



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 269 OF 2017

AINEA OKOTI OLAKA

ABABU MAKONGE.....PLAINTIFFS

VERSUS

JANEFRANCES AYUMA ANALO.....DEFENDANT

JUDGEMENT

This is the application of Ainea Okoti Olaka and Ababu Makonge who claim to be entitled to portions of Land Parcel No. Butsotso/Shikoti/2237 measuring 0.07 hectares and 0.06 hectares respectively by way of adverse possession.

They seek the following orders:-

1. A declaration that the respondents right over portions of Land Parcel No. Butsotso/Shikoti/2237 measuring 0.07 hectares and 0.06 hectares in area together with all the developments thereon got extinguished by operation of the law (adverse possession upon expiry of twelve (12) years when the applicants were in possession).
2. A declaration that upon the expiry of twelve (12) years from the date of the applicant's occupation of Land Parcel No. Butsotso/Shikoti/2237 originally designated as Land Parcel No. Butsotso/Shikoti/308 portions measuring 0.07 hectares and 0.06 hectares in area together with all the developments thereon were and are currently held in trust for the 1st and 2nd applicants respectively.
3. An order that portions of 0.07 hectares and 0.06 hectares in area together with all the developments thereon out of Land Parcel No. Butsotso/Shikoti/2237 vests in the 1st and 2nd applicants respectively and that the 1st and 2nd applicants should be registered as owners of their respective portions thereof under section 38 of the Limitation of Actions Act Cap 22, Laws of Kenya.
4. A declaration that the registration of the respondent as the owner of Land Parcel No. Butsotso/Shikoti/2237 is unlawful.
5. An order that the respondent do sign all relevant documents including applications for consent forms, transfers and attend all relevant Land Control Board Meetings to facilitate sub-division and transfer of the 0.07 hectares and 0.06 hectares out of Land Parcel No. Butsotso/Shikoti/2237 to the 1st and 2nd applicants respectively and that in default, the Deputy Registrar of this honourable court do sign the same.
6. An order condemning the respondents to pay costs of this suit.
7. Such orders or relief as this honourable court may deem just and reasonable to grant.

PW1, Ainea Okoyi Olaka, gave evidence that Land Parcel No. Butostos/Shikoti/2237 is currently registered in the name of JaneFrances Ayuma Analo, the respondent herein, (PEx2 is a copy of a certified true copy of the original register). That the said suit land parcel No. Butosotso/Shikoti/2237 measuring 0.07 hectares in area was bought by his late father Shadrack Olaka from the late Matanga Shibembe 1976 on which he developed thereon a rental eight (8) door house before his death in 1978 and was original designated as Land Parcel No. Butsotso/Shikoti/308 (PEx1 is a copy of the register). That consequently, he immediately took possession of the said suit land parcel No. Butsotso/Shikoti/2237 measuring 0.07 Hectares in the area and have been using it to dated. That the suit land parcel No. Butsotso/Shikotsi/2237 measuring 0.07 Hectares in area is clearly demarcated from the rest of the suit land by a boundary. That the respondent's husband now deceased fraudulently acquired and sub-divided land Parcel No. Butosots/Shikoti/308 into Butsotso/Shikoti/2237, No. Butsotso/Shikoti/2238 and Butsotso/Shikoti/2239 and retained Land Parcel No. Butsotso/Shikoti/2237, which is the subject matter

herein. That he filed Kakamega Municipality Division Land Dispute Case No. 08 of 2010 claiming the said portion to which an award was made in his favour (PEx3 is a copy of proceedings of the tribunal). Since 1978, he has been in peaceful use/and or possession of the said No. Butso/Shikoti/2237 measuring 0.07 Hectares in area and the respondent has never used it in any way. That the respondent has never lived or used his portion of 0.07 hectares of land out of Land Parcel No. Butso/Shikoti/2237.

