



REPUBLIC OF KENYA.

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 40 OF 2016

SAIDI OKANYA ATHUMANI *suing as the personal representative & administrator of*

Estate of RUKIA OSMAN OKANYA on his own behalf as beneficiary of the said Estate**PLAINTIFF**

VERSUS

BONFACE NYONGESA O. WAWIRE.....**DEFENDANT**

JUDGEMENT

This is the application of Saidi Okanya Athumani who sues as the beneficiary and administrator of the estate of the deceased Rukia Asman Okanya who claims to be entitled to 0.60 hectares or 1.5 acres out of L.R. No. North Wanga/Matungu/1045 in adverse possession for determination of the following issues;

1. Whether the applicant is a son, a relative or administrator of the estate of the deceased Rukia Asman Okanya.
2. Whether the deceased Rukia Asman Okanya purchased 0.60 hectares or 1.5 acres out of L.R. No. North Wanga/Matungu/1045 on 6th October, 1997.
3. Whether at the time of purchase of L.R. No. North Wanga/Matungu/1045 the same was registered in the name of deceased Joseph Lutebane Wawire.
4. Whether the respondent did succession in respect to the estate of the deceased Joseph Lutebane Wawire and was registered as the proprietor of L.R. No. North Wanga/Matungu/1045 on 24th November, 1999.
5. Whether the deceased Rukia Asman Okanya took possession of and used 0.60 hectares or 1.5 acres out L.R. No. North Wanga/Matungu/1045 on 6th October, 1997 till her death on 29th May, 2005.
6. Whether the applicant has been in possession and continues to use 0.60 hectares or 1.5 acres out of L.R. No. North Wanga/Matungu/1045 till to date.
7. Whether the deceased Rukia Asman Okanya died on 29th May, 2005 before 0.60 hectares or 1.5 acres out of L.R. No. North Wanga/Matungu/1045 was transferred in her name.
8. Whether the deceased Rukia Asman Okanya and the applicant herein have enjoyed open and exclusive use of 0.60 hectares or 1.5 acres out of L.R. No. North Wanga/Matungu/1045 without any interference from the respondent.
9. Whether the exclusive use of 0.60 hectares or 1.5 acres out of L.R. No. North Wanga/Matungu/1045 by the deceased Rukia Asman Okanya and the applicant herein in total exceeds the 12 years of limitation and entitles the estate of the deceased Rukia Asman Okanya throughout the applicant to obtain a title for 0.60 hectares or 1.5 acres out of L.R. No. North Wanga/Matungu/1045.
10. Whether the interest of the respondent herein got extinguished by operation of law on 25th November, 2011 in favour of the deceased Rukia Asman Okanya and her beneficiaries.
11. Whether the respondent should be ordered to transfer 0.60 hectares or 1.5 hectares out of L.R. No. North Wanga/Matungu/1045 which is in actual possession and use of the beneficiary of the deceased Rukia Asman Okanya, to the applicant herein as the administrator of the estate of the deceased Rukia Asman Okanya and in default thereof the executive officer of Mumias Law Court be directed to sign all transfer documents in favour of the applicant as the administrator of the estate of the deceased Rukia Asman Okanya.

12. Who should be condemned to bear costs for this suit.

The applicant seeks the following orders:-

(a) A declaration that the applicant as the administrator and beneficiary of the estate of the deceased Rukia Asman as having been in actual possession, exclusive, peaceful, open, continuous and uninterrupted possession, occupation and use of a portion of land measuring 0.60 hectares or 1.5 acres out of L.R. No. North Wanga/Matungu/1045 which is clearly demarcated on the ground with trees from 6th October, 1997 to date a period of over 12 years, the applicant has acquired title to the said 0.60 hectares or 1.5 acres out of L.R. No. North Wanga/Matungu/1045 by virtue of prescription or adverse possession as the respondent's title to the said 0.60 hectares or 1.5 acres has been extinguished by operation of the law and he holds title in respect to the said 0.60 hectares or 1.5 acres out of L.R. No. North Wanga/Matungu/1045 in trust for the applicant.

(b) For an order that L.R. No. North Wanga/Matungu/1045 measuring 7.9 hectares be sub divided and a portion of 0.60 hectares or 1.5 acres thereof currently in occupation, possession and utilization of the applicant herein be excised therefrom and a new number be registered in the name of the applicant.

(c) That under section 7, 17 and 38 of the Limitation of Actions Act Chapter 22 Laws of Kenya and section 7 (d) of the Land Act 2012, the applicant herein as the administrator and beneficiary of the estate of the deceased Rukia Asman Okanya he is entitled to be registered as the proprietor of 0.60 hectares or 1.5 acres currently in his possession and use out of L.R. No. North Wanga/Matungu/1045 measuring 7.90 hectares.

