



**REPUBLIC OF KENYA.**

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

**ELC CASE NO. 444 OF 2014**

**JASON INGIDA BULIMU.....PLAINTIFF**

**VERSUS**

**LABAN KINZI KIGASIA**

**(TRUFENA NDDECHE KIGACHA ).....DEFENDANT**

**JUDGEMENT**

By a plaint dated 8<sup>th</sup> May 2002, the plaintiff stated that he is registered as the absolute proprietor of land parcel No. TIRIKI/HAMISI “A”/338 measuring 0.37 Hectares which he purchased from one Muhindi Onyango on 2<sup>nd</sup> March, 2001 and commenced utilizing the same. The plaintiff avers that the defendant has illegally, wrongfully and without any colour of right trespassed onto part of the plaintiff’s L.R. TIRIKI/HAMISI “A”/338 and started using the same and though the plaintiff has asked the defendant to stop the said trespass the defendant has arrogantly refused and or failed to heed the plaintiff’s request and is now in the process of constructing a structure on the said parcel of land unlawfully and forcefully. The plaintiff’s prayer therefore is for this honourable court to declare an order as follows:-

(a) That the plaintiff is the rightful owner of L.R. NOL. TIRIKI/HAMISI “A”/338 and he is entitled to exclusive, peaceful and unhindered possession and use thereof and an order for eviction from the said parcel of land do issue forthwith against the defendant, his relatives, servants and agents.

(b) An order of injunction do issue perpetually restraining the defendant either by himself or through his employees, servants and or agents from laying claim to , trespassing onto, utilizing developing, carrying out any works, constructing or in any other manner dealing with or interfering with the plaintiff’s ownership, possession and or use of the said parcel of land.

(c) Costs of this suit.

PW1 produced the land sale agreement PEx1, Title deed PEx2 and the green card PEx3 as documentary evidence. The defendant lives on land parcel No. TIRIKI/HAMISI “A”/339 but is cultivating on part of his farm land parcel No. TIRIKI/HAMISI “A”/338. The surveyors report confirms that the defendant resides on land parcel No. TIRIKI/HAMISI “A”/339 PEx4. PW2 confirms that her husband one Muhindi Onyango sold the land to the plaintiff. The defendant wanted to buy but failed to do so. The land was not ancestral land and that her husband had bought it.

DW1 Laban Kingi Kigasia (now deceased) testified that the suit land is their ancestral land which originally was property of his father. That one Muhindi Onyango who sold the suit land to the plaintiff was his half-brother. He was sired by a different man and came with his mother. During land adjudication his father was sick and Muhindi Onyango aforementioned being older than him represented the family at the Land Adjudication Committee when land demarcation was in process. His said half-brother Muhindi Onyango instead of putting forward his name for registration since he was the only biological son of his father, took advantage of his being older than him to register himself as the owner thereof. The said half-brother kept the fact of registering himself owner of the land secret, while he assumed that he had registered the land in his name. His father took care of Muhindi Onyango and after he was fully grown up, he became aware of the whereabouts of his biological father, and left to go and live with him at Sabatia in Maragoli. That he is entitled to his father’s ancestral land as his only biological son. That long after his step-brother left to live with his biological father, he learnt that he had registered the suit land in his name. That he returned home in 1997 and put up his house in land parcel No. TIRIKI/HAMISI “A”/339 since the suit land parcel No. TIRIKI/HAMISI “A”/338 had a dispute. He cultivates on land parcel No. TIRIKI/HAMISI “A”/338. The plaintiff is a neighbor and he all along knew and saw him in peaceful and quiet occupation of the suit land. The plaintiff has never been in occupation of the suit land. The plaintiff first filed his claim in his Senior Principal Magistrate’s court Civil Suit No. 562 of 2002 which case was dismissed.

