



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 88 OF 2019**

**PAUL KIVISU LUSALA.....PLAINTIFF**

**VERSUS**

**ROBAI KAVAI AMBANI.....DEFENDANT**

**JUDGEMENT**

This is the application of Paul Kivisu Lusala who claims that he is entitled to the whole of L.R. No. Kakamega/Viyalo/300 registered in the name of the Robai Kawai Ambani by virtue of having been in exclusive, continuous and uninterrupted possession, occupation and open use of the entire estate for a period in excess of 12 years and in a peaceful manner and for the determination of the following questions;

1. Whether the late Eboso Ambayi who was the father of the respondent herein was the initial registered proprietor of L.R. No. Kakamega/Viyalo/300;
2. Whether the respondent is the current registered owner of L.R. No. Kakamega/Viyalo/300;
3. Whether the applicant has had exclusive use of L.R. No. Kakamega/Viyalo/300 an open, peaceful and uninterrupted manner for a period in excess of 12 years.
4. Whether the exclusive use of L.R. No. Kakamega/Viyalo/300 by the applicant in an open, peaceful and uninterrupted manner for a period in excess of 12 years has been adverse to the proprietary interests of the respondent;
5. When did time necessary to constitute adverse possession in favour of the applicants begin to run;
6. If having had the exclusive use of the estate as outlined above, the applicants have acquired ownership of the same through prescription.
7. If the proprietorship of the respondent is subject to the prescriptive rights of the applicant.

This court has carefully considered the evidence and submissions therein. The defendant was served but failed to attend court or 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. Kakamega/Viyalo/300 is registered in the name of the Robai Kavai Ambani the defendant herein. The issue is whether or not she 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 Sergon 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 that land parcel No. Kakamega/Viyalo/300 was initially registered in the name of Eboso Embayi before it was transferred to his daughter the defendant herein on the 3<sup>rd</sup> April 2018 (PEx1 and PEx2 are the search certificates). That in 1998 Belisi Eboso the widow of Eboso Embayi sold the suit land to him. That he took possession in 1998 and lives there to date. 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 respondents holds in trust for the plaintiff/applicant land parcel No. Kakamega/Viyalo/300.
2. That the plaintiff/applicant be declared the owner of land parcel No. Kakamega/Viyalo/300 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**