



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 134 OF 2014

JUMA KULUNDU MULISYA.....PLAINTIFF

VERSUS

SOFIA NASICHE WESONGA.....DEFENDANT

JUDGEMENT

This is the application of Juma Kulundu Mulisya who claims to be entitled to 2 acres of land out of L.R. South Wanga/Lureko/449 in adverse possession for determination of the following issues:-

1. Whether the applicant has been in open continuous enjoyment and use of 2 acres of land parcel No. South Wanga/Lureko/449 whose boundaries are clearly demarcated on the ground comprised in the said parcel of land for period of over 12 years exclusively, peacefully and uninterrupted since 1973 to date.
2. Whether the applicant is entitled to 2 acres out of land parcel No. South Wanga/Lureko/449 by virtue of being in use of the 2 acres after purchasing the same from the respondent's husband one Wesonga Wanzala (deceased) in 1973, by adverse possession.
3. Whether the applicant started utilizing two acres out of land parcel No. South Wanga/Lureko/449 before the demise of the first registered proprietor one Wesonga Wanzala (deceased).
4. Whether applicant had acquired registered interest in respect to 2 acres out of land parcel No. South Wanga/Lureko/449 by adverse possession against the first registered proprietor one Wesonga Wanzala (deceased) as at 11th August, 1985.
5. Whether the first registered proprietor one Wesonga Wanzala (deceased) title in respect to 2 acres out of land parcel No. South Wanga/Lureko/449 had been extinguished by way of operation of law in favour of the applicant as at 11th August, 1985.
6. Whether the applicant's claim for adverse possession over 2 acres out of land parcel No. South Wanga/Lureko/449 against the first registered proprietor one Wesonga Wanzala has been extinguished by the subsequent registration of the entire suit land to Sofia Nasiche Wesonga as proprietor on 26th September, 2011.
7. Whether the respondent herein obtained title from Wesonga Wanzala (deceased) the first proprietor of the suit land subject to the 2 acres' rights of the applicant as a prior purchaser in adverse possession in respect to the suit land.
8. Whether the applicant is entitled to the sub division of 2 acres of land that is clearly demarcated out of land parcel No. South Wanga/Lureko/449 and new title be issued to the applicant for the 2 acres arising therefrom.
9. Whether the 2 acres out of land parcel No. South Wanga/Lureko/449 has been under sugarcane plantation by the applicant contracted to Mumias Sugar Company Limited since 1973 till to date.
10. Whether the 2 acres out of land parcel No. South Wanga/Lureko/449 is identified by Mumias Sugar Co. Limited in its records as plot No. 449A in location south Wanga sub location Lureko 79 Account No. 9565.
11. Whether the respondent secretly commenced succession proceedings No. 27 of 2010 at Mumias Senior Resident Magistrates' Court without involving the applicant of registering the applicant's beneficial or purchaser interest of 2 acres out of land parcel No. South Wanga/Lureko/449.
12. Whether the applicant is entitled to an order of injunction restraining the respondent either by herself, her agents, servants and, or employees from entering, trespassing, alienating, dealing and or interfering with the applicant's peacefully possession and utilization

of two acres out of land parcel No. South Wanga/Lureko/449.

13. Whether the respondent should be ordered to transfer two acres out of land parcel No. South Wanga/Lureko/449 which is in actual possession and use of the applicant, to the applicant and in default thereof the Deputy Registrar of this honourable court be directed to do so on behalf of the respondent.

14. Who should be condemned to bear the costs thereof.

The applicant prays for orders that;

a. A declaration that the applicant having been in actual, exclusive, peaceful, open, continuous and uninterrupted possession, occupation and use of a portion of land measuring 2 acres out of land parcel No. South Wanga/Lureko/449 which is clearly demarcated on the ground with trees from 11th August, 1973 to date, a period of over 12 years, the applicant has acquired title to the said 2 acres of land by virtue of adverse possession as the respondent's title to the said 2 acres of land has been extinguished by operation of law and she holds title in respect to the said 2 acres out of the suit land in trust for the applicant.

b. For an order that land parcel No. South Wanga/Lureko/449 measuring 7.5 acres be sub divided and a portion of 2 acres thereof currently in occupation, possession and utilization of the applicant herein be excised therefrom and a new number be registered in the name of the applicant.