(d) That the respondent herein be ordered to execute all the necessary documents to effect the transfer for the 0.60 hectares or 1.5 acres land currently in possession of the applicant out of L.R. No. North Wanga/Matungu/1045 in favour of the applicant herein, in default whereof the executive office of Mumias law Court be empowered to execute all such documents on behalf of the respondent.

(e) That the respondent be condemned to bear the costs hereof.

(f) Any other or further relief this honourable court deems fit to grant.

The defendant avers that, prior to the intended sale of a portion out of land parcel number N/Wanga/matungu/1045 measuring approximately 0.60 hectares to one Rukia Asman Okanya (deceased), he had leased the said portion to one Zacheus Barasa Makokha who used his wife's name on the farmer's contract on Grace Nabalayo. Their lease expired in the year 1997 and the sugarcane farming contract was to revert back to his name. That on 6th October, 1997 he met Rukia Asman Okanya the deceased herein with an intention of entering into a land sale agreement with her for the sale of a portion out of land parcel number N/Wanga/Matungu/1045 measuring approximately 0.60 hectares for a consideration of Ksh. 90,000/=. DEx1 is the agreement of sale of land. That Rukia Asman Okanya (deceased) paid the consideration by way of 2 instalments being Ksh. 40,000/= for the first and Ksh. 50,000/= for the second which consideration was paid in full. That it was agreed that she would not interfere with his sugarcane farming and harvest two times before she would start utilizing the said portion. That he undertook the necessary steps to execute transfer of the portion measuring approximately 0.60 hectares to Rukia Asman Okanya (deceased) who had paid the consideration in full. That before the completion of the transfer process, Rukia Asman Okanya (deceased) breached their intended sale agreement by taking over his sugarcane farming fraudulently that one Zacheus Barasa Makokha who used his wife's name on the farmer's contract on Grace Nabalayo was to transfer the contract into his name but Rukia Asman Okanya (deceased) transferred into her name and yet she had no farmer's contract. That he went to the Assistant Chief's office to try and settle the breach of sale agreement with Rukia Asman Okanya (deceased) but he was shocked to learn that the deceased had already lied to the that part of the sugarcane was his yet she had taken over. That due to Rukia Asman Okanya (deceased) not cooperating he decided not to finalize the transfer process and instead converted the sale into a lease agreement to which Rukia Asman Okanya (deceased) did not object to and the deceased was to recover the Ksh. 90,000/= paid as consideration plus interest by planting 7 ratoon that is from 1998-2013. The lease period was to end in 2013 at an average of Ksh. 45,000/= per sugarcane cutting to which Rukia Asman Okanya (deceased) dealt with alone without the help of the applicant or Mohammed Juma Okanya. That Rukia Asman Okanya (deceased) passed on in the year 2005 and Mohammed Juma Okanya and Saidi Okanya Athumani took over the lease of sugarcane farming which was to run till 2013. That the claim by the applicant that Rukia Asman Okanya (deceased) took immediate vacant possession of the 0.60 hectares are not true as the sale was never finalized and the deceased only leased the land.

That Rukia Asman Okanya (deceased) occupied the said portion measuring 0.60 hectares till her demise in 2005 and the applicant has occupied till the end of the lease period and his occupation since the expiration of the lease period is unlawful.

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. North Wanga/Matungu/1045 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 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 he is the administrator of the estate of the deceased Rukia Asman Okanya. That the deceased Rukia Asman Okanya purchased 0.60 hectares or 1.5 acres out of L.R. No. North Wanga/Matungu/1045 on 6th October 1997 and that they have been in occupation ever since. He produced the sale agreement as PEx4. They planted sugar cane and he also produced the sugar cane statements from Mumias Sugar PEx8. PW2 corroborated the plaintiff’s evidence and stated that he was a witness in the sale agreement. PW3 corroborated the plaintiff’s case as well. The defendant admitted in his testimony that they was a sale agreement but he rescinded it as there was a breach of contract and he converted it into a lease agreement. I find the defence unsustainable and I reject it. There is no evidence that the sale agreement was converted to anything else. I find that the plaintiff resides on a portion of 1.5 acres. I find that the deceased Rukia Asman Okanya and the plaintiff/applicant herein have enjoyed open and exclusive use of 1.5 acres out of L.R. No. North Wanga/Matungu/1045 without any interference from the defendant/respondent until 2016 when this matter was filed in court. It is not in dispute that the plaintiff has been in occupation ever since. I find that the sale agreement is valid and not a forgery. 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 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 plaintiff has established his 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 1.5 acres of land parcel No. North Wanga/Matungu/1045.

2. That the plaintiff/applicant be declared the owner of a portion measuring 1.5 acres of land parcel No. North Wanga/Matungu/1045 and which he occupies and to which he is entitled to by virtue of adverse possession and which the 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. The defendant is to bear the Costs.

It is so ordered.

DELIVERED, DATED AND SIGNED THIS 30TH DAY OF APRIL 2020

N.A. MATHEKA

JUDGE