



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 36 OF 2018

PATRICK MUTENYO WANJALAPLAINTIFF

VERSUS

FATUMA NALIAKA KUTA

SALIM MUCHELULE OMULANGULA

ASMINI WABWIRE WANYAMA

RAMADHAN JOM KARIO

RAMADHAN MAHDLY WEKHUYI

GODFREY ONGUME CHICHOLA DEFENDANTS

JUDGEMENT

The applicant herein Patrick Mutenyo Wanjala claims to have acquired title to all those parcels of land previously comprised in the parcel of land then known as N. WANGA/KHALABA/172 and now subsequently subdivided to create new titles namely N. WANGA/KHALABA/1800, N. WANGA/KHALABA/1801, N. WANGA/KHALABA/1802, N. WANGA/KHALABA/1803, N. WANGA/KHALABA/1804 and N. WANGA/KHALABA/1805 and registered in the names of the 1st respondent, 3rd respondent, 4th respondent, 6th respondent and 2nd respondent respectively by adverse possession for orders and for determination of the following:-

1. Whether the applicant Patrick Mutenyo Wanjala has acquired title to the said parcels of land namely N. WANGA/KHALABA/1800, 1801, 1802, 1803, 1804 and 1805 previously comprised in title NO. N. WANGA/KHALABA/172 measuring in total 5.93 hectares or thereabouts by adverse possession.
2. Whether the respondents either as administrators of the estate of the late Ilario Wanzala Wanjala alias Wanyama Wanzala or as beneficiaries thereof hold title to the respective parcels of land in trust for the applicant.
3. Whether the title of the late Ilario Wanyama Wanzala alias Wanyama Wanjala and that of the respondents herein got extinguished on the expiry of 12 years from the time the applicant started occupying and or using the land way back in the 1970s.
4. Whether the estate of the late Ilario Wanzala Wanyama alias Wanyama Wanzala had any or good title to pass to the respondents herein as at 16/2/2007.
5. Whether the respondents should be ordered to transfer to the applicant the said land parcel NOS. N. WANGA/KHALABA/1800, 1801, 1802, 1803, 1804 and 1805 (previously forming part of L.R. N. WANGA/KHALABA/172) by executing all documents of transfer in respect of the said parcels of land in favour of the applicant.
6. Who should be condemned in the costs of this case.

It is based on the grounds that the plaintiff has been in occupation of the suit parcels of land since early 1970s continuously, openly, uninterrupted peacefully and without force to the total exclusion of the respondents herein including the deceased Ilario Wanyama Wanzala alias Wanyama Wanzala. That the defendants have never for a period exceeding twelve years backwards from 16/2/2007 occupied and or utilized any part of the suit land. That the plaintiff has houses on the suit land besides putting part of it under cane contracted to Mumias

Sugar Co. Ltd. And the rest under subsistence farming.

The plaintiff submitted that he has been occupying the said parcels of land since 1972 when his late father purchased the same from the late Wanyama Wanjala who was the father of the 1st and 3rd defendants. That he commenced citation proceedings against the 1st and 3rd respondents as well as their deceased step mother Yawewe Wanyama in Mumias SRM SUCC. Cause No. 6 of 2006 to compel them to take out letters of administration in respect of their late father's estate so as to enable him proceed against them as administrators of the estate of their late father. That on or about 7/3/2007 he was informed that some people had invaded the parcel of land known as N. WANGA/KHALABA/172 and were demarcating it and creating new boundaries therein. That he found new boundaries created in the land by the defendants herein who claimed to have acquired title to the said land. That he immediately conducted a search at the lands office which showed that title No. N. WANGA/KHALABA/172 had been closed on 27/2/2007 and new titles created on the same day. PW2 testified that Wanyama Wanjala sold the land to her husband Bernard Wanjala who died in 1974. He gave the land to his son the plaintiff who works in Nairobi and his worker lives on the land. PW3, Historia Wanga Wesonga states that he is the plaintiff's employee since 1995 and he lives on the suit land. No one else lives there.

