



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 247 OF 2015

JOHN SHIUNDU KWEYUPLAINTIFF

VERSUS

DEVIS KWEYU LUBALE

FREDRICK NETIA KWEYU DEFENDANTS

JUDGEMENT

This is the application of John Shiundu Kweyu who claims to have acquired title to three (3) acres of land parcel number East Wanga/Eluche/2248 under the Luhya customary law and by way of adverse possession for the determination of the following issues.

1. Whether the said Denis Kweyu Lubale and Fredrick Netia Kweyu hold title for three (3) acres of land parcel number East Wanga/Eluche/2248 in trust for the applicant John Shiundu Kweyu under the Luhya customary law.
2. Whether the said John Shiundu Kweyu has acquired title to three (3) acres of land parcel number East Wanga/Eluche/2248 by way of adverse possession.
3. Whether the said Denis Kweyu Lubale and Fredrick Netia Kweyu holds title for the three (3) acres of land parcel number East Wanga/Eluche/2248 in trust for the applicant John Shiundu Kweyu.
4. Whether the title deed held by the said Denis Kweyu Lubale and Fredrick Netia Kweyu for the three (3) acres of land parcel East Wanga/Eluche/2248 should be cancelled and a new title deed for the same be issued to the applicant John Shiundu Kweyu.
5. Who shall bear the costs of this suit.

PW1 the plaintiff testified that the defendants are his step brothers. He stated that E. Wanga/Eluche/2248 was registered in three names jointly namely:- Virginia Adhiambo Kweyu, Dennis Kweyu Lubale and Fredrick Netia Kweyu as absolute owners who are his step mother and step brothers. He has lived on the land and cultivates the same for the last six years. In 2014 the dispute was arbitrated by the Chief and he was given a go ahead to continue living there. He confirms that he was born out of wedlock.

The 1st defendant stated that, land parcel E. Wanga/Eluche/2248 was originally registered in three names jointly namely, Virginia Adhiambo Kweyu (deceased mother), Dennis Kweyu Lubale and Fredrick Netia Kweyu as absolute owners. Virginia died and her name was removed (title deed DEx4). That after the death of their mother the said land automatically remained in the joint name as Dennis Kweyu Lubale and Fredrick Netia Kweyu as absolute owners and they do not hold the said land in trust for the applicant nor any other person. That the plaintiff is his step brother born out of wedlock and his late father had given him land at Ematetie farm which he sold and disappeared only to reappear in 2010 when their father died. That when the applicant surfaced in 2010 they accommodated him to stay in their late mother's kitchen since he did not have anywhere to stay. That they accommodated him in good faith with the understanding that he was to seek a share from their late father Remigus Kweyu Lubale's Estate which is yet to be succeeded and distributed. That on the 29th October, 2014 the applicant forcefully without his knowledge and consent assembled some villagers and with the assistance of local administration trespassed into their land and demarcated a portion of land and constructed a house for the applicant in his absence since he works at Kimilili. That since then the applicant has become hostile and violent to his family members preventing him and his family from accessing it and utilize it as he has been doing previously. That the defendants are the absolute registered owners of land parcel E. Wanga/Eluche/2248 which does not form part of the estate of their late father. DW2 an uncle of the litigants confirmed that the plaintiff came to the suit land in 2009. DW3 the 2nd defendant testified that the plaintiff is their brother and he should get his share of the land. He also corroborated DW2's evidence that the plaintiff moved there in 2009.

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 owners of land parcel No. East Wanga Eluche/2248 are the defendants. The issue is whether or not they hold a good title by virtue of the plaintiff's claim of adverse possession of a portion of the land. 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 states that he has been in occupation of the suit land from 2009. The statutory prescribed period of 12 years has not been attained. I find that the plaintiff has not 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 not 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. Be that as it may, it is a finding of fact that the plaintiff is a step brother to the defendants and he was invited to stay on the suit land in 2009 when their mother was still alive. Indeed the 2nd defendant confirms that the dispute was adjudicated upon by the Chief and the plaintiff has put up a house and cultivates a portion of the land. According to *Halsbury's Laws of England, 4th Edition, Volume 48, paragraph 690*, a constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired.

