



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 192 OF 2017

JAPHETH LIJOODI..... PLAINTIFF

VERSUS

CLEMENT SHIKAMI

ALBERT MAINA JUNGANI.....DEFENDANTS

JUDGEMENT

This is the application of Japheth Lijoodi, the applicant herein who claims to have acquired title to the parcels of land known as Isukha/Shinyalu/1590 and Isukha/Shinyalu/1591 by adverse possession for orders and for determination of the following.

1. Whether the applicant Japheth Lijoodi has acquired title to the parcels of land known as Isukha/Shinyalu/1590 and Isukha/Shinyalu/1591 by adverse possession.
2. Whether the respondents (father and son respectively) hold title to the respective parcels of land in trust for the applicant.
3. Whether the title of the 1st respondent Clement Shikami Shisilivoti got extinguished long before 2009 upon the expiry of 12 years after the applicant took possession of the said two parcels of land.
4. Whether the 1st respondent had any or good title to transfer title No. Isukha/Shinyalu/1590 & 1591 which were part of the original land parcel No. Isukha/Shinyalu/1496 to the 2nd respondent.
5. Whether the 2nd respondent's title to the said parcels of land namely Isukha/Shinyalu/1590 and Isukha/Shinyalu/1591 should be cancelled and the said parcels of land be registered in the name of the applicant.
6. Whether the 2nd respondent should be ordered to transfer the said parcels of land to the applicant.
7. Whether the respondents should jointly and or severally be condemned in the costs hereof.

It is based on the affidavit of Japheth Lijoodi and on further grounds that the applicant has been in possession of the parcels of land namely Isukha/Shinyalu/1590 and Isukha/Shinyalu/1591 continuously openly, peacefully, without force and uninterrupted for a period exceeding 12 years since he took possession thereof. That the respondents have never raised any claim of ownership over the land upto 2009 when the 1st respondent secretly caused the original land parcel No. Isukha/Shinyalu/1439 to be subdivided into two portions to create title Nos. Isukha/Shinyalu/1496 and Isukha/Shinyalu/1497 and transferred Isukha/Shinyalu/1496 to the 2nd respondent who subsequently subdivided the same to create title Nos. Isukha/Shinyalu/1590 & 1591. That the purported subdivision of title No. Isukha/Shinyalu/1496 to create new title Nos. Isukha/Shinyalu/1590 and Isukha/Shinyalu/1591 was calculated to defeat the interests of the applicant who had acquired rights of ownership over the land by adverse possession. PW1 the plaintiff testified that he bought the land from the 1st defendant now deceased in 1992 and has been using it on and off. The sale agreements were never produced as exhibits in court. That some people have now trespassed and he does not know the 2nd defendant and that there is no house on the suit land. He confirms that there is no one using the land now.

DW1 the 2nd defendant testified that he is in occupation and use of his portion of land wherein he has put up a semi permanent structure. That the plaintiff has never at any time used and or occupied the suit land. His house was burnt down in 2016. He sold the land to two buyers and the court stopped him from using the land in 2012. The 1st defendant was his father who is now deceased.

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 parcels of land known as Isukha/Shinyalu/1590 is registered in the name of the 2nd defendant. The issue is whether or not he 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 Sergon J in the case of Gerald Muriithi v Wamugunda Muriuki & Another (2010) eKLR while referring to the case of Wambugu v 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 bought the suit land parcel in 1992 and has been using it on and off. That some people have now trespassed and he does not know the 2nd defendant and that there is no house on the suit land. He confirms that there is no one using the land now. DW1 the 2nd defendant testified that he is in occupation and use of his portion of land wherein he has put up a semi permanent structure. That the plaintiff has never at any time used and or occupied the suit land. The defence produced evidence that the 1st defendant was arrested by the police and charged in Kakamega Chief Magistrates Court Criminal Case No. 1907 of 2010 and later acquitted for obtaining money by false presences relating to the suit land. The plaintiff was the complainant in that case. 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 as he testified that he used the land on and off upto 2009 when the defendants subdivided the land. I find that the

plaintiff's occupation and use of the suit land was not continuous. I find that the plaintiff has failed to establish 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 failed to established his case on a balance of probabilities and I dismiss it with costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE