



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 149 OF 2013**

**ELPHAS OTIENDE ANDURU.....PLAINTIFF/APPLICANT**

**VERSUS**

**AKWERA HEZRON NDEGU**

**HEZRON ARUNGA.....DEFENDANTS/RESPONDENTS**

**JUDGEMENT**

This application is of one of Elphas Otiende Anduru who claims to have acquired by way of adverse possession Land Parcel W/BUNYORE/ITUMBU/256 for the determination of the following questions:-

1. Whether the applicant should be registered as the proprietor of the land parcel W/BUNYORE/ITUMBU/256 measuring 0.1 Ha or thereabout by virtue of adverse possession and trust.
2. Whether the registration of the 1<sup>st</sup> respondent and subsequent transfer to 2<sup>nd</sup> respondent as the registered proprietor of the said land parcel No. W/BUNYORE/ITUMBU/256 was illegal, void and null hence the same to be revoked.
3. Whether the registration of the 2<sup>nd</sup> respondent as proprietor of the whole land parcel No. W/BUNYORE/ITUMBU /256 should be cancelled and the 2<sup>nd</sup> respondent to transfer the said parcel of land measuring 0.1 HA or thereabout to the applicant.
4. Whether the applicant can be declared the absolute owner of land parcel No. W/BUNYORE /ITUMBU/256 which he has cultivated and has been in actual, possession, peacefully, openly and uninterrupted for a period of over 12 years.
5. Whether the 2<sup>nd</sup> respondent be ordered to execute all documents of transfer in respect of the parcel No. W/BUNYORE/ITUMBU/256 in favour of the applicant, failure to which authorize court executive officer or Deputy Registrar be empowered to execute the same on behalf of the 2<sup>nd</sup> respondent.

He prays for orders that;

- a. The respondents their agents, representatives, employees, servants and or assigns be restrained by a permanent order of injunction from interfering, alienating, subdividing, evicting and/or threatening the peaceful occupation of the applicant.
- b. A declaration that the applicant is entitled to the land parcel No. WEST BUNYORE/ITUMBU/256 measuring 0.1 Ha or thereabouts by virtue of adverse possession.
- c. A declaration that upon the expiry of 12 years the 1<sup>st</sup> respondents held land parcel No. W/BUNYORE/ITUMBU/256 in trust for the applicant.
- d. A declaration that upon expiry of 12 years the respondents interest in land parcel No. WEST BUNYORE/ITUMBU/256 occupied by the applicant got extinguished.
- e. A declaration that the registration of the 1<sup>st</sup> respondent and subsequent transfer to 2<sup>nd</sup> respondent as the registered proprietor of land parcel No. W/BUNYORE/ITUMBU/256 was illegal, void and null hence the same be cancelled and/or revoked.

f. A declaration that the 2<sup>nd</sup> respondent executes all documents of transfer in respect of parcel of land No. W/BUNYORE/ITUMBU/256 measuring 0.1 Ha or thereabout to the applicant and/or in default the executive officer of this court do execute all the necessary documents to effect the transfer.

g. A declaration that the registration of the 2<sup>nd</sup> respondent as the proprietor of land parcel land W/BUNYORE/ITUMBU/256 be cancelled and the same be transferred to the applicant.

h. An order of costs.

PW1, the plaintiff testified and submitted that he was born in 1970 and since then he has been on the said land knowing it belonged to his father. He has been using the suit land allocated to him by his father and his parents and close relatives have been buried there. It was not until 2012 when he realized that the suit land was registered in the name of the 2<sup>nd</sup> respondent/defendant after it was transferred by the 1<sup>st</sup> respondent/defendant (PEX 1 is a copy of the green card). The plaintiff's father had been using the land and had established his homestead. PW1 confirms in cross examination that he once heard that there was a dispute over the suit land.

The defendant states that, the applicant's originating summons dated application dated 21<sup>st</sup> May, 2013 is fundamentally defective as the same is res judicata since the matter was determined in the ruling made on 12<sup>th</sup> February, 1985 between the applicant's relative and his grandfather delivered in Kakamega CMCC No. 304 of 1980. That land parcel No. WEST BUNYORE/ITUMBU/256 is family land that initially belonged to his uncle who is the 1<sup>st</sup> respondent/defendant herein and after the demise of his grandfather his uncle petitioned for grant of letters of administration vide Succession Cause No. 138 of 1989 and subsequently acquired title to the said land which is now prime land and borders Luanda Vihiga road. That the disputed land being parcel No. WEST BUNYORE/ITUMBU/256 borders land parcel No. WEST BUNYORE/ITUMBU/257 which belonged to the late Wellington Anduru Khabuye who was the applicant's father. That prior to the demise of his grandfather the applicant's father had attempted to grab the disputed land and even lodged cautions in 1979 claiming ownership of the said land but the same was later removed by an order of the court. That the applicant's late father filed civil suit No. 304 of 1980 at Kakamega Chief Magistrates Court challenging his grandfather's ownership of land parcel No. WEST BUNYORE/ITUMBU/256 but his case was heard and dismissed with costs and he was ordered to vacate the land, no appeal was lodged against the said judgment by the applicant's late father. DEX1 is a copy of proceedings and judgment. That pursuant to the aforementioned judgment his late grandfather with the assistance of police officers evicted the applicant's late father and demolished all the houses that had been built on a portion of land parcel No. WEST BUNYORE/ITUMBU/256.

