



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 142 OF 2015

SHABAN UKHEVI NDAKWA.....PLAINTIFF

VERSUS

SHABAN BARASA MUCHIRI.....DEFENDANT

JUDGEMENT

Shaban Ukhevi Ndakwa the applicant herein claims to have acquired title to a portion of land from the parcel of land No. Bunyala/Sidikho/398 by adverse possession and for the determination of the following:-

1. Whether the applicant herein has acquired title to a portion of land and or more particularly lower part separated by river of the land title No. Bunyala/Sidikho/398 by adverse possession.
2. Whether the respondent herein holds title to the said portion of land in trust for the applicant.
3. Whether the titles of the respondent herein was long extinguished at the time he purported to transfer the parcels of land known as Bunyala/Sidikho/398.
4. Whether the parcel of land known as Bunyala/Sidikho/398 should be sub-divided into two portions with one of the portions for subsequent transfer to the applicant herein.
5. Whether the respondent should be ordered by this honourable court to transfer the said portion of land from the parcel of land known as Bunyala/Sidikho/398 to the applicant herein.
6. Who should bear the costs and incidental to the proceedings herein.

It is based on the affidavit of Shaban Ukhevi Ndakwa and grounds that the applicant herein has been in actual physical occupation of the suit land continuously openly without force and adverse to the interests of the respondent since 1970 to date. That the respondent's title to the suit land got extinguished between the year 1980.

PW1 the plaintiff testified that he has been in actual physical occupation of a portion of the suit parcel of land Title No. Bunyala/Sidikho/398 since the year 1970 to date whose boundaries are clearly marked on the ground. That the suit land parcel No. Bunyala/Sidikho/398 was his since time memorial and the defendant got registered as the title holder fraudulently. That the portion of land were properly physically field surveyed in 1970s but omitted either intentionally or otherwise thereafter fraudulently mapped to be inclusive to land parcel No. Bunyala/Sidikho/398 which is across the River Namakoye the permanent boundary between the two parcels. That he has occupied used and or developed the suit land exclusively, openly peacefully and continuously for a period over 12 years, and he has acquired title thereto by virtue of adverse possession. He produced the green cards and map as PEX1, 2 and 3. PW2 a neighbour corroborated his evidence.

DW1 testified that the defendant is the proprietor of land parcel No. Bunyala/Sidikho/1622 as per a copy of the title document (DEX1) which was issued to him in the year 2009. That land parcel No. Bunyala/Sidikho/1622 is a sub-division of land parcel No. Bunyala/Sidikho/398 and at no time has the plaintiff been entitled to it. That the said land is separated from plaintiff's father's land L.R. No. Bunyala/Sidikho/696 by a stream and the applicant claim on the suit land is misplaced. That the applicant is the son of Johnstone Misiko, the proprietor of land parcel No. Bunyala/Sidikho/696. That the said Johnstone Misiko is still alive and he has indeed given the applicant (his son) land out of land parcel No. Bunyala/Sidikho/696. That the applicant is driven by greed in bringing this suit as a similar suit being Kakamega HCCC No. 115 of 1999 (OS) was filed by his father Johnstone Misiko against the respondent herein claiming adverse possession of L.R. Bunyala/Sidikho/398 from which land parcel No. Bunyala/Sidikho/1622 was derived from. The case was withdrawn in the year 2009 for the sake of good relationship between the families. DEX2 is the copy of the proceedings.

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. Bunyala/Sidikho/1622 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, PW1 the plaintiff testified that he has been in actual physical occupation of a portion of the suit parcel of land Title No. Bunyala/Sidikho/398 since the year 1970 to date whose boundaries are clearly marked on the ground. That the suit land parcel No. Bunyala/Sidikho/398 was his since time memorial but the defendant got registered as the title holder fraudulently. That the portion of land were properly physically field surveyed in 1970s but omitted either intentionally or otherwise thereafter fraudulently mapped to be inclusive to land parcel No. Bunyala/Sidikho/398 which is across the River Namakoye the permanent boundary between the two parcels. land parcel No. Bunyala/Sidikho/1622 is a subdivision of land parcel No. Bunyala/Sidikho/398 and the plaintiff is physically located there. DW1 confirms that, land parcel No. Bunyala/Sidikho/1622 is a sub-division of land parcel No. Bunyala/Sidikho/398 and at no time has the plaintiff been entitled to it. That the said land is separated from plaintiff’s father’s land parcel No. Bunyala/Sidikho/696 by a stream and the applicant claim on the suit land is misplaced. He maintains that the plaintiff resides on land parcel No. Bunyala/Sidikho/696 and not land parcel No. Bunyala/Sidikho/1622. From the evidence adduced before me I find that the plaintiff indeed occupies a portion of the suit land from the year 1970 to date and the boundaries being clearly marked. I find that this portion of land is situated in land parcel No. Bunyala/Sidikho/1622 which is a sub-division of land parcel No. Bunyala/Sidikho/398. The plaintiff’s land is separated from the defendant’s

land by a river. It was not until 1999 when the first dispute was commenced over ownership of the said parcel of land. This was in Kakamega HCCC No. 115 of 1999 (OS) which was withdrawn in 2009. 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 for a portion of land parcel No. Bunyala/Sidikho/1622 and is a sub-division of land parcel No. Bunyala/Sidikho/398.
2. That the plaintiff/applicant be declared the owner of a portion of land parcel No. Bunyala/Sidikho/1622 a sub-division of land parcel No. Bunyala/Sidikho/398 and which he occupies and the boundaries are clearly marked 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. No orders as to Costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE