



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 63 OF 2018

BERENEDER MIMA.....PLAINTIFF/APPLICANT

AND

AYUB ZEBEDAYO.....1ST DEFENDANT/RESPONDENT

FRED REUEN MIMA.....2ND DEFENDANT/RESPONDENT

JUDGEMENT

This is the application of Bereneder Mina for orders that;

1. That the plaintiff/Applicant be declared the legal owner of Land Parcel No. North Kabras/Kivaywa/1620 situated in Lugari Constituency Kakamega by way of purchase from the 1st defendant.
2. The said plaintiff/applicant be registered as the sole proprietor of the said parcel of land namely L.R. No. North Kabras/Kivaywa/1620 in place of the 1st defendant in whose favour the land is currently registered.
3. That there be a stay of all legal proceedings filed by the 2nd defendant against all tenants occupying the property erected on LR No. North Kabras/Kivaywa/1620 (which proceedings have been filed to illegally and forcefully demand monthly rents from the tenants and which tenants have legally, dutifully, and consistently paid the month rents to the plaintiff/applicant) which suit includes, Business Premises Rent Tribunal Kakamega No. 16 of 2018 Fred Reuben Mima Vs Kassim Bankuli and against any such other proceedings that may be instituted by the 2nd defendant against the tenants occupying the property erected on L.R. No. Kabras/Kivaywa/1620 from time to time.
4. That an injunction be issued restraining the defendants whether by their servants, agents, employees or otherwise howsoever from fencing, subdividing, building alienating or otherwise dealing with the said piece of land.
5. That an injunction be issued restraining the defendants whether by their servants, agents, employees or otherwise howsoever from illegally or otherwise interfering with the plaintiff's quiet possession and enjoyment of the said piece of land.
6. That costs of this summons be provided for.

It is based on the grounds that the plaintiff is a widow who acquired the said piece of land by way of purchase from the 1st defendant on 1st March 2007. The 1st defendant has refused/declined/or neglected to allow the said land be registered in favour of the plaintiff/applicant despite the plaintiff/applicant being in active possession of the said piece of land for over 11 years, and despite the matter having been brought to the attention of the Registrar of Lands at Kakamega and the Registrar of Land having issued summons against the 1st defendant for the resolution of the dispute. That the plaintiff/applicant has been attending to the property and has paid all utility bills. That the plaintiff/applicant constructed rental houses on the said piece of land and rented them out to her tenants. That after the death of the plaintiff/applicant's husband on 10th August 2014, the 2nd defendant, who is a stepson to the plaintiff/applicant, forcefully took over the said property and has threatened, evicted and demanded that tenants pay all the rental proceeds of the houses constructed thereon to himself(the 2nd defendant), and those tenants who continued to pay the rents to the plaintiff/applicant have been unfairly targeted by the 2nd defendant, in many ways, but not limited to being subjected to recovery proceedings before courts of law. That the 2nd defendant has threatened to take further unspecified actions on the plaintiff/applicant should she continue pursuing her rights arising out of the said piece of land.

The 1st defendant stated that he has been the registered proprietor of L.R. No. North Kabras/Kivaywa/1509(plot 1509) measuring approximately 0.032 Ha since the 23rd day of January 2004 as shown by a copy of the title deed. That in the year 2006 he demarcated plot 1509 into 3 portions and disposed of the same separately to Joash Kubwa, Wilson Wafula and Reuben Mima Kongoni(deceased) who was husband of the applicant and father to the 2nd respondent. That however, he was unable to transfer the 3 portions to the buyers because the

deceased was the only purchaser with arrears to wit, Kshs.14,150, compelling the applicant/plaintiff to commit herself in writing on the 1st March 2007 to defray the same. That by the time the deceased died in the year 2014 the purchase arrears of Kshs.14,140/= were yet to be paid and the 2nd respondent did so on the 19th day of December 2014 as shown by the agreement. That upon receiving the final balance of Kshs.14,140/= he handed over the original title deed to plot 1509 to the 2nd respondent with the understanding that as soon as the family was through with the succession proceedings over the estate of the deceased he would transfer of the 3 portions to their respective owners.

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 owner of land parcel No. North Kabras/Kivaywa/1620 is the 1st defendant. 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, the plaintiff states that, she acquired the said piece of land by way of purchase from the 1st defendant on 1st March 2007. The 1st defendant has refused/declined/or neglected to allow the said land be registered in favour of the

plaintiff/applicant despite the plaintiff/applicant being in active possession of the said piece of land for over 11 years! I find that the plaintiff has not established on a balance of probabilities that she has been in exclusive, continuous and uninterrupted possession, occupation and open use of the said suit land for a period in excess of 12 years. I find that the plaintiff has failed to establish her case on a balance of probabilities against the defendants and I dismiss it with no orders as to costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 8TH DECEMBER 2020.

N.A. MATHEKA

JUDGE