**

**JUDGEMENT**

This is the application of Stephen F. Ambani Chafu who claims to be entitled to the whole of land title No. Kakamega/Municipality/Block II/224 measuring 0.05 Ha in area by adverse possession and for the determination of the following questions:-

1. Whether the plaintiff has been in open, continuous peaceful and exclusive possession of the whole of land parcel No. Kakamega/Municipality/Block II/224 which is a lease hold interest for a period exceeding 12 years.
2. Whether the defendant, by selling the whole of L.R. No. Kakamega/Municipality/Block II/224 to the plaintiff and allowing him take possession of it for a period of over 12 years now, created a constructive trust in his favour.
3. Whether the registration of L.R. No. Kakamega/Municipality/Block II/224 in the defendant's name as the Administratrix of the Estate of Vincent Wanga Kasaja (deceased) has been extinguished by operations of the law.
4. Whether the defendant is holding L.R. No. Kakamega/Municipality/Block II/224 in trust for the plaintiff.
5. Whether the plaintiff is entitled to be registered as the proprietor of the whole of land parcel No. Kakamega/Municipality Block II/224 under the Limitation of Actions Act.

The plaintiff seeks for the award of the following orders:-

- (a) A declaration that the defendant's right over the whole of land parcel No. Kakamega/Municipality/Block II/224 measuring 0.05 (Ha) in area has been extinguished by adverse possession upon expiration of 12 years when the plaintiff was in possession.
- (b) A declaration that the defendant created a constructive trust in favour of the plaintiff by selling the whole of land parcel number Kakamega/Municipality Block II/224 to the plaintiff and allowing him take possession of it to her exclusion for a period of over 12 years now.
- (c) A declaration that upon expiration of 12 years when the plaintiff was in open, peaceful and continuous occupation and use of the whole of land parcel No. Kakamega/Municipality/Block II/224 was held and is currently held in trust for the plaintiff.
- (d) An order that the whole of land parcel No. Kakamega/Municipality/Block II/224 vests in the plaintiff and that he be registered as owner thereof under section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya.
- (e) An order that the defendant be ordered to sign all relevant documents to facilitate transfer of the whole of land parcel No. Kakamega/Municipality/Block II/224 to the plaintiff and that in default, the Deputy Registrar of this honourable court be at liberty to sign the same.
- (f) An order that the defendant be condemned to pay costs of this suit.

This originating summons is supported by the annexed affidavit of Stephen F. Ambani Chafu and he states that that L.R. No. Kakamega/Municipality/Block II/224 measuring 0.05 Ha which is a leasehold interest registered in the name of Salome Mideva Wanga as the Administratrix of the estate of Vincent Wanga Kasaja (deceased). That on 29<sup>th</sup> day of September, 2006, she sold the land to him at an agreed price of Ksh. 1,000,000/= which money he paid in full to her. That during the month of October, 2006, she allowed him to take possession of the land and to date, he is in exclusive possession of it for a period of over 12 years. That for a period of over 12 years now, his family has been staying in the land and using it openly, peacefully and continuously with the full knowledge of the defendant who has never used it at all. That he has been maintaining the property and been paying rates and other utilities. That despite the defendant being registered as the owner she has never lived on or used the land parcel No. Kakamega/Municipality/Block II/224 since he took possession of it. That his possession of the suit land has been peaceful, continuous, open, notorious and exclusive with the full knowledge of the defendant. That he exercises all rights of ownership over the suit land. That the rights of the defendant over the land have been extinguished by operations of the law and she holds the same in trust for him. That further, since she sold the land to him and allowed him take possession of it, she created a constructive trust over the land in his favour and she is holding it in trust for him. That the defendant should be ordered to sign all relevant forms and/or documents to have the land registered in his name in place of hers and in default, the Deputy Registrar of this honourable court be ordered to do so.

PW1 Gabriel Charles Ambani who is the plaintiff's son and holds a power of attorney testified electronically from Wales in the United Kingdom that his father purchased the land in 2006 and his family been in occupation ever since. He produced the sale of land agreement dated 29<sup>th</sup> day of September, 2006 and an acknowledgement thereof dated 4<sup>th</sup> day of October, 2006. He also produced the photographs and receipts issued upon payment of rates and other utilities and the green card of the suit property. PW2 and PW3 corroborated his evidence. They confirmed that they have been living on the suit land from 2006 to date and have never seen the defendant there.

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 No. Kakamega/Municipality Block II/224. 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 on 29<sup>th</sup> day of September, 2006, the defendant sold the suit land to him at an agreed price of Ksh. 1,000,000/= which money he paid in full to her. That during the month of October, 2006, she allowed him to take possession of the land and to date, he is in exclusive possession of it for a period of over 12 years. . He produced the sale of land agreement dated 29<sup>th</sup> day of September, 2006 and an acknowledgement thereof dated 4<sup>th</sup> day of October, 2006. He also produced the photographs and receipts issued upon payment of rates and other utilities 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 plaintiff has 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 2009 to date. I am satisfied that he bought the suit land and took possession the same year. I find that the plaintiff has established 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. I find that the plaintiff has established his 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. Kakamega/Municipality/Block II/224 measuring 0.05 (Ha) in area has been extinguished by adverse possession upon expiration of 12 years when the plaintiff was in possession.
2. A declaration that the defendant created a constructive trust in favour of the plaintiff by selling the whole of land parcel number Kakamega/Municipality Block II/224 to the plaintiff and allowing him take possession of it to her exclusion for a period of over 12 years now.
3. A declaration that upon expiration of 12 years when the plaintiff was in open, peaceful and continuous occupation and use of the whole of land parcel No. Kakamega/Municipality/Block II/224 was held and is currently held in trust for the plaintiff.
4. That the whole of land parcel No. Kakamega/Municipality/Block II/224 vests in the plaintiff and that he be registered as owner thereof under section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya.
5. That the defendant is hereby ordered to sign all relevant documents to facilitate transfer of the whole of land parcel No. Kakamega/Municipality/Block II/224 to the plaintiff within the next 30 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.

6. No orders as to costs as the suit was undefended.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 27<sup>TH</sup> JULY 2021.**

**N.A. MATHEKA**

**JUDGE**