



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 17 OF 2017

BERNADETTA SHITUKAU.....PLAINTIFF

VERSUS

INGATIUS KWAMA.....DEFENDANT

JUDGEMENT

This the application of Bernadetta Shitukhu who claims Land Parcel No. Isukha/Shirere/831 measuring approximately 2 acres or thereabouts, by virtue of adverse possession and trust for the determination of the following questions;

- (a) Whether the applicant is entitled to 2 acres of land parcel No. or thereabout by virtue of adverse possession and trust, or,
- (b) Whether the applicant should be registered as proprietor of 2 acres out of land parcel No. Isukha/Shirere/831.
- (c) Whether the registration of Ignatius Kwama as the sole proprietor of land parcel No. Isukha/Shirere/831 should be cancelled and the respondent being the administrator of the estate do transfer 2 acres out of the said land to the applicant, or
- (d) Whether one Raphael Kwama (deceased) held part of the said Land parcel No. Isukha/Shirere/831 in trust for the applicant.
- (e) Whether Raphael Kwama (deceased) proprietary rights over 2 acres thereof are extinct by virtue of effluxion of time.

And for orders that;

- (a) A declaration that the applicant is entitled to 2 acres or thereabout out of land parcel No. Isukha/Shirere/831 by virtue of adverse possession.
- (b) A declaration that the applicant should be registered as the sole proprietor of 2 acres or thereabouts out of land parcel No. Isukha/Shirere/831 instead of the respondent.
- (c) A declaration that Raphael Kwama's registration as the sole proprietor of land parcel No. Isukha/Shirere/831 be cancelled and the respondent being the administrator by transmission do transfer 2 acres out of the said land to the applicant, and in default, the executive officer of this honourable court do sign all relevant transfer documents in favour of the applicant to effect the transfer.
- (d) A declaration that the respondent's father and consequently the respondent upon expiry of 12 years held the said land parcel No. Isukha/Shirere/831 in trust for the applicant.
- (e) A declaration that upon expiry of 12 years Raphael Kwama (deceased) and consequently Ignatius Kwama's interest in 2 acres out of land parcel No. Isukha/Shirere/831 got extinct.
- (f) An order under section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya, that the applicant be registered as the proprietor of 2 acres out of land parcel No. Isukha/Shirere/831 instead of the respondent.
- (g) An order for costs.

That defendant submitted that, though he is the administrator of the estate of his deceased father which comprises of parcel of land number Isukha/Shirere/831, he is not registered as the sole proprietor thereof as alleged by the applicant/plaintiff since the process of registration was hindered by the encumbrances placed on the said title by the applicant herein. That the suit parcel of land was transferred into the name of his deceased father during the lifetime of his grandfather and as such the same is not ancestral land. That the suit land having been transferred in

the name of his father way back in 1981, he had no obligation to the applicant over the same and such no trust relationship existed in respect of the suit parcel of land as alleged by the applicant. That though he has allowed the applicant to reside with him on the suit parcel of land as his aunt; that does not give her an olive branch to start claiming ownership of his inheritance which action is aimed at disinheriting him and other dependants of his deceased father's estate who have every right to our deceased father's property. That she raised her objection in the succession proceedings but the same was dismissed for lack of merit and as such she cannot revive her claim in this suit in the manner she has instigated the same. That having allowed the applicant to reside with them on their father's property which she was only limited to utilize 0.50Ha of the said land on humanitarian grounds which offer was reiterated in the succession cause referred to above on grounds that she was not to dispose off the same. However, it appears that she is now marred with greed to demand more land with a sole purpose of disposing the same as demonstrated above.

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. Isukha/Shirere/831 is Raphael Kwama Shituku now deceased and the administrator of his estate 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 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, she was born on the suit land in 1966 and has lived there ever since. The land was registered in her brother's name in trust for her as she was 15 years when her father died. PW2 her sister corroborated the plaintiff's evidence. The plaintiff used to live in their father's house but when it collapsed she put up her own. PW3 and PW4 also confirm that the plaintiff lives on that land. DW1 states that he does not know how the plaintiff stated living on the suit land and that she only uses half an acre and that is what she should be given by the court. I believe the plaintiff. I find that the plaintiff has been in exclusive, continuous and uninterrupted possession, occupation and open use of the said portions of land for a period in excess of 12 years. The plaintiff was never married and never left her father's home from 1966. I find that the plaintiff has established that her 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 her case on a balance of probabilities against the defendant and I grant the following orders;

1. Declaration that the defendant/respondent holds in trust for the plaintiff/applicant a portion measuring 2 acres of land parcel number Isukha/Shirere/831.

2. That the plaintiff/applicant be declared the owner of a portion measuring 2 acres of Isukha/Shirere/831 and which she occupies and to which she is entitled to by virtue of adverse possession and which the defendants 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