



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 2 OF 2019

ALI JUMA SONGITO PLAINTIFF

VERSUS

SHEBAN OSUNDWA WESONGA.....DEFENDANT

JUDGEMENT

This is the application of Ali Juma Songito, who claims to be in possession of land parcel number N/Wanga/Kholera/2016 since 15th of March, 1985 to date for the determination of the following questions;

- (a) Whether the said Juma Songito has held land parcel number N/Wanga/Kholera/2016 since 1985 openly and without interruption for a period of 12 years.
- (b) Whether title to land parcel N/Wanga/Kholera/2016 issued to Sheban Osundwa should be cancelled and Mr. Juma Songito be registered as proprietor of 2 acres thereof.
- (c) Whether title number N/Wanga/2016 can be traced to land parcel number N/Wanga/Kholera/517.
- (d) Whether title to that portion now known N/Wanga/Kholera/517, measuring 2 acres or there about got extinguished in the year 1995 before Sheban Osundwa got title and that the late Juma Lutta had no title to transfer to Sheban Osundwa.
- (e) Whether land parcel number N/Wanga/Kholera/2016 can be subdivided and 2 acres be transferred to Ali Songito.
- (f) Who pays costs in this case.

The defendant submitted that, he is the son to Suleiman Juma (deceased), one of the only two children to Juma Lutta (deceased), the other being his aunt Ms. Florence Terenji. That he was the registered proprietor of land parcel No. N/Wanga/Kholera/2016 which was initially part of N/Wanga/Kholera/1997 and has since been subdivided to N/Wanga/Kholera/2083, N/Wanga/Kholera/2084, N/Wanga/Kholera/2088, N/Wanga/Kholera/2089 and N/Wanga/Kholera/2072. That his late grandfather Juma Luta Osundwa was the registered owner of land parcel No. N/Wanga/Kholera/1002. That land parcel No. N/Wanga/Kholera/1002 was initially part of land parcel No. N/Wanga/Kholera/517 also registered in his late grandfather Juma Luta Osundwa's name. That land parcel No. N/Wanga/Kholera/517 was subsequently subdivided into parcel No. N/Wanga/Kholera/1002 and parcel No. N/Wanga/Kholera/1003 in 1983, the latter having been bought from his grandfather by Mr. Vincent Amaya. That his late grandfather had a nephew known as Ali Juma Songito who was a son to his sister married in Bulimbo within Kakamega County, in the Republic of Kenya. That sometime in 1984, Ali Juma Songito together with his mother were forced by Ali Juma Songito's elder brother called Onjala to flee their Bulimbo home and seek refuge at his late grandfather Juma Luta Osundwa's home. That his late grandfather offered Ali Juma Songito two land parcels cumulatively measuring 100 ft x 100ft on his land which at the time still existed as parcel No. N/Wanga/Kholera/517, but later became land parcel No. N/Wanga/Kholera/1002, as a temporary settlement place. That contrary to his grandfather's expectation, Ali Juma Songito never left the land thereafter. That sometime in 1999, his late grandfather summoned his father Suleiman Juma, his aunt Florence Terenji, Ali Juma Songito and himself and pronounced his intention to give the 100 ft x 100ft plot to Ali Juma Songito absolutely, and to have the rest of land parcel No. N/Wanga/Kholera/1002 registered in his name in trust for the beneficiaries as he was ageing while his father ailing. That Ali Juma Songito objected to the pronouncement by his grandfather and demanded to be allocated 0.5 acres. That because of the unending squabbles over land with Ali Juma Songito, upon the demise of his grandfather in 2000, he was forced to relocate to Shibale within Kakamega County for his safety as Ali Juma Songito had even issued death threats. That he frequently visits the land where he undertakes farming, as well as to check on his mother and other family members who still stay on the land. That sometime in 2012, Ali Juma Songito cut down trees on the land without his authority and the matter was reported to the area Assistant Chief who handled the matter in conjunction with the Chief and the area forestry office. That on or about 14th February, 2013 while overseeing ploughing on the land in the company of Mr. Saidi Odongo, he was assaulted by Ali Juma Songito, his wife, 3 daughters and 2 sons for declining to give them 0.5 acres of land he had demanded.

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 registered owner of land parcel No. N/Wanga/Kholera/2083 is the defendant. The issue is whether or not they 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 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 Rutherford & 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 suit land from Juma Luta Osundwa in 1985. He produced the agreement and the green card. He took possession in 1985 and it was subdivided in 2006. It is now in the name of the defendant. He has put up 4 permanent houses and 3 semi permanent houses. He denies being given 100feet by 100feet as claimed by the defendant. He maintains he is using N/Wanga/Kholera/2016 which has now been subdivide to No. N/Wanga/Kholera/2083 and his land is two acres. PW2 and PW3 corroborated the plaintiff's evidence. DW1 stated that the agreement produced by the plaintiff is a forgery. He confirms that parcel No. N/Wanga/Kholera/2083 is a subdivision of parcel No. N/Wanga/Kholera/2016 and belongs to him. The plaintiff resides on a portion of only half an acre and not 2 acres. He inherited the same from his grandfather and lives elsewhere. I have perused the said sale agreement dated 1985 and it is clear that the size of land being sold to the plaintiff was 2 acres. It is not in dispute that the plaintiff has been in occupation ever since and the dispute seems to be the size of the land. I find that the agreement is valid and not a forgery. For these reasons, 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. I find that the plaintiff 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 plaintiff has established his case on a balance of probabilities against the defendant and I grant the following orders;

1. Declaration that the respondent holds in trust for the plaintiff/ applicant for portion measuring 2 acres of land parcel No. N/Wanga/Kholera/2083 the sub divisions of land parcel N/Wanga/Kholera/2016.
2. That the plaintiff/applicant be declared the owner portion measuring 2 acres of land parcel No. N/Wanga/Kholera/2083 sub divisions of land parcel N/Wanga/Kholera/2016 and which he occupies and to which they are entitled to by virtue of adverse possession and which the defendant/respondent be ordered to transfer the said suit land to the plaintiff/applicant within the next 30 days from the date of this judgement and in default the Deputy Registrar to sign the transfer documents.
3. No orders as to Costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 19TH FEBRUARY 2020.

N.A. MATHEKA

JUDGE