DW1, the 2nd defendant testified that Wanyama Wanjala was his uncle and his mother's brother. He was born on that land and still lives there. It is after his uncle died in 1987 that he started seeing the plaintiff. This was in 1990. His uncle's wife reported to the chief and the plaintiff was stopped. Later the deceased's wife filed succession. The land was subsequently distributed to the family members in 2007. DW2 the assistant chief of the area since 1996 confirms that it is the defendants who live on the suit land and that the plaintiff resides in Kholera sub location. The owner of the land was Wanyama Wanjala. The court visited the scene on the 24th June 2014 and the plaintiff pointed out a posho mill, some crops and the place where his mother's house used to be. The village elder Jared Amuka stated that the said homestead and crops shown belonged to one Historia Wanga. 2nd defendant confirmed the same and states that he has sued the said Historia in a Mumias Court. That the said Historia's father had also sued them claiming he had bought the land. They moved there in 2004. The 1st defendant showed her houses and some other houses belonged to third parties who claimed to have bought the land.

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 Nyang'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 owners of land parcel No. S. Wanga/Lureko/172 now subdivided are the defendants. 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 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, Patrick Mutenyo Wanjala claims to have acquired title to all those parcels of land previously comprised in the parcel of land then known as N. WANGA/KHALABA/172 and now subsequently subdivided to create new titles namely N. WANGA/KHALABA/1800, N. WANGA/KHALABA/1801, N. WANGA/KHALABA/1802, N. WANGA/KHALABA/1803, N. WANGA/KHALABA/1804 and N. WANGA/KHALABA/1805 and registered in the names of the defendants. The plaintiff submitted that he has been occupying the said parcels of land since 1972 when his late father purchased the same from the late Wanyama Wanjala who was the father of the 1st and 3rd defendants. PW1 produced a land transfer document signed by his father and Wanyama Wanjala dated 11th January 1972. The plaintiff produced several sugar cane contracts from 1992 to 2008. He submits that it is his worker Historia who resided on the said land while he worked in Nairobi. PW3 the said Historia confirms that he has stayed there from 1995 and it was not until 2011 that the 2nd defendant had him arrested for trespass. PW2 the plaintiff's mother testified that they bought land in 1970 from Wanyama Wanjala and moved there. Wanyama Wanjala went to live in Uganda. The 2nd defendant confirmed that his house was not on the suit land because of the cases. The 1st defendant confirmed during the site visit of the suit land by the court that she returned to the suit land in 1986 from Marachi and found the house build by the said Historia. She later sold part of the land to third parties. It is in evidence that the plaintiff commenced citation proceedings against the 1st and 3rd respondents as well as their deceased step mother Yawewe Wanyama in Mumias SRM SUCC. Cause No. 6 of 2006 to compel them to take out letters of administration in respect of their late father's estate so as to enable him proceed against them as administrators of the estate of their late father. It was later in 2007 that he discovered the land had been subdivided. I find that the plaintiff's father purchased the suit land in 1972 and his family took possession. It is clear that the plaintiff grew sugar cane between 1992 and 2008 as per the contracts with the sugar company. It was only in 2007 when disputes arose over the suit land. During the site visit the court established that PW3, the plaintiff's caretaker had a homestead there and grew crops. I find that the plaintiff and his family were in possession of the suit land continuously and openly for a period of over 12 years. I find that the estate of the late Ilario Wanzala Wanyama alias Wanyama Wanzala did not have good title to pass to the defendants herein as at 16/2/2007. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. That the plaintiff has acquired title to the said parcels of land namely N. WANGA/KHALABA/1800, 1801, 1802, 1803, 1804 and 1805 previously comprised in title NO. N. WANGA/KHALABA/172 measuring in total 5.93 hectares or thereabouts by adverse possession.
2. That the defendants as administrators of the estate of the late Ilario Wanzala Wanjala alias Wanyama Wanzala or as beneficiaries thereof hold title to the respective parcels of land in trust for the applicant.
3. That the title of the late Ilario Wanyama Wanzala alias Wanyama Wanjala and that of the respondents herein got extinguished on the expiry of 12 years from the time the plaintiff started occupying and or using the land way back in the 1970s.
4. The defendants are ordered to transfer to the applicant the said land parcel NOS. N. WANGA/KHALAHA/1800, 1801, 1802, 1803, 1804 and 1805 (previously forming part of L.R. N. WANGA/KHALABA/172) by executing all documents of transfer in respect of the said parcels of land in favour of the plaintiff and in default the Deputy Registrar to do so.
5. The defendants to bear the costs of this case.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 14TH MAY 2019.

N.A. MATHEKA

JUDGE