



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 87 OF 2016

ALFRED LIGOVELE ALUVUSI.....PLAINTIFF

VERSUS

MORRIS LING'ONDU MADEGWA.....DEFENDANT

JUDGEMENT

This is the application of one Alfred Ligovele Amuguzi who claims that he is entitled to the entire parcel of land measuring approximately 1.4 Ha, namely, L.R. No. Idakho/Shitoli/293 registered in the name of the said Morris Ling' Ondu Madegwa;

By virtue of having been in continuous and uninterrupted possession, occupation and open use of the said entire parcel of land for a period in excess of 12 years and in a peaceful manner for determination of the following questions;

1. If the respondent is the registered proprietor of L.R. No. Idakho/Shitoli/293;
2. If the applicant has been in possession and occupation of the said entire parcel of land for a period in excess of 12 years in an open, peaceful and uninterrupted manner;
3. If such possession and occupation of the entire parcel of land has been adverse to the proprietary interests of the respondent;
4. When did time necessary to constitute adverse possession in favour of the applicant begin to run;
5. If having been in possession and occupation of the parcel of land in an open, peaceful and uninterrupted manner for a period in excess of 12 years, whether the applicant has acquired ownership of the same through prescription;
6. If the proprietorship of the respondent with respect to the parcel of land is subject to the prescriptive rights of the applicant.

PWI, the plaintiff testified that the suit land belongs to the defendant as per the search certificate dated 2016 (PEX.1). He bought the same from the defendant and produced three sale agreements (PEX 2). He took possession in 1979 and he grazes his cattle there. The defendant was served but failed to attend court or file any documents.

This court has carefully considered the evidence and submissions therein. The defendant was served but failed to attend court to adduce oral evidence or file any response. 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 registered owner of land parcel No. Idakho/Shitoli/293 as at 30th March 2016 is the 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 Seron 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 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 plaintiff states that, he bought the same form the defendant and produced three sale agreements PEx2. He took possession in 1979 and he grazes his cattle there. He has not put up any structure there. I have perused the sale agreements in court and they refer to Land parcel No. 853 situated in Shitoli sub location Idakho location. This is different from the suit parcel in this case which is Idakho/Shitoli/293. For these reasons, I find that the plaintiff has not established on a balance of probabilities that he has been in exclusive, continuous and uninterrupted possession, occupation and open use of the said suit land for a period in excess of 12 years. I find that the plaintiff has failed to establish his case on a balance of probabilities against the defendant and I dismiss it with no orders as to costs as the same was not defended.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 20TH FEBRUARY 2020.

N.A. MATHEKA

JUDGE