



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 48 OF 2012

ELIZABETH SAVALA.....PLAINTIFF

VERSUS

HEZEKIAH KIRAH LIYOSI

JAMES KHASHAMBA.....DEFENDANTS

JUDGEMENT

This is the application of Elizabeth Savala who claims to be entitled to registration as proprietor of land parcel Nyang'ori/Banja/1039 through adverse possession and issue thereof of title deed in her name for determination of the following questions that:-

1. Whether the 1st defendant sold the portion of land which later was registered as Nyang'ori/Banja/1039 to the plaintiff and her husband and if so whether it was in the year 1972.
2. Whether the plaintiff took possession of the sold portion and if so whether she so took possession in 1972.
3. Whether the plaintiff has been in continuous and uninterrupted possession, use and occupation of the suit land and if so whether the period has run from the year 1972.
4. Whether the sale agreement the 1st defendant made with the plaintiff and or her late husband is valid to secure the transfer of title of suit land to the plaintiff.
5. Whether if the sale agreement has become invalid the invalidity affects the plaintiff's right to claim title to the suit land through adverse possession.
6. Whether the subdivision of the original parcel known as Nyang'ori/Banja/1039 in the year 1996 to create the suit land had adverse effect to the plaintiff's claim to title of the resulting portion through adverse possession.
7. Whether after 6th September, 1996 when title known as Nyang'ori/Banja/1039 was created the plaintiff continued in quiet and uninterrupted occupation, possession and use thereof and whether if so such occupation, possession and use remained in place until 17th November, 2011.
8. Whether the 1st defendant sold the suit land to the 2nd defendant and effected transfer and issue of title deed to the latter on 21st October, 2010 and whether as of that date the 1st defendant had any valid title to the suit land to transfer to the 2nd defendant.
9. Whether the 2nd defendant is an innocent purchaser for value of the suit land and whether the 2nd defendant's title to the suit land can be defended and or defeat the plaintiff's claim for title to the suit land.
10. Whether the award of the tribunal in Hamisi District Land Disputes Tribunal Claim No. 33 of 2011 later adopted by Hamisi Senior Principal Magistrate's Court in Misc. Award No. 13 of 2011 which gave the plaintiff the land is a competent order for transfer of suit land to the plaintiff and issue of title deed to her and if not whether the proceeding have any adverse effect to the plaintiff's claim in this summons.
11. Whether the plaintiff has proved her claim to the required standard for title to the suit land through adverse possession.

She prays for orders that:-

(a) A declaration is made that the plaintiff Elizabeth Savala is rightfully entitled to registration as proprietor through adverse possession of land parcel known as Nyang'ori/Banja/1039 and that the registration of the 2nd defendant James Kashamba Aludira thereon as proprietor be cancelled and the title deed earlier issued to him be recalled and cancelled or dispensed with.

(b) Costs incurred be recovered from the defendants.

PW1 testified that her husband bought the suit land in 1972 (PEx 1 is a copy of the sale agreement). They took possession and she has been living there to date. The plaintiff filed before the Vihiga Land Disputes Tribunal Land Case No. 13 of 2011 claiming ownership of the said parcel of land and that she also filed an application at the Principal Magistrate's Court at Hamisi Application Number 13 of 2011 for the adoption of the decision of the said tribunal which had given judgment in her favour. PEX 2 are copies of the proceedings in the tribunal and the decree PEX3.

The 2nd defendant testified that he is registered owner and proprietor of all that parcel of land known as Nyangori/Banja/1039 as per a copy of the title deed DEx1. That on 11th September, 2010, he entered into an agreement of sale of all that parcel of land known as Nyangori/Banja/1039 with the 1st defendant as per a copy of the said agreement attached PEX2. That upon entering into the said agreement, he and the vendor (Hezekiah Kirahi Liyosi) made an application to the Tiriki West Land Control Board and a letter of consent dated 15th September, 2010 was issued for the transfer of the said parcel of land from the vendor's name to his. That he is a purchaser for valuable considerations in an overt market without notice and hence he acquired good title to the said parcel of land.

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 Nyang'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. Nyang'or/Banja/1039 is the 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 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 testified that her husband bought the suit land in 1972 (PEx 1 is a copy of the sale agreement). They took possession and she has been living there to date. The plaintiff filed before the Vihiga Land Disputes Tribunal Land Case No. 13 of 2011 claiming ownership of the said parcel of land and that she also filed an application at the Principal Magistrate's Court at Hamisi Application Number 13 of 2011 for the adoption of the decision of the said tribunal which had given judgment in her favour. PEX 2 are copies of the proceedings in the tribunal and the decree PEX3. This award still stands. I find that the defendant's title cannot stand as the plaintiff was in occupation of the suit land from way back in 1972. The said suit land was not available for sale. It has come out in evidence that the 1st defendant sold the suit land to the 2nd defendant and effected transfer and issue of title deed to the latter on 21st October, 2010. I find that on that date the 1st defendant had no valid title to the suit land to transfer to the 2nd defendant. 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 her possession with her 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 her case on a balance of probabilities against the defendants and I grant the following orders;

1. Declaration that the 2nd defendant/respondent holds in trust for the plaintiff/ applicant for land parcel No. Nyang'ori/Banja/1039.
2. That the plaintiff/applicant be declared the owner of land parcel No. Nyang'ori/Banja/1039 and which she occupies and the boundaries are clearly marked to which she is entitled to by virtue of adverse possession and which the 2nd defendant/respondent be ordered to transfer the said suit land to the plaintiff/applicant within the next 30 (thirty) 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 THIS 30TH DAY OF APRIL 2020

N.A. MATHEKA

JUDGE