



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 182 OF 2016

DISMAS MAYENDE MZUNGU

NAOMI N. KHAROYA.....PLAINTIFFS

VERSUS

JOSEPH KAULA WANGWE

WILBERFORCE NAWENO KAULA

NICHOLAS TEKERA KAULA.....DEFENDANTS

JUDGEMENT

This is the application of Dismas Mayende Mzungu and Naomi N. Kharoya who claim that they are entitled to the whole of L.R. No. Bunyala/Sidikho/192 (estate) registered in the name of the late Kaula Wangwe (deceased) by virtue of having been in exclusive, continuous and uninterrupted possession, occupation and open use of the entire estate for a period in excess of 12 years and in a peaceful manner for determination of the following questions;

1. If the deceased is/was the registered proprietor of L.R. No. Bunyala/Sidikho/192;
2. If the 1st respondent is the administrator of the estate of the deceased.
3. If on the 29th day of April, 2015 the estate of the deceased, to wit, L.R. No. Bunyala/Sidikho/192 was distributed amongst the respondents by transmission.
4. If the applicants have had exclusive use of the estate in an open, peaceful and uninterrupted manner for a period in excess of 12 years.
5. If the exclusive use of the estate by the applicants in an open, peaceful and uninterrupted manner for a period in excess of 12 years has been adverse to the proprietary interests of the 1st respondent as the legal representative of the estate of the deceased and/or the respondents generally.
6. When did time necessary to constitute adverse possession in favour of the applicants begin to run;
7. If having had the exclusive use of the estate as outlined above, the applicants have acquired ownership of the same through prescription.
8. If the distribution of the estate through transmission to the respondents is subject to the prescriptive rights of the applicants.

That the defendants/ respondents aver that they are the sons of the deceased Kaula Wangwe. That the deceased died intestate hence they initiated the succession cause 135 of 1993 as they are entitled to the deceased estate by virtue of being heirs by the help of their neighbor who is the 1st plaintiff/applicant and placed him as a guarantor in the succession cause. That the 1st plaintiff/applicant made them append signatures to the succession forms and promised to file the cause and have copies of the same supplied to him after filing and never kept his word to date. That the 1st plaintiff/applicant took advantage of their illiteracy and as they are merely lay people with little or no knowledge of the procedures of this honourable court. That the 1st plaintiff/applicant went ahead to acquire a title deed from the lands office Kakamega

without their consent.

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 owners of land parcel No. Bunyala/Sidikho/192 are the defendants as per the confirmation of grant dated 10th July, 2015. 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 he bought the suit land from the defendants in 1993 and took possession. He produced the sale agreement and the payment acknowledgements PEx 3 and PEx 4. The 1st defendant is the administrators of the estate of one Kaula Wangwe who was the proprietor of the suit land at the material time. In 2014 he was informed that the title is a forgery and he surrendered the same to the Land Registrar. Confirmation of grant was done in 2015 (PEX. 9). DW1 the 1st defendant stated that they never sold the suit land and that the plaintiff evicted them. DW2 the 2nd defendant testified that the plaintiff bought land from their neighbour and not them. They asked him to undertake succession proceedings for them and he evicted them. DW3 corroborated the 1st and 2nd defendants'

evidence. I have perused the said sale agreement dated 1993 and it is clear that all the defendants participated and signed the same. It is not in dispute that the plaintiff has been in occupation ever since, the defendants claim they were evicted. I find that the agreement is valid and not a forgery. I find that the defendants were paid the purchase price in full. It was only in 2014 that the plaintiff was summoned by the police over the said land. I am satisfied from the evidence adduced before me that the defendants willingly sold the suit land to the plaintiffs and gave him possession. They later changed their minds and now want to benefit from the purchase price paid and also keep the land. For these reasons, I find that the plaintiffs have 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 1st 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 plaintiffs have established his case on a balance of probabilities against the defendants and I grant the following orders;

1. Declaration that the defendants holds in trust for the plaintiffs'/ applicants land parcel No. Bunyala/Sidikho/192.
2. That the plaintiffs/applicants be declared the owner of land parcel No. Bunyala/Sidikho/192 which they occupy and to which they are entitled to by virtue of adverse possession and which the defendants/respondents be ordered to transfer the said suit land to the plaintiffs/applicants 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