



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 215 OF 2014

SOLOMON LUTOME CALEB

EZEKIEL MUTEVESI ANYAMA.....PLAINTIFFS

VERSUS

YOHANA WALUVENGO.....DEFENDANT

JUDGEMENT

The plaintiffs aver that they are the registered proprietors of land parcel No. S/Kabras/Samitsi/1536 and 1535 respectively and as the registered proprietors they have absolute rights of ownership over the said pieces of land. The defendant without any colour of right has trespassed into the said parcel and is committing acts of waste thereon. The plaintiffs' prayers against the defendants is for an order of eviction of the defendant from the aforesaid land parcels.

The defendant denies the fact of registration of the plaintiffs as absolute proprietors of land parcel No. South Kabras/Samitsi/1536 and 1535 the suit parcels respectively. The defendant also denies that he has trespassed onto the suit parcels. The defendant states that the purported registration of the plaintiffs as absolute proprietors of the suit parcels is null and void since the defendant has been in occupation of the suit parcels peacefully, openly and continuously since 2001 to date and hence has acquired adverse possession of the suit parcels. The defendant states that the plaintiffs' father Caleb Kubara Wanyama entered into a written sale of land agreement with the defendant's deceased father Yakobo Walubengo Wanyama on 28th March, 2001 whereby the defendant's father purchased a portion of 2 acres out of the original land parcel No. south Kabras/Samitsi/801. The defendant further states that his said deceased father immediately took possession of the 2 acres where he built a house and resided with his family including the defendant and they have been cultivating and using the said two acres to date. The defendant further states that after the plaintiffs' father sold the two acres to the defendant's family the plaintiffs' father and other family members including the plaintiff's herein moved out of the said land and went to live in Chimoi where they have purchased another piece of land from the proceeds of the said sale agreement. The defendant further states that his father died on 17th March, 2002 without having the 2 acres transferred to him and was buried within the 2 acres aforesaid. In 2013 the defendant discovered that the original parcel No. South Kabras/Samitsi/801 measuring 7 acres had been secretly subdivided by the plaintiffs' said father into three portions namely south Kabras/Samitsi/1534, 1535 and 1536 respectively whereby land parcel No. S. Kabras/Samitsi/1535 and 1536 were purportedly registered in the name of the 2nd and 1st plaintiff herein respectively. The defendant states the portion given to the plaintiffs measures approximately 2 acres and is the same portion that he resides on and has been cultivating since 2001 to date. In the premises the defendant states that the plaintiffs' rights if any over the suit parcel has been extinguished by the rights of the defendant over the same land which he acquired by adverse possession and as such the registration of the plaintiffs should be cancelled and the defendant registered as the absolute proprietor of the suit parcels by virtue of the doctrine of adverse possession. The defendant counterclaims as against the plaintiffs jointly and severally for an order that:-

- (a) The registration of the plaintiffs in respect of the suit parcels aforementioned be cancelled and the defendant be registered as the absolute proprietor of the said suit parcel by virtue of having obtained adverse possession thereof.
- (b) The plaintiffs be ordered to execute all the relevant documents to effect the transfer and registration of the suit parcels in the name of the defendant within 14 days of the order and in default the Deputy Registrar of this court to execute the said documents.
- (c) Costs of this counterclaim be borne by the plaintiffs.

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 1st and 2nd plaintiffs are the absolute proprietors of land parcel No. South Kabras/Samitsi/1536 and 1535 the suit parcels. The first issue for determination is whether or not the defendant is a trespasser. The second issue is whether or not they hold good title by virtue of the defendant’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 2nd plaintiff states that, testified that his brother and him are the registered proprietors of land parcel No. S/Kabras/Samitsi/1536 and 1535. That the defendant has trespassed. That he is aware that his father had a sale agreement with one Walubengo who purchased 2 acres of the said land in 2001. They do not live there but he is aware the defendant resides on the suit land. PW2 a neighbour testified that the plaintiffs do not reside on the suit land as they moved away in 1995. The defendant has resided there for over 12 years. DW1, the defendant testified that his father bought the suit land in 2001 and they took possession immediately. He produced the sale agreement DEx2. His father died in 2002 and was buried there. The entire suit parcel was 7 acres and his father bought 2 acres. I believe the defendant’s testimony. Indeed the 2nd plaintiff admits that the sale agreement exists. The plaintiffs have failed to prove their case on a balance of probabilities and I dismiss it. For these reasons, I find that the defendant 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. I find that the defendant has established that his possession with his family 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 defendant has established his case in the counter claim on a balance of probabilities against the plaintiffs and I grant the following orders;

1. The registration of the plaintiffs in respect of the suit parcels S/Kabras/Samitsi/1536 and 1535 be cancelled and the defendant be registered as the absolute proprietor of 2 acres of the said suit parcel by virtue of having obtained adverse possession thereof.

2. The plaintiffs be ordered to execute all the relevant documents to effect the transfer and registration of 2 acres of the suit parcels in the name of the defendant within 30 days of the order and in default the Deputy Registrar of this court to execute the said documents.

3. No orders as to Costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE