



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 17 OF 2019**

**ANTONY OTINDO KULALI.....PLAINTIFF**

**VERSUS**

**PAULO MUNYOKHO STEPHEN .....DEFENDANT**

**JUDGEMENT**

This is the application of Antony Otindo Kulali who claims to be entitled to a portion measuring one (1) acre comprised in L.R. No. Butso/so/Shikoti/14825 measuring approximately 0.74 (Ha) in area by adverse possession for determination of the following questions:-

1. Whether the applicant has acquired title to a portion of land measuring one (1) acre comprised in L.R. No. Butso/so/Shikoti/14825 by adverse possession.
2. Whether title of the respondent to a portion of land measuring one acre in respect to L.R. No. Butso/so/Shikoti/14825 has long been extinguished.
3. Whether the respondent holds a portion of land measuring one (1) acre comprised in L.R. No. Butso/so/Shikoti/14825 in trust for the applicant.
4. Whether the respondent's name should be cancelled from the register and a portion of land measuring one acre from L.R. No. Butso/so/Shikoti/14825 be carved out and registered in the applicant's name and the remainder thereof registered in the respondent's name.
5. Whether the Deputy Registrar of this honourable court should be empowered to sign all relevant forms to enable L.R. No. Butso/so/Shikoti/14825 sub-divided and one acre thereof registered in the applicant's name as proprietor thereof and the remainder, if any, registered in the respondent's name should he decline to do so.
6. Who should bear the costs of and incidental to the proceedings herein.

The plaintiff prays for the following orders;

- a. A declaration that the respondent's right over a portion of land measuring one (1) acre comprised in L.R. No. Butso/so/Shikoti/14825 measuring approximately 0.7 Ha in area got extinguished by adverse possession upon expiry of 12 years when the applicant was in possession.
- b. An order that upon expiry of 12 years since 18<sup>th</sup> February, 1987 when the applicant was in possession of a portion of land measuring approximately one acre from the piece of land known as L.R. No. Butso/so/Shikoti/14825 measuring approximately 0.74 Ha, the respondent held and currently holds the said portion in trust for the applicant.
- c. An order that under section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya, the applicant be registered as the owner of the said portion measuring approximately one acre from the piece of land known as L.R. No. Butso/so/Shikoti/14825 measuring approximately 0.74 Ha.
- d. An order that the respondent do execute all relevant application forms to the relevant Land Control Board, attend the same for consent to sub-divide and transfer to the applicant a portion of land measuring one (1) acre comprised in L.R. No. Butso/so/Shikoti/14825 and provide all necessary documents for such exercise in default, the Deputy Registrar of this honourable court be allowed to execute such documents on behalf of the respondent.

- e. An order that the respondent be condemned to pay the costs of this suit.
- f. Any further orders or reliefs as this honourable court may deem just and reasonable to grant.

PW1 the plaintiff testified that he bought the suit land from the defendant and produced copies of the said sale agreement PEx1. He produced the green card PEx2 and photos of his home PEx3. PW2 and PW3 corroborated his evidence. He testified that he has been in occupation of a portion measuring one acre of the suit land exclusive to the defendant continuously, openly, without force and adverse to the defendant's interests since 1987. That the defendant's title to a portion of land measuring one acre comprised in L.R. No. Butso/Shikoti/14825 got extinguished after 12 years of the applicant's possession thereof. That the applicant has established his home on a portion of land measuring one acre of the parcel of land and been cultivating it by planting food crops, trees continuously to date. That the respondent has never stayed, occupied and/or used a portion of land measuring one acre comprised in L.R. No. Butso/Shikoti/14825 to date. That the applicant has acquired a portion measuring one acre comprised in L.R. No. Butso/Shikoti/14825 by operating of the law.

This court has carefully considered the evidence and submissions therein. The defendant was served but failed to attend court of file any defence. 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 L.R. No. Butso/Shikoti/14825 is registered in the name of the defendant herein. 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 bought the suit land from the defendant and produced copies of the said sale agreement PEx1. He produced the green card PEx2 and photos of his home PEx3. PW2 and PW3 corroborated his evidence. He testified that he has been in occupation of a portion measuring one acre of the suit land exclusive to the defendant continuously, openly, without force and adverse to the defendant's interests since 1987. The plaintiff's evidence was 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 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 holds in trust for the plaintiff a portion measuring approximately one acre from the piece of land known as L.R. No. Butso/14825 measuring approximately 0.74.

2. That the plaintiff be declared the owner of a portion measuring approximately one acre from the piece of land known as L.R. No. Butso/14825 measuring approximately 0.74 Ha 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 90 (ninety) 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 AT KAKAMEGA THIS 24<sup>TH</sup> DAY OF JUNE 2020.**

**N.A. MATHEKA**

**JUDGE**