



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 256 OF 2017

JOHN AMALEMBA KAROLI:.....:PLAINTIFF

JOSEPH MMEYWA AMALEMBA:.....:PLAINTIFF

THOMAS MBOYA AMALEMBA:.....:PLAINTIFF

MUKAVANA AMALEMBA:.....:PLAINTIFF

VERSUS

JOSEPH CHIBEYIA MAKAMU:.....:DEFENDANT

JUDGEMENT

The plaintiffs deny that the defendant has been or is the sole registered proprietor of L.R. NO. ISUKHA/LUKOSE/1027 since 18th March, 1985 or any other date and deny that they jointly or severally, unlawfully or without the plaintiff's consent or permission moved onto the said parcel of land in 2001, they deny that they required the plaintiff's consent to use the said parcel of land, deny that the plaintiff has used the Provincial Administration to resolve the issue, deny that the defendants ought to vacate therefrom. The plaintiffs aver that they inherited the suit land L.R. NO. ISUKHA/LUKOSE/1027 from the deceased Karoli Muvaka and have occupied and utilized L.R. NO. ISUKHA/LUKOSE/1027 by constructing homes and growing trees and crops thereon exclusively, peacefully, openly, continuously and uninterrupted from 1980 to date and for a period of over 12 years and that they are lawfully entitled to such occupation, possession and use and to the title thereof by virtue of adverse possession. The plaintiffs aver that the defendant has never used or moved onto or taken possession or occupation of the suit land L.R. NO. ISUKHA/LUKOSE/1027 for a period of over 12 years and that as the defendant's title thereto has been extinguished by operation of law, he holds the said title in trust for the plaintiffs to whom he ought to transfer the same. In the circumstances the plaintiffs aver that the defendant's claim is statute barred and as he is in law not the owner of the suit land, he is not entitled to the orders sought in the counterclaim against the plaintiffs or any remedy at all. The plaintiffs pray that this honourable court be pleased to dismiss the defendant's suit with costs and declare that the plaintiffs are lawfully entitled to the suit land by virtue of adverse possession.

PW1, the 1st plaintiff gave evidence that, the suit land is his land. He left in 1980 but returned in 1993 because of the tribal clashes. He sold the land to the defendant in 1985 but the defendant had a balance of Kshs. 2000/= which he never paid. He has been living there peacefully since 1993. This matter was consolidated with civil suit number 97 of 2003 where the defendant herein is the plaintiff there. He had gone to Nandi to work in 1980. PW2, gave evidence that he heard that PW1 sold the suit land but failed to pay the full purchase price. PW3 confirmed that PW1 sold part of the land to the defendant though he was not a witness to the sale agreement. PW4 the 1st plaintiff's son stated that his father went to work in

Nandi in 1980 and returned to the suit land in 1993. He sold the land without the consent of the family.

The defendant avers that he has since 18th March 1985 been the sole registered proprietor of the whole of that parcel of land known as ISUKHA/LUKOSE/1027 measuring approximate area 0.8 Ha. The plaintiff avers that in the year 2001 the defendants jointly and severally and without the plaintiff's consent or permission moved onto the plaintiff's parcel of land aforementioned and erected houses thereon and started staying therein. The plaintiff avers that he has used the Provincial Administration to resolve the issue, and the said Provincial Administration office has ruled that the defendants vacate from the suit parcel of land but the defendants have refused to vacate. The defendant's claim as against the plaintiffs jointly and severally is that the plaintiffs act of occupying the suit land amounts to trespass, the same is unlawful and the plaintiffs jointly, severally and anybody claiming on settling on the suit parcel of land on the strength of the plaintiffs should be forcefully evicted therefrom, and that they be further restrained by way of permanent injunction from further interfering with the defendant's peaceful enjoyment of the suit property. DW1, the defendant testified that he bought the land legally from PW1 in 1984. PW1 moved away but returned in 1994. PW1 signed all the transfer forms before the defendant could get the 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. L.R. NO. ISUKHA/LUKOSE/1027 is the defendant (PEX1 is the green card). The issue is whether or not he holds a good title by virtue of the

plaintiffs' 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 1st plaintiff testified that he sold the suit land to the defendant in 1985 but never got the full purchase price and they remained a balance of Kshs.2000/=. He left in 1986 and returned in 1993 due to tribal clashes. He has been residing on the suit land peacefully land from 1993. It is the plaintiff's evidence that the defendant filed suit against him in 2003 which is civil suit number 97 of 2003 which was consolidated with the present suit seeking his eviction. The 1st plaintiff states that he could have signed transfer forms by mistake. I find that the 1st plaintiff is not a truthful witness. I am satisfied that he did sell his land and relocated to Nandi. He only returned due to the tribal clashes prevailing at the time. I find that the plaintiff has failed to establish that his possession of the suit land was continuous and not broken for any temporary purposes or any endeavours to interrupt it for a period on 12 years. From 1993 when he returned to 2003 when the defendant filed suit is a period of 10 years. I find that the 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. I find that the counter claim by the defendant has been proved and I grant the following orders;

1. The plaintiffs, their agents/servants and employees are to vacate from the suit land parcel No. ISUKHA/LUKOSE/1027 within the next 6 (six) months from the date of this judgement and in default eviction order to issue forthwith.

2. A permanent injunction to issue to restrained the plaintiffs either, by themselves or through his employees, servants, relatives, and/or agents from trespassing onto land parcel No. ISUKHA/LUKOSE/1027.

3. Each party to bear its own costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 9TH DAY OF APRIL 2019.

N.A. MATHEKA

JUDGE