



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT NAKURU
ELC CASE NO. 432 OF 2017

NGENDA INVESTMENT RURAL SACCO LTD.....PLAINTIFF

VERSUS

SURAJ KUNVAR PRATAPSINGH PARMAR.....1ST DEFENDANT

PRAVINSINGH PRATAPSINGH PARMAR (sued as administrators of the estate of

Pravinsingh Prabhatsing Singh Parmar (deceased).....2ND DEFENDANT

AND

PAUL NDEGWA THIGA.....INTENDED INTERESTED PARTY

RULING

1. The intended interested party by the Notice of Motion application dated 20th January 2020 expressed to be brought under Section 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 1 Rule 10(2), Order 40 Rules 1, 2, 3 and 4, Order 51 Rule 1 and 3 of the Civil Procedure Rules 2010 seeks for the following prayers:

1. Spent
2. Spent
3. That the judgement/decree herein be set aside.
4. That the intended interested party be enjoined in the suit.
5. That all proceedings herein be set aside and the intended interested party be allowed to file his defence and or any other pleadings as may be directed or required.
6. Spent
7. That pending the hearing and determination of this suit this Honourable Court be pleased to restrain the plaintiff herein by themselves, their agents, servants and whosoever claiming under them from trespassing, entering, remaining, alienating, interfering and/or dealing in any manner whatsoever with all that parcel of land known as Nakuru Municipality Block 10/63.
8. Costs of this application be provided for.

2. The application is supported on the grounds set out on the body of the application and on the supporting affidavit sworn by the intended interested party on 20th January 2021. The applicant avers that on 24th October 2011 he bought the suit property land parcel No. Nakuru Municipality Block 10/63 from one Ronald Kilele. He stated he was issued with a certificate of lease on 7th October 2020 and a copy of the abstract of title (green card). He further averred that in 2019 the plaintiff began to bring people on the suit property for unknown reasons which prompted him to file ELC CMCC No. E56 of 2020. The applicant averred that he had been in occupation of the suit property since he bought it and further deponed that the sale agreement relied on by the plaintiff/respondent dated 10th July 2002 was not signed by the parties and neither was there any evidence of payment of purchase price.

3. That the applicant/proposed interested party deponed that in ELC E56 OF 2020, the plaintiff herein attached different transfer forms from the ones they have attached in the present matter and that they have indicated they knew the whereabouts of the defendants as they had been communicating with them via email.

4. In response to the application, the plaintiff through its manager Samuel Serem Rono filed a replying affidavit. He deponed that the plaintiff Sacco started in 1998 and was registered as a co-operative under the Societies Act Cap 108 Laws of Kenya with one of its objectives being buying of properties. He stated in 2002, the plaintiff identified plot number Nakuru Municipality Block 10/63 which had a residential house, bought the same and established its offices thereon. The house was also renovated and rented out to other tenants.

5. The plaintiff averred that it had been in occupation of the suit property since the year 2002 and had been receiving rent from its tenants. That the interested party had never occupied the suit property. The plaintiff averred that the plaintiff as per the records held by the Land office had never been registered as owner of the suit property. That the searches done in 2002, 2016 and 2018 indicated the owner of the suit property to be Pravinsingh Prabatsingh Parmar.

6. The chairman of the plaintiff, one Raymond Kipkorir Cheruiyot also filed a replying affidavit in opposition to the interested party's application. He deponed that the plaintiff bought the suit property on 10th July 2002 from Suraj Kunvar Pratapsingh Prabhatsingh Parmar and Pravinsingh Pratapsingh Parmar who were the administrators of the estate of Pratapsingh Prabhatsingh Parmar the registered owner. That they executed transfer documents and the process of transfer took place at the Nakuru Municipal Council Offices where they were paying rates. He reiterated that the plaintiff took possession of the building and rented it out to tenants who have been paying rent to the plaintiff.

7. The plaintiff averred that after they failed to get the vendors to execute fresh transfer forms, they approached this court and sought orders of adverse possession as they had been in adverse possession of the suit land from the time they paid for the land. The court allowed the plaintiff's claim for adverse possession vide its judgment dated 17th December 2020. The plaintiff stated that the title held by the interested party cannot be genuine and the same is under police investigations by the Central Police Station under OB/50/27/10/2020 and that it was also being investigated by the Directorate of Criminal Investigations under inquiry file No. 20/2020.

8. Through a further affidavit sworn by Colonel (RTD) Raymond Kipkorir Cheruiyot the plaintiff reiterated the contents of the replying affidavit earlier filed and attached receipts for security services, insurance policies, reports, rent collection receipts, audit reports, single business permits among other documents to illustrate that the plaintiff had all the time been in occupation and possession of the property.

9. The application was canvassed by way of written submissions. The intended interested party in his submissions submitted that as per the green card, the plaintiffs had never owned the suit property. He submitted that he had in his possession a title deed which showed that the land belonged to him and therefore the court should exercise its discretion and set aside the judgment and grant him an opportunity to be heard. The interested party further submitted that the court should restrain the plaintiff from accessing the suit property and that the application should be allowed with costs.

10. The plaintiff/respondent on the other hand in their submissions, reiterated the contents of their replying and further affidavits and urged the court to dismiss the intended interested party's application.

11. After considering the application and the responses thereto, the issue for determination is whether the court should exercise its discretion in favour of the intended interested party and grant the orders sought in the application.