The defendant, Jane Frances Ayuma Anala, stated that she is the administrator of the estate of the late Robert Analo John (alias) Makatiani Analo deceased. DEx1 is a copy of the grant of letters of administration in Bungoma SPMS Court Probate and Administration Succession Cause No. 122 of 1995. That she is the current registered owner of all that parcel of land known as Butso/Shikoti/2237 which was created out of land parcel number Butso/Shikoti/308. In the pleadings the respondent stated that the applicants' originating summons/suit is bad in law, an abuse of the due process of the court, the same being subjudice or res judicata the issue raised therein being the same issues having been raised and determined in the suit filed before the Land Disputes Tribunal Case No. 8 of 2010 and the Provincial Land Disputes Appeals Committee Civil Appeal Case No. 111 of 2010 and further Kakamega High Court Civil Appeal No. 47 of 2011. She referred to the applicants' annexure A003 being the Land Disputes Tribunal Proceedings Award of Kakamega Municipality Division and the Provincial Land Disputes Tribunal Appeals committee marked as JFAA 3 dated the 26th January, 2011. This court has considered the preliminary objection that the suit is res judicata and the submissions herein. A Preliminary Objection, as stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

“..... consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”

In the same case, Sir Charles Newbold said:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion”.

J.B. Ojwang, J (as he then was) in the case of Oraro vs. Mbajja (2005) e KLR had the following to state regarding a 'Preliminary Objection'.

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that, “where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”

The issue as to whether or not this suit is res judicata is therefore properly raised as a Preliminary Objection and the court will consider the same first. Section 6 and 7 of the Civil Procedure Act Cap 21 provides as follows:

Section 6.

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim, litigate under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

Section 7.

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

I have perused the pleadings referred to in the preliminary objection and find that on ELC Appeal Case No. 7 of 2014 which was originally Kakamega High Court Civil Appeal No. 47 of 2011 the court quashed the decisions of the tribunal since they did not have jurisdiction to entertain the matter as per the above quoted case law. I find that the tribunals did not have jurisdiction and were not a court competent and hence their proceedings would not fall under the doctrine of res judicata. This matter is therefore properly before this court.

This court has carefully considered the evidence and submissions therein of the main case. 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 Land Parcel No. Butso/Shikoti/2237 is registered in the name of the defendant herein. The issue is whether or not she 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 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 vs 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 vs 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 plaintiffs must show that the defendant 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 his father bought the suit land from the late Matanga Shibembe in 1976 and developed rental houses. That the 1st plaintiff took over in 1998 from his mother and has rental houses there to date. The defendant admits that her husband bought land but the title reads a larger piece of land and she is willing to surrender the same to the original seller and not the 1st plaintiff. Indeed she produced a sale agreement confirming that her husband purchase 0.5 acres of land from the suit land parcel No. Butso/Shikoti/308 (DEx3). Her title reads 0.41 hectares! She further confirmed that the 1st plaintiff does collect rent from the suit portion of land. For these reasons, I find that the 1st 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 1978. I find that the 1st 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. The 2nd plaintiff, Ababu Makonge did not attend court nor give any evidence and I dismiss his suit with no orders as to costs. I find that the 1st plaintiff, Ainea Okoti Olaka has established his case on a balance of probabilities against the defendant and I grant the following orders;

1. Declaration that the defendant/respondent holds in trust for the 1st plaintiff/applicant a portion of Land Parcel No. Butso/Shikoti/2237 measuring 0.07 hectares.
2. That the 1st plaintiff/applicant be declared the owner of a portion of Land Parcel No. Butso/Shikoti/2237 measuring 0.07 hectares of which he occupies and to which he is entitled to by virtue of adverse possession and which the defendant/respondent be ordered to transfer the said suit land to the plaintiff/applicant within the next 90 (ninety) days from the date of this judgement and

in default the Deputy Registrar to sign the transfer documents.

3. Costs to the 1st plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 21ST JULY 2021.

N.A. MATHEKA

JUDGE