



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 278 OF 2017

CHARLES MUKA ANYANGA.....PLAINTIFF

VERSUS

NYANGWESO OMUMANI ALIAS PETER NYANGWESO....DEFENDANT

JUDGEMENT

This application is of one Charles Muka Anyanga of P.O. Box 714, Kakamega who claims to be entitled to a portion measuring 5 acres from parcel L.R. Butso/so/Shikoti/1314, by adverse possession for determination of the following issues and making the following orders;

- (a) A declaration that the applicant bought a portion measuring 5 acres comprised in the present parcels L.R. Butso/so/Shikoti/10002, 10003 and 10004 and took vacant possession in 1974 and has continued to be in peaceful, uninterrupted possession since then to-date.
- (b) A declaration that the respondent's rights and interest in the 5 acres comprised in the aforesaid parcels got extinguished by adverse possession upon expiry of 12 years while the applicant was in possession.
- (c) A declaration that the respondent at the expiry of 12 years held and is holding a portion measuring 5 acres of aforesaid parcels in trust for the applicant.
- (d) A declaration that the aforesaid portion of 5 acres comprised in the three aforesaid parcels vests in the applicant, to whom it should be transferred and be accordingly registered as sole absolute owner forthwith.
- (e) An order that the respondent do sign all relevant documents to facilitate the subdivision transfer of a portion occupied by the applicant measuring 5 acres of parcel L.R. Butso/so/Shikoti/10002, 10003 and 10004 to the applicant and in default the Deputy Registrar of this court be authorized to sign the same on behalf of the respondent.
- (f) An order that the respondent be condemned to pay the costs of this suit.
- (g) Such further orders or reliefs as this Court may deem fit to grant.

PW1, the plaintiff testified that, he purchased in 1974 five acres of land from the defendant which is now comprised in land parcels L.R. Butso/so/Shikoti/10002, 10003 and 10004. He took vacant possession in 1974 and has continued to be in peaceful, uninterrupted possession until 2003. The plaintiff called four witnesses to corroborate his evidence. PW2 a brother to the defendant confirmed that the defendant signed the sale agreement. PW 2, PW3 and PW5 all signed the agreement as witnesses.

The defendant submitted that, he never entered into any purchase agreement to sell his land to the applicant herein. That the applicant has been his neighbor for a long time and all this time he has been in exclusive use of his land parcel Butso/so/Shikoti/6956. That as the absolute registered owner of land parcel L.R. BUTSOTSO/SHIKOTI/6956 he has the right to use the land in any manner he deems fit. That he has never approached the applicant to advance him a sum of Ksh. 200,000/= being conditional for him transferring the alleged purchase to him. DW1 testified that he never signed the agreement. in cross examination he states he signed the document as a village elder and not as a seller. His brother sold his part of the land and not him. That the plaintiff now deceased was buried there and he has left his wife and children. He has since divided the land to his children.

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 parcels L.R. Butso/Shikoti/10002, 10003 and 10004 is the 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 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 was in vacant possession of the suit land from 1974 to 2003. The plaintiff testified that, he purchased in 1974 five acres of land from the defendant which is now comprised in land parcels L.R. Butso/Shikoti/10002, 10003 and 10004. He took vacant possession in 1974 and has continued to be in peaceful, uninterrupted possession until 2003. The plaintiff called four witnesses to corroborate his evidence. He produced the sale agreement as an exhibit. I find the agreement valid and that the defendant indeed sold 5 acres of his land now comprised in land parcels L.R. Butso/Shikoti/10002, 10003 and 10004 to PW1. Indeed the defendant states that the plaintiff's family resides on that land and PW1 was buried there. I find that the defendant is not being a truthful witness when he says he signed the agreement as the village elder. I find that the plaintiff has established possession that was continuous and was not broken for any temporary purposes or any endeavours to interrupt it for a period of over 12 years. I find that the plaintiff has established his case on a balance of probabilities and grant the following orders;

1. A declaration that the respondent's rights and interest in the 5 acres comprised in the land parcels L.R. Butso/Shikoti/10002, 10003 and 10004 got extinguished by adverse possession upon expiry of 12 years while the applicant was in possession.

2. A declaration that the respondent at the expiry of 12 years held and is holding a portion measuring 5 acres of aforesaid parcels in trust for the applicant.
3. A declaration that the aforesaid portion of 5 acres comprised in the three aforesaid parcels vests in the applicant, to whom it should be transferred and be accordingly registered as sole absolute owner forthwith.
4. An order that the respondent do sign all relevant documents to facilitate the subdivision transfer of a portion occupied by the applicant measuring 5 acres of parcel L.R. Butso/Shikoti/10002, 10003 and 10004 to the applicant and in default the Deputy Registrar of this court be authorized to sign the same on behalf of the respondent.
5. No orders as to costs as the parties are neighbours.

It is so ordered.

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

N.A. MATHEKA

JUDGE