



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 206 OF 2017

HENRY AMONDO.....APPLICANT

VERSUS

MUSA KONGOLI.....RESPONDENT

JUDGEMENT

This is the application of Henry Amondo for the determination of the following issues:-

1. Whether the respondent Musa Kongoli holds title for 0.5 acres of land parcel number South Kabras/Chesero/3213 in trust for the applicant Henry Amondo.
2. Whether the applicant Henry Amondo has acquired title by way of adverse possession for 0.5 acres of land parcel number South Kabras/Chesero/3213.
3. Whether the applicant bought 0.5 acres of land parcel number South Kabras/Chesero/3213 legally from the respondent's brother Francis Manda.
4. Whether the title deed held by the respondent in respect of the 0.5 acres of land parcel number South Kabras/Chesero/3213 should be cancelled and a new title deed for the same be issued in favour of the applicant.
5. Whether Kaskoni Musumba and Musa Kongoli were holding title to 0.5 acres of land parcel number South Kabras/Chesero/3213 in trust for their brother Francis Manda.
6. Who shall pay the costs of this suit?

The plaintiff testified that he bought 0.5 acres from Francis Manda from land parcel number South Kabras/Chesero/126 in the year 1998 and took possession of the portion of land. That the portion of land was registered in the name of Kaskoni Musumba who was holding the portion of land in trust for Francis Manda. That in the year 2007 Kaskoni Musumba sub-divided land parcel number South Kabras/Chesero/126 into land parcel number 2580 and 2581 (the search certificate marked PEx2). That in the year 2011 Kaskoni Musumba again sub-divided land parcel number 2580 into land parcel number South Kabras/Chesero/2949 and 2950 (the search certificate is marked PEx3). That in the year 2015 Kaskoni Musumba again sub-divided land parcel number South Kabras/Chesero/2949 into land parcel number South Kabras/Chesero/3212 and 3213 (the search certificate is marked PEx4). That his portion of 0.5 acres remained in land parcel number South Kabras/Chesero/3213. That Kaskoni Musumba transferred the whole of land parcel numbers South Kabras/Chesero/3213 to Musa Kongoli without giving him his share of 0.5 acres which he was holding title in trust for him (a copy of the land registrar is marked PEx5). That Kaskoni Musumba and Musa Kongoli were holding title for 0.5 acres in trust for him since he had acquired title for the portion by way of adverse possession. That Kaskoni Musumba transferred land parcel number South Kabras/Chesero/3213 to Musa Kongoli so that he does not claim his share of 0.5 acres from him even though he had acquired title by way of adverse possession of the same. That the title deed held by Musa Kongoli in respect of 0.5 acres of land parcel number South Kabras/Chesero/3213 should be cancelled and a new title deed for the portion be issued to him.

The defendant DW1, submitted that in the year 2015 he purchased land parcel No. South Kabras/Chesero/3213 from one Kaskoni Musumba for value. That he followed due procedure and obtained title to the same (DEx4 is a copy of the title). That at the time of the aforesaid purchase, land parcel No. South Kabras/Chesero/3213 was vacant and he proceeded to take vacant possession to-date. DW2 the said Kaskoni Musumba, testified that the plaintiff/applicant never purchased any portion of land out of land parcel No. South Kabras/Chesero/3213. That at no given time was any portion of land parcel No. South Kabras/Chesero/3213 held in trust either for Francis Manda and or the plaintiff/applicant herein. That the applicant's efforts to trespass onto the suit land were always resisted by him leading to several cases and that the applicant was successfully ejected from the suit land before the period of 12 years lapsed and he cannot claim to have acquired the

suit land by adverse possession. That he sold the suit land to the defendant herein.

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. South Kabras/Chesero/3213 is the 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 vs Wamugunda Muriuki & Another (2010) eKLR while referring to the case of Wambugu vs 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 - vs- 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 -vs - 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 bought 0.5 acres from Francis Manda from land parcel number South Kabras/Chesero/126 in the year 1998 and took possession of the portion of land until 2015. That the portion of land was registered in the name of Kaskoni Musumba who was holding the portion of land in trust for Francis Manda. Evidence has been adduce in court DEXh 5 & 6 that there were criminal and civil cases over the suit land between the parties way back in 2010. For these reasons, I find that the plaintiff has not established on a balance of probabilities that he 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 his case on a balance of probabilities

against the defendant 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