



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 507 OF 2014

FRANCIS MAKUBA MUKANDA.....PLAINTIFF

VERSUS

FELIX SAKWA MUTSWENJE.....DEFENDANT

JUDGEMENT

By a plaint dated 21st March 2011, the plaintiff is the registered proprietor of L.R. NO. East Wanga/Malaha/1767 measuring 2.55 Hectares. The defendant stays in LR NO. East Wanga/Malaha/419 which borders the plaintiff's land. That on 5th June, 2009, when the plaintiff obtained his title deed he learnt that the defendant had trespassed into the plaintiff's land without any colour of right and planted his crops (maize) on the plaintiff's land on several occasions and the latest being on 22nd March, 2011 and had destroyed the boundaries between the two parcels of land to access the plaintiff's land illegally. The plaintiff's claim against the defendant is for an order to be issued by this honourable court for the two parcels of land LR NO. East Wanga/Malaha/419 No. East Wanga/Malaha/1769 to be surveyed and boundaries reinstated by a qualified government Surveyor from Kakamega District Office. The plaintiff prays for:-

1. An order to the district surveyor Kakamega to survey and reinstate boundaries between L.R. NO. EAST WANGA/MALAHA/419 and LR. NO. EAST WANGA/MALAHA/1767.
2. Costs and interest of this suit.
3. Any other order that this court may deem fit to grant.

The defendant admits that the plaintiff is the registered proprietor of the parcel of land known as E/WANGA/MALAHA/1767, but that the defendant's father, Andoni Sakwa Mutswenje, had bought a portion of land out of the then parcel of land known as E/WANGA/MALAHA/420 that now forms part of the parcel of land known as E/WANGA/MALAHA/1767 in 1969 from one Mukanda Mukuba, and the purchased portion has been in occupation by the defendant since 1969 for a period of well over twelve (12) years peacefully, openly, continuously and uninterrupted until in the year 2009 when the plaintiff started unlawfully laying claim over this purchased portion. The defendant avers, therefore, that the defendant has acquired title to a portion measuring two (2) acres out of the parcel of land known as E/WANGA/MALAHA/1767 by way of adverse possession. The defendant, therefore, counter-claims for a declaration that the defendant has acquired title to a portion of land measuring two (2) acres out of the parcel of land known as E/WANGA/MALAHA/1767 by way of adverse possession and that the same be ordered to be transferred in the name of the defendant. The defendant denies that the defendant has trespassed on the parcel of land known as E/WANGA/MALAHA/1767 as alleged.

This court has considered the application and submissions herein. 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 defendants 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 by way.

In the instant case, it is not disputed that the suit land is registered in the plaintiff's name. It is also not disputed that the plaintiff has never resided or used the portion of land land. The defendant testified that he has lived on the suit land since 1969. He lives there to date. He has built a home there. I find that the plaintiff has failed to prove his case on a balance of probabilities and I dismiss it. The plaintiff does not dispute this fact. I find from the evidence adduced that, the defendant has been in possession and occupation of the parcels of land for period in excess of 12 years in an open, peaceful and uninterrupted manner. I find that the defendant has proved his counterclaim on a balance of probabilities and I grant the following orders;

1. A declaration that the defendant is the owner of a portion measuring two (2) acres out of the parcel of land known as E/WANGA/MALAHA/1767 having lived on, occupied and used the said parcel of land from 1969 to-date and the defendant is hence entitled to the said parcel of land by virtue of adverse possession and the plaintiff is ordered to transfer title to the said parcel of land to the applicant.

2. Each party to bear its own costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 28TH DAY OF FEBRUARY 2019.

N.A. MATHEKA

JUDGE