That consequently, his grandfather gained full control and occupation of the disputed land and later on gave the said land to his uncle who is the 1<sup>st</sup> respondent/defendant herein prior to his death in the 1987. That subsequently, the 1<sup>st</sup> respondent/defendant petitioned for grant of letters of administration vide Succession Cause No. 138 of 1989 and obtained title to the said land in 1992 which land is now prime land and borders Luanda Vihiga road. That upon the 1<sup>st</sup> respondent/defendant securing title to land parcel No. WEST BUNYORE/ITUMBU/256 he travelled back Nakuru where he had been working and left the disputed land under the care of his grandmother one Selpha Eklesia Hezron who has been cultivating it. That it was during the 1<sup>st</sup> respondent's/defendant's absence from home that the applicant again secretly encroached on apportion of land that borders their land parcel No. WEST BUNYORE/ITUMBU/257 and built temporary houses in 2008 with full knowledge that the said land does not belong to his late father and the court had earlier on determined who the real owner was. That the matter was reported to the area chief by the 1<sup>st</sup> respondent/defendant but despite advise from the local authorities the applicant and his family refused to vacate from the portion of land they were occupying. That the 1<sup>st</sup> respondent/defendant decided to sell the entire parcel of land and upon consultation with the family members it was decided that instead of selling the land to strangers he should consult from members of the family and see if there is anyone willing to buy the land. This is when DW1, the 2<sup>nd</sup> respondent/defendant offered to buy the land. That through an advocate he conducted a search and after ascertaining that the said land had no encumbrances they executed a Sale Agreement with the 1<sup>st</sup> respondent/defendant after he had paid the agreed purchase price. DEX 4 and 2 are copies of search certificate and Sale Agreement dated 6/2/2003. Through his advocates he later on processed the title and was issued with the same on 12/9/2012 and became the new owner of land parcel No. WEST BUNYORE/ITUMBU/256. DEX3 is a copy of the said title.

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. WEST BUNYORE/ITUMBU/256 is the 2<sup>nd</sup> respondent/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 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 1970. It is the plaintiff's evidence that he was aware of a dispute over the said land way back before it changed ownership to the 1<sup>st</sup> respondent/defendant. He produced the green card which shows the first caution was placed in 1979. It is a finding of fact that in civil suit No. 304 of 1980 at Kakamega Chief Magistrates Court the same was challenging the 2<sup>nd</sup> respondent's/defendant's grandfather's ownership of land parcel NO. WEST BUNYORE/ITUMBU/256 and the case was heard and dismissed with costs and the plaintiff therein was ordered to vacate the land no appeal was lodged against the said judgment. I find that the plaintiff has failed to establish that the defendants had knowledge (or the means of knowing actual or constructive) of the possession or occupation, that the possession was continuous and not be broken for any temporary purposes or any endeavours to interrupt it for a period on 12 years. It is the 2<sup>nd</sup> respondent's/defendant's evidence that his grandfather had full control and occupation of the disputed land and later on gave the said land to his uncle who is the 1<sup>st</sup> respondent/defendant herein prior to his death in the 1987. That subsequently, the 1<sup>st</sup> respondent/defendant petitioned for grant of letters of administration vide Succession Cause No. 138 of 1989 and obtained title to the said land in 1992. That upon the 1<sup>st</sup> respondent securing title to land parcel No. WEST BUNYORE/ITUMBU/256 he travelled back Nakuru where he had been working and left the disputed land under the care of his grandmother one Selpha Eklesia Hezron who has been cultivating it. That it was during the 1<sup>st</sup> respondent's absence from home that the applicant again secretly encroached on apportion of land that borders their land parcel No. WEST BUNYORE/ITUMBU/257 and built temporary houses in 2008 with full knowledge that the said land does not belong to his late father and the court had earlier on determined who the real owner was. That the matter was reported the area Chief (Chief's letter dated 2013 PEx5) by the 1<sup>st</sup> respondent/defendant but despite advise from the local authorities the applicant and his family refused to vacate from the portion of land they were occupying. That the 1<sup>st</sup> respondent/defendant decided to sell the entire parcel of land and upon consultation with the family members it was decided that instead of selling the land to strangers he should consult from members of the family and see if there is anyone willing to buy the land. This is when DW1, the 2<sup>nd</sup> respondent/defendant offered to buy the land. That through an advocate he conducted a search and after ascertaining that the said land had no encumbrances they executed a Sale Agreement with the 1<sup>st</sup> respondent/defendant after he had paid the agreed purchase price. DEx 4 and 2 are copies of search certificate and sale agreement dated 6/2/2003. Through his advocates he later on processed the title and was issued with the same on 12/9/2012 and became the new owner of land parcel No. WEST BUNYORE/ITUMBU/256. DEx3 is a copy of the said title. The 1<sup>st</sup> respondent/defendant was an innocent purchaser for value and his title is 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 as the parties are neighbours.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 9<sup>TH</sup> DAY OF APRIL 2019.**

**N.A. MATHEKA**

**JUDGE**