c. That under section 7, 17 and 38 of the Limitation of Actions Act Chapter 22 Laws of Kenya and section 7 (d) of the Land Act 2012, the applicant herein be entitled to be registered as the proprietor of 2 acres currently in his possession and use out of land parcel No. South Wanga/Lureko/449 measuring 7.5 acres.

d. That the respondent herein be ordered to execute all the necessary documents to effect the transfer of title for the 2 acres of land currently in possession of the applicant out of land parcel No. South Wanga/Lureko/449 in favour of the applicant herein, in default whereof the Deputy Registrar of this honourable court be empowered to execute all such documents on behalf of the respondent

e. That the respondent herein either by herself, her agents, servants and or employees be restrained by an order of injunction from entering, trespassing, alienating, dealing and or interfering with the applicant's peaceful possession and occupation of two acres out of land parcel No. South Wanga/Lureko/449.

f. That the respondent be condemned to bear the costs hereof.

The plaintiff testified that he bought 2 acres of land from land parcel No. South Wanga/Lureko/449 from Wesonga Wanzala in 1973 and planted sugarcane. PEx2 is the sale agreement and translation. The seller never transferred title to him and he obtained a letter from the Chief to be included in the succession PEx4. PW2 the area chief then confirmed writing the said letter. PW3 who works for Mumias sugar confirmed that the plaintiff had a file with them till 2011.

The defendant Sofia Nasiche Wesonga the administrator of the estate of the late Wesonga Wanzala testified that the applicant never bought the land but only leased the land from the deceased. That there was a family meeting held on 16th February, 2012 in which Juma Kulundu Mulisya attended in which meeting the applicant was told to stop using the land as his stay had expired DEx1 is copy of the minutes of the said meeting held on 16th February, 2012. That the applicant insisted with his encroachment even after the meeting and this made her file an application at Busia High Court in which she sought injunctive orders vide Busia High Court Civil Suit No. 141/13. That the applicant is no longer in physical, occupation, possession and or use of 2 acres and or any other portion out of the suit land and that he ought to remove the caution which he has registered on the suit land. That since the applicant was using the portion of land with the permission of the registered proprietor, the principle of adverse possession does not and cannot arise. That the applicant last had a sugarcane farming contract on a portion of the suit land in 2002 and since then he was told to vacate the land which he did at the expiration of the cane contract and thus the applicant has no business or right of claiming title over a portion of land that he is not physical occupation and possession of the same. That she is an administrator of the estate of the late Wesonga Wanzala which estate has to distribute to the beneficiaries of the estate upon settlement of the liabilities and the applicant is not a liability to the estate of the deceased as he alleges.

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 defendant is the proprietor of parcel of land known South Wanga/Lureko/449 (PEx1). 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 Sergon 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 he bought 2 acres of land from land parcel No. S Wanga/Lureko/449 from Wesonga Wanzala in 1973 and planted sugarcane. PEx2 is the sale agreement and translation. The seller never transferred title to him and he obtained a letter from the Chief to be included in the succession PEx4. PW2 the area chief then confirmed writing the said letter. PW3 who works for Mumias Sugar Company confirmed that the plaintiff had a file with them until 2011. The defendant Sofia Nasiche Wesonga testified that the applicant never bought the land but only leased the land from the deceased. That there was a family meeting held on 16th February, 2012 in which Juma Kulundu Mulisya attended in which meeting the applicant was told to stop using the land as his stay had expired DEX1 is copy of the minutes of the said meeting held on 16th February, 2012. I have perused the documents adduced as evidence and find that indeed the plaintiff was present at the said meeting of 16th February, 2012. It is the defendant's evidence that she filed an application at Busia High Court in which she sought injunctive orders vide Busia High Court Civil Suit No. 141/13. That the applicant is no longer in physical, occupation, possession and or use of 2 acres and or any other portion out of the suit land. The sugar cane contracts also ended in 2011 as per PW3's evidence. I concur with the defence and the family meeting that the plaintiff was only a licensee hence was allowed to use the land for a period of time. It is surprising that the plaintiff if at all he bought the suit land as claimed failed to pursue transfer of title from 1973. 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 from 1973 as he was a licensee. I find that the plaintiff has failed to establish his case on a balance of probabilities against the defendant and dismiss it with costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE