



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 53 OF 2018

TIMONA KIMARONG KARATASI.....PLAINTIFF

VERSUS

EDWIN JUMA LUMBASI

GORPACHEN KATALI MREFU..... DEFENDANT

JUDGEMENT

This is the application of Timona Kimorong Karatasi who claims to have acquired $\frac{1}{4}$ acre by way of adverse possession out of all that parcel of land known as North Malakisi/West Sasuri/762 for determination of the following issues:-

1. Transfer of $\frac{1}{4}$ acre out of land parcel number North Malakisi/West Sasuri/762 to the applicant for reasons set out in the annexed affidavit of Timona Kimorong Karatasi and on other reasons to be adduced at the hearing of this summons.
2. The legality and validity of the beneficial ownership, use, and adverse possession of $\frac{1}{4}$ acre out of land parcel number North Malakisi/West Sasuri/762 claimed by the applicant.

The plaintiff prays for orders that;

1. That the respondents right over the $\frac{1}{4}$ acre on parcel number North Malakisi/West Sasuri/762 got extinguished by the adverse possession upon the expiry of 12 years when the applicant has been in possession.
2. A declaration that the beneficial ownership and use of the said parcel was legal and appropriate parcel to be transferred to the applicant and also that the respondents do execute the transfer in respect thereof in favour of the applicant and in default thereof the Deputy Registrar to execute the transfer.
3. A declaration that the respondents be permanently barred from taking and/or using the said parcel or any other part thereof.
4. A declaration under section 38 of the Limitation of Actions Act Chapter 22 Laws of Kenya that the applicant be registered as proprietor of $\frac{1}{4}$ acre out of title number North Malakisi/West Sasuri/762.
5. A declaration that the respondents be ordered to honour the terms of the sale agreements entered on various dates between May, 1992 and November, 1993 and/or other relief that the honourable court may deem fit to grant in the circumstances thereof.
6. An order that the respondents be condemned to pay costs of the suit.
7. Further or other relief.

PW1 the plaintiff testified that in 1992 he bought the suit land from Ainea Wamembo as per the sale agreement PEx3 and he paid the purchase price in full. He took possession and is cultivating the land and there is a house there. The said Ainea died in 2009 before transferring the same to him. PW2 was the secretary in the first three agreements and corroborated the plaintiff's evidence. PW3 testified that he was a witness to the sale agreement. It is their evidence that Ainea was unwell and needed money for treatment. The two are neighbors and lived peacefully. PW4 confirmed that he witnessed the sale agreement of 6th November 1993.

DW1 the 1st defendant testified that he is the registered owner of L.R. No. N. Malakisi/W. Sasuri/762 jointly owned by Gorpacheni Katali Mrefu, who is his uncle. That his deceased father was Jackson Lumbasi, who was a brother to Gorpacheni Katali Mrefu. That his deceased grandfather, Ainea Wamembo was never, a party to any land sale agreement.

The 2nd defendant DW2, testified that he is the joint registered owner of LR. No. N. Malakisi/W. Sasuri/762, jointly owned by Edwin Juma Lumbasi who is his nephew. That his deceased father Ainea Wamembo was never a party to any land sale agreement. That the plaintiff is the rightful registered owner of N. Malakisi/W. Sasuri/763. That on 14th October, 2019, when the County Surveyor of County Government of Bungoma visited land parcel numbers N. Malakisi/W. Sasuri/762 and N. Malakisi/W. Sasuri/763. After carrying out the demarcation and the boundary between the two parcels of land he was satisfied with the findings and the Boundary Demarcation Report dated 14th October, 2019, which was done by the County Surveyor of Bungoma County.

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 defendants are the joint proprietors of parcel of land known as North Malakisi/West Sasuri/762. The issue is whether or not they hold 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 he bought ¼ acre of the suit Land Parcel No. North Malakisi/West

Sasuri/762 from from Ainea Wamembo as per the sale agreement PEx3 in 1992 and he paid the purchase price in full by 1993. PW2, 3 & 4 corroborated his evidence. Indeed DW2 the 2nd defendant confirms that the plaintiff has been in occupation of the suit land for 16 years. I find the plaintiff's evidence is consistent and reliable. 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 1992 to 2008. I am satisfied that he bought the suit land and took possession planting trees and cash crops. 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 defendants and I grant the following orders;

1. A declaration that the plaintiff is entitled to a portion of land parcel No. North Malakisi/West Sasuri/762 measuring approximately ¼ acres by virtue of adverse possession.
2. That the defendants as the proprietors of land parcel No. North Malakisi/West Sasuri/762 do transfer ¼ acre to the applicant within the next 90 (ninety) days from the date of this judgement, and in default, the Deputy Registrar do sign all relevant transfer documents in favour of the plaintiff to effect the transfer.
3. No orders as to Costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE