



REPUBLIC OF KENYA.

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 631 OF 2014

JOSEPHAT NUHU ALIKHANA.....PLAINTIFF

VERSUS

LIYANZER ROSELYNE INGATO..... DEFENDANT

JUDGEMENT

The application is by Josephat Nuhu Alukhava who claims to be entitled to the whole of that parcel of land known as Kakamega/Mugomari/329 by virtue of adverse possession for the determination of the following issues:-

1. Whether the plaintiff has been in occupation of and/or possession of the whole of that parcel of land known as KAKAMEGA/MUGOMARI/329 measuring 0.40 for a period of 12 years or more, openly, peacefully, continuously and without force.
2. The ownership of the whole of that parcel of land known as Kakamega/Mugomari/329 claimed by the applicant for reasons to be adduced at the hearing of this summons.
3. And in particular that:-
 - (a) A declaration that the defendant/respondent's rights over the whole of the suit parcel of land got extinguished by adverse possession.
 - (b) A declaration that the plaintiff/applicant has acquired title over the whole of that parcel of land known as Kakamega/Mugomari/329 by virtue of adverse possession and the parcel of land be transferred and registered in the name of the plaintiff/applicant's.
 - (c) That the costs of this proceeding be provided for.

This summons is supported by the applicant/plaintiff's affidavit. Pw1 testified that he had been living on the suit land from 1995 with his Aunt Juliana looking after her. In 2004 the said Aunt willed the suit land to him through a written will PEx1. His Aunt died in 2006. Josephine who was the Aunt's daughter inherited that land and he took her to the tribunal where he was awarded the land (PEx2 are the proceedings and the ruling of the Shinyalu Land Disputes Tribunal). However in 2010 the defendant came and evicted him and his family. PW2, confirms that her mother Juliana gave the plaintiff the land. PW3, a clan member corroborated the plaintiff's evidence. He confirms that the plaintiff resided on the suit land from 1995 to 2010.

The defendant submitted that she purchased the suit property from Josephine Mutakha Musanga for value without notice and got registered as the absolute proprietor thereof. She produced the agreement, certificate of title and green card as DEx 1, 2 and 3. That she taken possession of the same. That it is therefore not true that the applicant has had exclusive possession of the suit property. That she is aware that the applicant had previously been engaged in a protracted case with the previous vendor Josephine Mutakha Musanga more specifically Kakamega Misc. 81 of 2009 which the court declined to adopt for want of jurisdiction. That the said Josephine Mutakha Musanga obtained the same through succession and the plaintiff's remedy if any i.e. through succession proceedings. That as against her the period of 12 years has not lapsed and therefore the application is premature and devoid of any merit. DW2 and DW3 were witnesses in the said land sale agreement and corroborated the defendant's evidence.

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. Hon Justice Munyao Sila 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. Kakamega/Mugomari/329 is the defendant. The issue is whether or not she 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 Sergon 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 resided on the suit land from 1995 to 2010. In 1995 he was invited to the suit land by his Aunt and lived there taking care of her, hence he was a licensee. In 2004 his Aunt writes a will PEx1 bequeathing the land to him upon her death. The said Aunt dies in 2006. By 2009 the plaintiff is already at the Land Disputes Tribunal with the said Josephine who acquired her mother’s land through Succession. Clearly the plaintiff only stayed at the land peacefully, openly and uninterrupted between 2006 and 2009. Before 2006 he was there with the permission of the original owner one Juliana who is now deceased. I find that the plaintiff has failed to establish that the defendant had knowledge (or the means of knowing actual or constructive) of the possession or occupation, the possession was not continuous and was broken by endeavours to interrupt it within the period of 12 years. The defendant was an innocent purchaser for value and her title in good. I find that the plaintiff has failed to establish his case on a balance of probabilities and I dismiss it with no orders as to cost.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 20TH DAY OF MARCH 2019.

N.A. MATHEKA

JUDGE