12. The Intended interested party submitted that he bought the land parcel No. Nakuru Municipality Block 10/63 from Ronald Kilele on 24th October 2011 and was issued with a certificate of lease on 7th October 2020. He stated he had been in occupation of the suit land until 2019 when the plaintiff allegedly began bringing people to the suit property which prompted him to file ELC CMCC No. E56 of 2020.

13. The plaintiff in response submitted that it bought the suit property in 2002 from Suraj Kunvar Pratapsingh and Pravinsingh Pratapsingh and has been in possession and occupation of the suit property since then and has tenants on it who pay rent. The plaintiff submitted that searches done at the land registry in the years 2002, 2016 and 2018 indicated the owner of the suit property to be Pravinsingh Prabatsingh Parmar contrary to the assertions of the intended interested party.

14. Where a party seeks a judgement to be set aside, such party must demonstrate that it has a defence with triable issues. In the case of **Patel v EA Cargo Handling Services Ltd [1974] EA 75** the Court of Appeal stated as follows:-

“The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect, the defence on the merits does not mean, in my view a defence that must succeed, it means as Sheridan J. put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

15. Further, in the case of **Flora Cheronu v Mary Njihia & 7 Others; Daniel Nyaga Munyambo & 7 Others (Applicants) [2021] eKLR** the court held as follows:

25. This is a court of justice and must consider whether there are other grounds upon which the judgment may be set aside. The presence of a defence on the merits is essential and the applicants have not exhibited what they deem as their appropriate defence to the suit. They did not file any draft defence at all... *The applicants have failed to demonstrate that they intend to be enjoined in the suit for purposes of being parties to the suit to enable them file their defence if any...*

16. In the case of **Gulf Fabricators vs County Government of Siaya [2020] eKLR** the court relied on the judgement of the court of appeal in

the case of **Philip Kiptoo Chemwolo & Mumias Sugar Co. Ltd Vs Augustine Kubende (1982-1988) KAR 1036** which cited with approval the English case of **Evans V Bartam [1993] AC 473**:

“The discretion is in terms unconditional. The courts however have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly, there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has prima facie defence.”

17. Since no draft defence is attached to the intended interested party’s application, the court can only decipher what its case is from the affidavit in support of the application. He claims he bought the suit property in 2011 from one Richard Kilele and was registered as the owner as shown by the annexed copy of green card. Interestingly, a search done on the suit property on 28th June 2016 showed that the suit property was registered in the name of the original owner Paratabsingh Prabatsing Parmar. This is the basis on which the court granted the plaintiff’s claim of adverse possession. The genuineness if the abstract of title exhibited by the interested party is questionable.

18. In the present matter the court at the time it rendered its judgment on 17th December 2020 was satisfied that the plaintiff had been in actual and physical possession of the suit property from July 2002 when it purchased the property. The possession was continuous and uninterrupted and was therefore adverse to the interest of the registered owner. Even if the proposed interested party purchased the suit property in October 2011, which is disputed, such purchase would have been subject to the plaintiff’s accruing rights of an adverse possessor. The plaintiff’s rights as an adverse possessor crystallized in July 2014 after the expiry of twelve years and the plaintiff was henceforth entitled to be declared as owner of the suit property on application.

19. There is no evidence that the proposed intended interested party ever occupied and/or possessed the suit property as he alleges. The plaintiff’s rights and interest over the suit property were adjudicated vide the judgment rendered on 17th December 2020 and any claim or interest the proposed interested party may have over the suit property may not be conveniently adjudicated in the instant suit which the court has already determined. The plaintiff’s claim was attached to and ran with the land. It was one of being an adverse possessor against the registered proprietor. Whether it was the defendants or the proposed interested party against whom time ran, their titles would stand extinguished once the doctrine of adverse possession was held to be applicable.

20. On the basis of the evidence adduced by way of documents and the annexures in support of the present application there is clear evidence by way of searches dated 28th June 2016 and 27th July 2018 that the registered owner of land parcel **Nakuru Municipality Block10/63** was Pratapsingh Prabatsingh Parmar (deceased). These documents evidence ownership of the property as at the time they were made and under section 26 of the Land Registration Act, 2012 constitute prima facie evidence of who the registered proprietor of the property was. It is not understandable how the Mr. Richard Kilele who the interested party claims to have purchased the property from came to own the property. The implication is that there was no transfer to Mr. Kilele or the interested party otherwise their names would have been appearing in the register at the time the official searches were carried out.

21. My view is that the interested party would have no answer to the plaintiff’s claim for adverse possession of the suit property and no purpose would be served by enjoining him to the proceedings. The plaintiff’s claim was laid against the person who as per the records held by the Lands Office was shown to be the registered proprietor of the land. That was as it should be when a claim is predicated under the doctrine of adverse possession. Even though the interested party as contended he occupied the property since 2011 when he claims to have purchased the same he has not tendered any evidence to prove he was in possession at any time. The plaintiffs have exhibited documents that show they have been paying rates, receiving rents from tenants and business permits for their offices. The plaintiff’s possession was continuous and uninterrupted and accordingly the judgment in their favour on account of adverse possession was merited.

22. The upshot is that I find no merit in the intended interested party’s Notice of Motion dated 20th January 2020. The same is hereby dismissed with costs to the plaintiff.

23. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 23RD DAY OF NOVEMBER 2021

J M MUTUNGI

JUDGE