



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 53 OF 2019**

**STEPHEN M. MBAYI MAKOMERE.....PLAINTIFF**

**VERSUS**

**WYCLIFFE MAHERU.....DEFENDANT**

**JUDGEMENT**

This is the application of Stephen Melchezedek Mbayi Makomere who claims to have acquired title to the whole of land parcel No. Marama/Shinamwenyuli/164 containing by measurement approximately 0.38 hectares having inherited, lived on, occupied and used the whole of the said parcel of land exclusively, peacefully, continuously, openly and uninterrupted from his birth to-date, a period of over 50 years. The applicant has since been entitled to the said parcel of land by virtue of adverse possession having inherited and lived on, occupied and utilized the same with his family solely, exclusively, openly, quietly and uninterrupted for a period of over 12 years and prays that this honourable court does determine and order as follows:-

- a. That the applicant be declared the owner of the whole of land parcel No. Marama/Shinamwenyuli/164, having inherited, lived on, occupied and used the same from his birth to date a period of over 50 years and the applicant is entitled to the said parcel of land by virtue of adverse possession and the respondent be ordered to transfer title thereto to the applicant.
- b. That the court issues a declaration that the respondent is holding title to land parcel No. Marama/Shinamwenyuli/164 in trust for the applicant and the respondent be ordered to transfer title to the said parcel of land to the applicant and in default of the respondent transferring the same voluntarily the court do make an order authorizing the Deputy Registrar of the High Court of Kenya at Kakamega to execute all the documents necessary to effect the transfer of title to the parcel of land aforesaid into the name of the applicant.
- c. The respondent be ordered to bear the costs of this originating summons.
- d. That the honourable court does make further orders and or issue any further relief deemed fit and just.

The plaintiff testified that the defendant/respondent herein, who is his uncle, is entitled to, lives on, occupies and utilizes land parcel No. Marama/Lunza/1520 which is in the neighbourhood. That land parcel No. Marama/Lunza/Shinamwenyuli/164 was his fathers and his offspring and when he died he inherited it. That during adjudication, the defendant/respondent's mother, one Kumama, who was on the ground had instructions to register land parcel No. Marama/Lunza/1520 which was meant for the respondent in the respondent's name and then registered land parcel No. Marama/Shinamwenyuli/164 which was his father Benson Makomere and his offspring in the latter's name, but the said Kumama registered land title No. Marama/Shinamwenyuli/164, by error, in the name of Wycliff Mahero, the respondent, a copy of the register for land parcel No. Marama/Shinamwenyuli/164 was produced as PEx1. That from the time of adjudication in 1964 to-date the defendant/respondent has never laid claim to, trespassed on, used or utilized the suit land parcel No. Marama/Shinamwenyuli/164. That from the time he was born to-date, a period of over 50 years, he has lived on, occupied, used and or utilized land parcel No. Marama/Shinamwenyuli/164 exclusively, peacefully, openly, continuously and uninterrupted and he has developed the same by building houses and living thereon and he has grown trees and crops thereon such as sugarcane, maize, beans, millet, pineapples and bananas. His occupation and use has been notorious and has been with the knowledge of the defendant/respondent. That his relatives (wife and children) namely Leah Amumbwe Mbayi, Aggrey Angatia Makomere, Michael Mahende Makomere and Benson Makomere Mbayi died on 16/2/1994, 1/7/1995, 2/1/2995 and 23/3/1994 respectively and he buried them on the suit land parcel No. Marama/Shinamwenyuli/164 with the knowledge and participation of the defendant/respondent. That he has asked and or pleaded with the respondent to transfer title to the suit parcel of land No. Marama/Shinamwenyuli/164 to him but he has declined and remained adamant in his refusal thereby necessitating this suit.

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. Marama/Lunza/Shinamwenyuli/164 is the defendant. The issue is whether or not they 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 testified that the defendant/respondent herein, who is his uncle, is entitled to, lives on, occupies and utilizes land parcel No. Marama/Lunza/1520 which is in the neighbourhood. That land parcel No. Marama/Lunza/Shinamwenyuli/164 was his fathers and his offspring and when he died he inherited it. That during adjudication, the defendant/respondent's mother, one Kumama, who was on the ground had instructions to register land parcel No. Marama/Lunza/1520 which was meant for the respondent in the respondent's name and then registered land parcel No. Marama/Shinamwenyuli/164 which was his father Benson Makomere and his offspring in the latter's name, but the said Kumama registered land title No. Marama/Shinamwenyuli/164, by error, in the name of Wycliff Mahero, the respondent. PW2 and PW3 corroborated his evidence. The plaintiff's case remains unchallenged. 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 land parcel No. Marama/Shinamwenyuli/164.
2. That the plaintiff/applicant be declared the owner of land parcel No. Marama/Shinamwenyuli/164 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 16<sup>TH</sup> DAY OF APRIL 2020.**

**N.A. MATHEKA**

**JUDGE**