



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 511 OF 2014

GRACE ANDESO INDECHE.....PLAINTIFF

VERSUS

WYCLIFFE INDEKWA OMUYONGA

JOSHUA NJEKA MBAYI.....DEFENDANTS

JUDGEMENT

This is the application of Grace Andeso Indeché who claims to be entitled to be registered as proprietor of land parcel known as Kisa/Mushiangubu/1454 by way of adverse possession for determination of the following questions: -

1. Whether the plaintiff was prior to the year 1995 in possession of the parcel of land known as Kisa/Mushiangubu/1287 and if so whether the said occupation was legal, and peaceful.
2. Whether the transfer of the land parcel known as Kisa/Mushiangubu/1287 to the 1st defendant Wycliffe Indekwa Omuyonga from Jackson Indeché Amulabu was a bonaface transfer and whether indeed there was consideration paid by the transferee for the transaction.
3. Whether the transfer of the land parcel known as Kisa/Mushiangubu/1287 to Wycliffe Indekwa Omuyonga was aimed by the transferor to disturb the plaintiff's occupation, use and possession of the said land.
4. Whether after the transfer and or registration of land parcel known as Kisa/Mushiangubu/1287 in the name of the 1st defendant on the 14th November, 1995 the plaintiff continued to enjoy peaceful possession, occupation and use of the same land.
5. Whether by 9th June, 2009 when the 1st defendant subdivided the original land parcel known as Kisa/Mushiangubu/1287 to create new parcels known as Kisa/Mushiangubu/1453 and 1454 the plaintiff had been in continuous and uninterrupted occupation of the original land for twelve years.
6. Whether on expiry of 12 years from 14th November, 1995 the defendant's title to land parcel known as Kisa/Mushiangubu/1287 was extinguished in favour of the plaintiff and if so to what extent.
7. Whether by June 2009 the 1st defendant held any valid title to land parcel known as Kisa/Mushiangubu/1287 to the exclusion of the plaintiff or at all and whether the said 1st defendant had any legal capacity to subdivide the said land parcel to create new parcels known as Kisa/Mushiangubu/1453 and Kisa/Mushiangubu/1454.
8. Whether the new parcels known as Kisa/Mushingubu/1453 and Kisa/Mushiangubu/1454 are legally recognized and whether the proprietors of the said parcels hold proprietary interests therein capable of being protected by the law.
9. Whether the 1st defendant was capable of transferring land parcel known as Kisa/Mushiangubu/1454 to the 2nd defendant by sale or otherwise and whether any such transfer would be recognized by the law.
10. Whether the 1st defendant's dealing with the three suit parcels of land to the exclusion of the plaintiff who was in occupation and a step mother was discriminatory and offended the Constitution of Kenya or not.
11. Whether the plaintiff is entitled to the original land parcel known as Kisa/Mushiangubu/1287 or to both or any of the resulting portions being as Kisa/Mushiangubu/1453 or 1454 and to be registered proprietor and be issued with the deed for the same.

12. Whether if the two portions namely Kisa/Mushiangubu/1453 and Kisa/Mushiangubu/1454 were created without any legal authority the new numbers should be cancelled and or reverted to the original number being Kisa/Mushiangubu/1287.

13. Whether the plaintiff is still in occupation, use and possession.

The plaintiff testified that she has been in continuous and uninterrupted possession occupation and use of land parcel known as Kisa/Mushiangubu/1287 before and after creation of the said title and the said possession, occupation and use subsists to date. That she stayed with the 1st defendant on land parcel No. Kisa/Mushiangubu/1287. By 8th June, 2009 when the 1st defendant purported to subdivide the land parcel known as Kisa/Mushiangubu/1287. To parcels known as Kisa/Mushiangubu/1453 and Kisa/Mushiangubu/1454. The 1st defendant transferred land parcel No. Kisa/Mushiangubu/1454 to the 2nd defendant. The plaintiff prays for the orders of this court that:-

(a) The plaintiff be registered proprietor of land parcel known as Kisa/Mushiangubu/1287 or the subsequent parcels known as Kisa/Mushiangubu/1453 and Kisa/Mushiangubu/1454 through adverse possession.

(b) The plaintiff be issued with title deed(s) for the said parcel(s)

(c) Costs occasioned by the foregoing proceedings be paid by the defendants.

The 1st defendant stated that the plaintiff/applicant is his aunt and she was a wife to his late uncle Jackson Indech Amulabu. The 1st defendant stated that Jackson Indech Amulabu was holding land parcel number Kisa/Mushiangubu/1287 in trust for him since he was a son to his brother Zachariah Omuyonga Amulabu. That when he attained maturity age in the year 1993 his uncle Jackson Indech Amulabu transferred land parcel number Kisa/Mushiangubu/1287 to him. That in the year 1993 when he was given the parcel of land the plaintiff was working in Thika with Kenya Cannery. That in the year 1995 when his uncle Jackson Indech Amulabu died, the plaintiff did not attend the funeral to claim her share of inheritance from her husband. That her husband had land parcel number Kisa/Mushiangubu/1286 which she is entitled to get a share and not from his land parcel number Kisa/Mushiangubu/1287. That the plaintiff/applicant built her house on his land parcel number Kisa/Mushiangubu/1287 because his uncle declined to show her a place to build because she was married elsewhere after they separated with his uncle. That he gave the plaintiff/applicant a place to build on humanitarian grounds because she had no place to build after she retired from her place of employment at Thika Nairobi. That the plaintiff/applicant is taking advantage of his hospitality to claim a share of my parcel of land.

The 2nd defendant in his replying affidavit stated that he bought land parcel number Kisa/Mushiangubu/1454 from Wycliffe Indekwa Omuyonga in the year 2009. That the seller attended all the requisite land control boards and he was issued with a title deed in the year 2009. That when he purchased the parcel of land from the seller, he was working on the portion of land sold to himself. That the plaintiff/ applicant was not working on any portion of land parcel number Kisa/Mushiangubu/1454 and hence cannot claim adverse possession of the same. That he fenced land parcel number Kisa/Mushiangubu/1454 since the time of purchase and the plaintiff has never used any part of the parcel of land. That he has been in possession of land parcel number Kisa/Mushiangubu/1454 since the time of purchase upto date.

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 a finding of fact that in 2009 the 1st defendant subdivided the original land parcel known as Kisa/Mushiangubu/1287 to create new parcels known as Kisa/Mushiangubu/1453 and 1454. It is not in dispute that the registered owner of land parcel No. Kisa/Mushiangubu/1287 was one Jackson Indeché Amulabu now deceased and Kisa/Mushiangubu/1453 is registered in the 2nd defendant's name and Kisa/Mushiangubu/1454 is registered in the 1st defendant's name. The issue is whether or not the defendants hold 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, PW1 the plaintiff testified that Jackson Indeché Amulabu deceased was her husband. That she got married to him in the late 1950s. That the suit land was her matrimonial home and they agreed to settle their nephew the 1st defendant on a portion of the said land around 1993. Unknown to her husband transferred the entire parcel into the 1st defendant's name in 1995. By then she had been in occupation for over 35 years. Her co wives were settled elsewhere. She took the matter to Kwisero Land Disputes tribunal which ruled in her favour. I find that the plaintiff holds beneficial interest on the suit land. I find that she is not there on humanitarian grounds but as a right as this has been her matrimonial home from the 1950s. The 1st defendant is now trying to disinherit the plaintiff. I find that the suit land was not available for sale to the 2nd Defendant as the 1st defendant was holding it in trust for the plaintiff. The 1st defendant was a mere licensee. From the evidence adduced before me I find that the plaintiff indeed occupies a portion of the suit land to date. 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 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 defendants/respondents holds in trust for the plaintiff/ applicant for land parcels known as Kisa/Mushiangubu/1453 and Kisa/Mushiangubu/1454 being subdivisions of land parcel No. Kisa/Mushiangubu/1287.

2. That the plaintiff/applicant be declared the owner of land parcel No. known as Kisa/Mushiangubu/1453 and Kisa/Mushiangubu/1454 being subdivisions of land parcel No. Kisa/Mushiangubu/1287 and which she occupies and the boundaries are clearly marked to which she 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 (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