A constructive trust may arise in the Plaintiff's favour in the circumstances of this case. The requirements for a constructive trust to arise are explained in more detail in *Halsbury's Laws of England, 4th Edition, Volume 48* at paragraph 690 and I quote;

“A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where: (1) there was a common intention that both parties should have a beneficial interest; and (2) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party’s words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate.

The first question is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the property, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. Such an agreement will be conclusive.

Where the evidence is that the matter was not discussed at all, the court may infer a common intention that the property was to be shared beneficially from the conduct of the parties. In this situation direct contributions to the purchase price by the party who is not the legal owner, whether initially, or by way of mortgage instalment, will readily justify the inference necessary to the creation of a constructive trust.

Exceptionally the agreement, arrangement or understanding may be arrived at after the date of the original acquisition. Once common intention has been established, whether by direct evidence of common agreement or by inference from conduct, the claimant must show that he acted to his detriment in reliance on the agreement.

The final question to determine is the extent of the respective beneficial interests. If the parties have reached agreement, this is conclusive. Where there is no agreement as to the extent of the interest, each is entitled to the share the court considers fair having regard to the whole course of dealing between the parties in relation to the property.”

In the instant case, the relevant doctrines of “resulting trust” or “constructive trust” would apply. The court in **N W K v J K M & Another (2013) eKLR** stated as follows:-

“Subject to any express declaration of trust, where property is purchased in one party’s name but both parties contribute to the purchase price, the other party acquires an interest under a resulting trust proportionate to his or her contribution to the purchase price, or alternatively may make a claim under a constructive trust. On such a claim the first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement or understanding reached between them that the property is to be shared beneficially. This common intention, which has been said to mean a shared intention communicated between them and which must relate to the beneficial ownership of the property can only be based on evidence of express discussion between the parties, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made, it will only be necessary for the party asserting a claim to a beneficial interest against the party entitled to the legal state to show that he or she had acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or proprietary estoppels.”.....

“A constructive trust will arise in connection with the legal title to property whenever one party has so conducted himself that it would be inequitable to allow him to deny to the other party a beneficial interest in the property acquired. This will be so where: (1) there was a common intention that both parties should have a beneficial interest and (2) the claimant has acted to his detriment in the belief that by so acting he was acquiring a beneficial interest. The relevant intention of each party is the intention reasonably understood by the other party to be manifested by that party’s words or conduct notwithstanding that he did not consciously formulate that intention or even acted with some different intention which he did not communicate.

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Where the evidence is that the matter was not discussed at all, the Court may infer a common intention that the property was to be shared beneficially from the conduct of the parties. In this situation direct contributions to the purchase price by the party who is not the legal owner, whether initially, or by way of mortgage installment, will readily justify the inference necessary to the creation of a constructive trust.”

The plaintiff in this case was invited to the suit premises being a child of the home born out of wedlock. His step mother a joint owner of the suit land was alive and had no objection. In 2014 the matter was resolved by the administration and he continued to live of the suit land with his family. Indeed the 2nd defendant testified in court that the plaintiff is entitled to the suit land. It is only the 1st defendant who objects to the same. A constructive trust is one imposed by a Court of equity regardless of the intention of the owner of the property. It is s a trust imposed by law whenever justice and good conscience require it. This is a case in point. It is an equitable remedy by which the Court can enable an aggrieved party to obtain restitution. I find that the plaintiff has established his case on a balance of probabilities against the defendants on the facts that he is a benefical owner of a portion of the suit land and I grant the following orders;

1. Declaration that the respondents hold in trust for the plaintiff a portion of 3 acres of land parcel No. East Wanga Eluche/2248.
2. That the plaintiff be declared the owner of a portion of 3 acres of land parcel No. East Wanga Eluche/2248 and which he occupies and to which he is entitled to by virtue of constructive trust and which the defendants/respondents are ordered to transfer the said suit land to the plaintiff within the next Ninety (90) 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 23RD DAY OF JUNE 2020.

N.A. MATHEKA

JUDGE