



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELCC No. 71 OF 2019

CHARLES KIMITA WILL..... PLAINTIFF

VERSUS

CHHAGANLAL ANANDJI PANCHAMATIA.....DEFENDANT

JUDGMENT

1. By Originating Summons dated 5th July 2019 drawn by M/s Wachira Mbuthia & Co. Advocates and filed in court on 9th July 2019, the plaintiff seeks the following orders:

1. THAT the Plaintiff be declared to have become entitled by virtue of adverse possession of over twelve (12) years of all that piece of land containing 1.90 acres or thereabout registered under the Registration of Titles Act (Chapter 281) laws of Kenya (now repealed) in the name of CHHAGANLAL ANANDJI PANCHAMATIA and comprised in the title No. LR NO. 530/3/V and situate in Elburgon Township.

2. THAT the Plaintiff be registered as sole proprietor of the said parcel of land measuring 1.90 acres or thereabout being a portion of land namely LR No. 530/3/V in place of CHHAGANLAL ANANDJI PANCHAMATIA in whose favour the said piece of land is registered.

3. THAT the Defendant be directed to transfer the said piece of land measuring 1.90 acres being LR No. 530/3/V and execute all necessary documents to facilitate the transfer within thirty (30) days from the date of the order and in default, the Deputy Registrar this honourable court be directed to execute such necessary documents in his place.

4. THAT the Defendant be ordered to surrender the original title to the Registrar of Titles Nairobi for the same to be cancelled and in its place the Registrar of Titles to issue a title in favour of the Plaintiff in respect of LR No. 530/3/V.

5. THAT the deputy registrar be empowered to sign any documents that the Respondent may refuse to sign.

6. THAT the cost of this application be met by the Defendant.

2. The summons is supported by an affidavit sworn by the plaintiff. He deposed that in or about April 1974, his father Willie Mwangi Muchuki (deceased) jointly with one Danson Kahingo Ngugi (deceased) acquired land parcel LR No. 580/28 which they held as joint tenants in common in equal shares and that immediately thereafter, his father Willie Mwangi Muchuki (deceased) took possession of his half share in LR No. 580/28 together with the adjacent land known as LR No. 530/3/V which was unoccupied and fenced off both parcels where he subsequently established a sawmill on LR NO. 530/3/V and remained in occupation and use of the said land Parcel No. 530/3/V until 16th May 1985 when he passed on. He further deposed that prior to his father's demise, he took over the sawmill which he has been operating up to the date of his affidavit and that additionally, he also started cultivating crops on the said parcel of land. That he has been in occupation and use of the land LR No. 530/3/V uninterrupted and unhindered for 29 years and has extensively developed it without permission of the defendant. He annexed a bunch of photographs and a copy of the title duly certified by the Registrar of Titles on 7th June 2019 as a true copy of the original. The plaintiff also filed a supplementary affidavit sworn by himself on 9th October 2020 in which he deposed that the term of the lease expired and that it was extended on 1st October 1971 for a further term of 77 years. He annexed a copy of a document to that effect signed by the Commissioner of Lands in the presence of the Registrar of Titles.

3. Although duly served, the defendant neither entered appearance nor defended the claim. The plaintiff's case therefore remains wholly unchallenged.

4. The summons was heard through affidavit evidence and written submissions. In submissions filed on behalf of the plaintiff, it is argued that the plaintiff has proven his case on a balance of probabilities and has met the requirements to succeed in a claim for adverse possession. He urged the court to grant him judgment as prayed.

5. I have considered the Originating Summons, the affidavits and the submissions filed. The only issue in this case is whether the plaintiff has established that he is entitled to be registered as the owner, by adverse possession, of the parcel of land known as LR No. 530/3/V in place of the defendant. The Court of Appeal restated the essentials of adverse possession in Loise Nduta Itotia v Aziza Said Hamisi [2020] eKLR as follows:

In line with the Act, Kneller, J. (as he then was) in the case of Kimani Ruchire vs Swift Rutherford & Co. Ltd. [1980] KLR. 10, outlined some tenets of adverse possession thus;

“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 plaintiffs must show that the company 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 or by way of recurrent consideration.”

In the case of Wambugu vs Njuguna [1983] KLR 172 This Court cited the case of Wallis Cayton Bay Holiday Camp Ltd. vs Shell Mex and B.P. Ltd. [1975] Q.B. 94 with approval and cited the following passage therefrom

“The next question, therefore is what constitutes dispossession of the proprietor. Bramwell LJ in Leigh vs. Jack (1879) 5 Ex D 264 said at 273, that to defeat a title by dispossessing the former owner 'acts must be done which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.”

The above considered together, make it clear that for a claim of adverse possession to succeed it must be demonstrated that the occupation was continuous, open and uninterrupted for a period of 12 years.

6. The court restated the same ingredients in the case of Murunga Kabangi & 2 others v Hannah Wairimu Gitau & another [2019] eKLR which the plaintiff cited in his submissions.

7. As previously noted, the plaintiff's case is unchallenged. From the annexed copy of title in respect of the parcel of land known as LR No. 530/3/V, I note that through grant number I.R. 7481, the government of Kenya granted unto Thomas Arthur Kershaw Turton all that piece of land situated in Elburgon Township measuring 1.90 acres being LR No. 530/3/V whose dimensions were delineated in Land Survey Plan Number 43767 for a term of 25 years from 13th July 1949. Entry number 8 in the title reflects a transfer to the defendant on 23rd June 1965. In view of what is deposed in the supplementary affidavit and the annexure thereto, I note that the term of the lease was extended on 1st October 1971 for a further term of 77 years. I am therefore persuaded that the defendant has a leasehold title in respect of the suit property.

8. I am equally persuaded that the plaintiff has been in exclusive, open and uninterrupted possession of the suit property as of right from 16th May 1985 to date. He has had more than 12 years of uninterrupted possession and has therefore established his case for adverse possession.

9. In the end, I make the following orders:

a) The plaintiff is hereby declared to have become entitled by virtue of adverse possession to all that piece of land measuring 1.90 acres or thereabout registered under the Registration of Titles Act (Chapter 281) laws of Kenya (now repealed) in the name of Chhaganlal Anandji Panchamatia and comprised in title No. LR NO. 530/3/V delineated in Land Survey Plan Number 43767 and situated in Elburgon Township.

b) The plaintiff be registered as sole proprietor of the aforesaid parcel of land in place of Chhaganlal Anandji Panchamatia in whose favour the said piece of land is currently registered.

c) The defendant is hereby directed to transfer the aforesaid piece of land and execute all necessary documents to facilitate the transfer within thirty (30) days from the date of this judgment and in default, the Deputy Registrar of this court is hereby directed to execute such necessary documents in his place.

d) The defendant is hereby ordered to surrender the original title of the aforesaid parcel of land to the Registrar of Titles Nairobi for the same to be cancelled and in its place the Registrar of Titles to issue a title in favour of the plaintiff in respect of LR No. 530/3/V.

e) The deputy registrar of this court is hereby empowered to sign any documents that the defendant may refuse to sign.

f) For the avoidance of doubt, the interest acquired by the plaintiff pursuant to this judgment is a leasehold title for the remainder of the term of 77 (seventy seven) years from the First day of October 1971 (One Thousand Nine Hundred and Seventy One).

g) Since I have not been shown any evidence that a demand before action was issued and considering that the defendant did not resist this case, I make no order as to costs.

10. It is so ordered.

Dated, signed and delivered at Nakuru this 17th day of December 2020.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff

No appearance for the defendant

Court Assistants: B. Jelimo & J. Lotkomoi