



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 3 OF 2019

ENOCK LIBOSI MUGINGWA.....PLAINTIFF

VERSUS

FRANCIS AMBUYA

ISAAC AMBOYA.....DEFENDANTS

JUDGEMENT

This is the application of Enock Liboso Muringwa who claims to be in possession of land parcel number Butso/so/Shikoti/17881 since the year 2002 to date for the determination of the following questions.

- (i) Whether the said Enock Liboso Muringwa has held land parcel number Butso/so/Shikoti/17881 for a period exceeding 12 years.
- (ii) Whether prior to 20/6/2014, land parcel number Butso/so/Shikoti/17881 was part of land parcel number Butso/so/Shikoti/4296 and the said Enock Liboso was using it exclusively up to the time of the sub division to date.
- (iii) Whether the 1st respondent's title to that portion of land parcel number Butso/so/Shikoti/4296 which came to be known as Butso/so/Shikoti/17881 got extinguished by the year 2014 upon Mr. Enock Liboso Muringwa using it peacefully, continuously and without interruption for a period of 12 years.
- (iv) Whether therefore, Mr. Francis Ambunya Yohanna had no good title to pass to Isaac Kinyanjui Ambunya on 1/8/2016 as the title got extinguished in the year 2014.
- (v) Whether the court can cancel Mr. Isaac Kinyanjui Ambunya's registration as proprietor of land parcel number Butso/so/Shikoti/17881 and order that Enock Liboso Muringwa can be registered as proprietor in his place.
- (vi) Whether the applicant can be paid costs of this case.

This application is based on the ground that land parcel number Butso/so/Shikoti/17881 is a sub-division of land parcel number Butso/so/Shikoti/4296 which the applicant bought on 9th May, 2002 and has since used openly and continuously till to date a period of 15 years and on the sworn affidavit of Enock Liboso Muringwa. The plaintiff produced the sale agreement as an exhibit.

This court has carefully considered the evidence and submissions therein. The defendants were 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 number Butso/17881 which is a sub-division of land parcel number Butso/4296 is the 2nd 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, land parcel number Butso/17881 is a sub-division of land parcel number Butso/4296 which the applicant bought on 9th May, 2002 and took possession. In 2017 he discovered it had been transferred to the 2nd defendant. Minutes of a baraza held on 16th July 2017, the 1st defendant agrees to transfer the suit land to the plaintiff (PEx7). The plaintiff’s evidence has not been challenged. For these reasons, 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. I find that the plaintiff has established that his 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 his case on a balance of probabilities against the defendants and I grant the following orders;

1. Declaration that the 2nd defendant holds in trust for the plaintiff land parcel number Butso/17881 being the sub-division of land parcel number Butso/4296.
2. That the plaintiff/applicant be declared the owner land parcel number Butso/17881 the sub-division of land parcel number Butso/4296 and to which he is entitled to by virtue of adverse possession and which the defendants/respondents 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 18TH FEBRUARY 2020.

N.A. MATHEKA

JUDGE