



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 47 OF 2019

SULEIMAN MUKABANA MASIBAYI.....PLAINTIFF

VERSUS

MUSA OMOTO OCHOMO.....DEFENDANT

JUDGEMENT

This is the application of Suleiman Mukabana Masibayi who claims to be entitled to 1 ½ acres of land falling within Land Parcel No. S/Wanga/Ekero/1978 by adverse possession and for the award of the following orders:-

- (a) A declaration that the respondent's right over a portion of land title No. S/Wanga/Ekero/978 measuring 1 ½ acres in area got extinguished by operation of law/adverse possession upon expiry of 12 years when the applicant was in possession.
- (b) A declaration that upon expiry of 12 years from the date of the said registration, a portion measuring 2 ½ acres out of Land Parcel No. S/Wanga/Ekero/978 was held and is currently held in trust for the applicant.
- (c) An order that 1 ½ of Land Parcel No. S/Wanga/Ekero/978 vests in the applicant and under section 38 of the Limitation of Actions Act Cap 22 Laws.
- (d) A declaration that the registration of respondent as the owner of Land Parcel No. S/Wanga/Ekero/978 is unlawful.

It is grounded on the annexed affidavit of Suleiman Mukabana Masibayi – applicant and the following grounds that the respondent wants to sell the suit land which the applicant has acquired by way of adverse possession. That the applicant's originating summons has higher chances of success. That it is in the interest of justice if this application is allowed.

That on 17th January, 2001 he purchased from the respondent 1 ½ acres out of Land Parcel No. S/Wanga/Ekero/978 (PEx1 is a copy of the agreement). That he immediately took vacant possession of the purchased portion and started using/cultivating and staying on the parcel to-date. That the 1 ½ acres of land which he has been staying on and cultivating is clearly separated from the rest of the suit land by a clear boundary. That since 2001, he has been in peaceful use/possession of the said 1 ½ acres of land and the respondent has never used it in any way. That he planted sugarcane, trees, maize, bananas and he has his home on the said land. That the respondent has never stayed or used his 1 ½ acres of Land Parcel No. 2142 which was a sub-division of Land Parcel No. S/Wanga/Ekero/978 as he migrated from the suit land once he sold to him and another purchaser (PEx2 & 3 are copies of the register and mutation forms). That by the ruling dated 22nd May, 2012 delivered by the High Court at Kakamega in Civil Case No. 92 of 2000 it was ordered that his titles S/Wanga/Ekero/2142 be cancelled (PEx4 & 5 are copies of the title deed). That his possession of 1 ½ acres of the said Land Parcel No. S/Wanga/Ekero/978 herein has been open, continuous, notorious and exclusive of the respondent or the registered owner. That from the year 2001, the 1 ½ acres of land out Land Parcel No. S/Wanga/Ekero/978 was held in trust for them.

This court has carefully considered the evidence and submissions therein. The defendant was served but failed to 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.”

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)”.

I have perused the documents adduced as evidence and in particular the green card of the suit land. I note that the same was issued by the land registrar way back on the 3rd April 2014. The last entry therein is in 2013. The position of the suit land currently cannot be ascertained. By a ruling of the court dated 15th April 2010 the title was to be cancelled and I acre to be transferred to the applicant in that matter. It is also unclear whether or not this forms part of the land which has a caution by virtue of compulsory acquisition by the government. I find that ownership of the suit land has not been establish and hence the plaintiff’s claim for adverse possession cannot stand. I find that the plaintiff has failed to prove his case on a balance of probabilities and I dismiss it with no orders as to costs as it was undefended.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 24TH DAY OF JUNE 2020.

N.A. MATHEKA

JUDGE