



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 518 OF 2014**

**AINEAH W. NDOMBI.....PLAINTIFF**

**VERSUS**

**SIMON O. LUKERI.....DEFENDANT**

**JUDGEMENT**

This application is brought by Ainea Wawire Ndombi who claims to have acquired title to a portion measuring 4 acres out of land parcel Namirama/Bunyala/526 by adverse possession for determination of the following questions:-

1. Whether the plaintiff has been in quiet, open, exclusive and continuous occupation of a portion measuring 4 acres out of land parcel NAMIRAMA/BUNYALA/526 for period of over 28 years peacefully and uninterrupted commencing from 1983.
2. Whether the plaintiff Ainea Wawire Ndombi has acquired title to a portion measuring 4 acres out of land parcel Namirama/Bunyala/526 by operation of law, to wit, through adverse possession.
3. Whether the respondent's title to the suit land has become extinguished by operation of law.
4. Whether a portion measuring 4 acres out of land parcel Namirama/Bunyala/526 should be registered in the name of Ainea Wawire Ndombi and the rest of the land parcel be registered in the name of Saimon Ukhevi Lukeri.
5. Whether the respondent should be condemned to pay costs of this originating summons.

It is supported by the grounds set forth in the affidavit of Aineah Wawire Ndombi.

PW1 testified that sometime in 1983 he bought 4 acres of land from the defendant at a cost of Kshs. 10,800/=. PEx1 is the land sale agreement. The defendant inherited the land from his father and he produced the green card and grant as exhibits (PEx2 and 3). He is living there to date and has built houses and his wife and children died and were buried there. PW2 and PW3 were witnesses to the said agreement and PW3 confirms drafting the same. They all confirm that PW1 took possession in 1983.

The defendant submitted that, it is not true that the palintiff's entire family in 1983 purchased a portion measuring 4 acres of land out land parcel No. Namirama/Bunyala/526 for an undisclosed purchase price. That as at 1983 he did not possess and/or own any title in land parcel No. Namirama/Bunyala/526 capable of being purchased by the plaintiff. That the title of land parcel No. Namirama/Bunyala/526 was registered in the name of his late father and not in his name. That if there was such agreement the same is a nullity and void ab initial and cannot be enforced in court of law. That he was registered as the administrator of the estate of Lukeri Mafuku in 1986. That it is not true that he wanted to evict the plaintiff from the aforesaid land and sell the same to another person. That it is true that the plaintiff lodged a caution in land parcel No. Namirama/Bunyala/526 in 2012 when he started to trespass into the land and he is waiting for confirmation of the grant to lodge a complaint to have the caution removed. That the plaintiff will not suffer any loss as he does not occupy and/or stay on the land and has never occupied the land since 1983. That that the plaintiff has his home where he owns land and stays with his entire family.

DW1, the defendant confirms that the plaintiff has been residing there since 1983. However, he was invited there by his mother and he would be willing to give him one acre only where he was to stay and not four. He confirms that he got the grant after his mother passed away (DEX1 and 2). DW2 his wife corroborated the defendants 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. Namirama/Bunyala/526 is the defendant as the administrator of the estate of Lukeri Mafuku. The issue is whether or not he holds a portion of four acres of the land on behalf of the plaintiff by virtue of the 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 has resided on the suit land from 1983 to date. PW1 testified that in 1983 he bought 4 acres of land from a portion land parcel No. Namirama/Bunyala/526 from the defendant at a cost of Kshs. 10,800/=. PEx1 is the land sale agreement. The defendant inherited the land from his father and he produced the green card and grant as exhibits (PEx2 and 3). He is living there to date and has built houses and his wife and children died and were buried there. PW2 and PW3 were witnesses to the said agreement and PW3 confirms drafting the same. PW1 took possession in 1983.

Clearly the plaintiff stayed at the land peacefully, openly and uninterrupted between 1983 and 2012 when this suit was filed. I find that the plaintiff has established that the defendant had knowledge (or the means of knowing actual or constructive) of the possession or occupation, I find that the plaintiff entered into a land sale agreement with the defendant in 1983 before taking possession and was not living there at the invitation of the defendant’s mother. The plaintiff has been in quiet, open, exclusive and continuous occupation a portion measuring 4 acres out of land parcel NAMIRAMA/BUNYALA/526 for period of over 28 years peacefully and uninterrupted commencing from 1983. I find that the plaintiff has established his case on a balance of probabilities and I grant the following orders;

1. The plaintiff Ainea Wawire Ndombi has acquired title to a portion measuring 4 acres out of land parcel Namirama/Bunyala/526 by operation of law, to wit, through adverse possession.

2. A portion measuring 4 acres out of land parcel Namirama/Bunyala/526 should be registered in the name of Ainea Wawire Ndombi. The defendant is to transfer title to a portion measuring 4 acres out of land parcel Namirama/Bunyala/526 to the plaintiff and in default the Deputy Registrar to sign the transfer documents.

3. There will be no costs in this suit as the parties are relatives.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 20<sup>TH</sup> DAY OF MARCH 2019.**

**N.A. MATHEKA**

**JUDGE**