DW2 testified that he is a neighbor to both parties and that the defendant inherited the land from his father. DW3 states that the defendant was her husband and they moved there in 1978. They built three houses on land parcel No. TIRIKI/HAMISI “A”/338 and then a few years ago moved them to land parcel No. TIRIKI/HAMISI “A”/339. DW4 a former Assistant Chief confirmed that the defendants’ relatives were buried on the suit land and there was no dispute. He states that defendant lives and farms on land parcel No. TIRIKI/HAMISI “A”/338. DW5

gave evidence that his father sold DW1 land (DEx4 is the agreement). However the agreement has no description of the land. DW6 a neighbor testified that DW1 inherited the land from his father. The defendant counter claims by virtue of trust created by his father and also adverse possession.

This court has carefully considered the evidence and submissions therein. The defendant submitted that this court does not have jurisdiction to entertain this matter as the matter had been dismissed in Civil Suit No. 562 of 2002 and the tribunal had rendered their decision. The preliminary issue to be determined therefore is whether or not this court has jurisdiction. I have perused the judgement in Kakamega Civil Suit No. 562 of 2002, the court referred the matter to the tribunal as it did not have jurisdiction. This is not res judicata. At the tribunal the matter was heard but the award has never been adopted in court. Secondly the plaintiff was not a party. Hence there is no award in existence in this matter. Pursuant to the Constitutional mandate granted under Article 162 (2) of the Constitution. Parliament enacted the Environment and Land Court Act chapter 12 A of the Laws of Kenya wherein section 12 (2) (d) stipulates as follows.

1. ....

2. In exercise of its jurisdiction under Article 162 (2) of the Constitution, the court shall have power to hear and determine disputes relating to the environment and land, including disputes

....(d) relating to public, private and community land and contracts, chores in action or other instruments granting any enforceable interest in land: and.

The pleadings in the matter show that the matter is predominantly a land matter to be dealt with by the Environment and Land Court. I find this matter is not res judicata and this court shall proceed to analyse and determine the same.

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. TIRIKI/HAMISI “A”/338 is the plaintiff. The issue is whether or not he holds a good title by virtue of the defendant’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, it is the plaintiff's evidence that he purchased the same from one Muhindi Onyango on 2<sup>nd</sup> March, 2001 and commenced utilizing the same. The plaintiff avers that the defendant has illegally, wrongfully and without any colour of right trespassed onto part of the plaintiff's land L.R. TIRIKI/HAMISI "A"/338. The defendant testified that he returned home in 1997 and put up his house in land parcel No. TIRIKI/HAMISI "A"/339 since the suit land parcel No. TIRIKI/HAMISI "A"/338 had a dispute. DW2 his wife states that they settled there in 1978. DW4 stated that the defendant resides and cultivates the suit land parcel No. TIRIKI/HAMISI "A"/ 338. These are material contradictions in the defendant's case. This case was filed in 2002. I find that the defendant has failed to establish that he has been in possession of the suit land peacefully and openly for a continuous period of twelve years. Indeed there is an agreement on record showing that the defendant attempted to buy the suit land. One wonders then why he would want to buy land from his brother which he claims is ancestral. PEx3 the certified register shows that Muhindi Onyango was the first registered owner of suit land parcel No. TIRIKI/HAMISI "A"/ 338. No evidence has been adduced to show that he held the same in trust. I find that the plaintiff was an innocent purchaser for value. I see no fraud on the part of the said Muhindi Onyango or the plaintiff herein. I find that the plaintiff holds good title and as the proprietor of suit land he is entitled to the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. The defendant's claim for adverse possession in the originating summons must fail and is dismissed. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. That the plaintiff is the rightful owner of L.R. No. TIRIKI/HAMISI "A"/338 and he is entitled to exclusive, peaceful and unhindered possession and use thereof and the defendant, his relatives, servants and agents are given 3 (three) months from the date of this judgement to vacate the suit land L.R. No. TIRIKI/HAMISI "A"/338 and indefeasible order to issue forthwith.

2. An order of permanent injunction do issue restraining the defendant either by himself or through his employees, servants and or agents from laying claim to , trespassing onto, utilizing developing, carrying out any works, constructing or in any other manner dealing with or interfering with the plaintiff's ownership, possession and or use of the said parcel of land.

3. Each party to bear its own costs of this suit.

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**