



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 224 OF 2014

CHARLES MURIONGO

ANTONY MURIONGO.....PLAINTIFFS

VERSUS

FRANCIS OMONDI.....DEFENDANT

JUDGEMENT

This is an application of the applicants who claim to have acquired title to the whole of land parcel No. S. Wanga/Lureko/695, by adverse possession for the determination of the following issues;

1. Whether the applicants have by themselves and/or as administrators of Zakaria Kweyu have been in continuous and or in uninterrupted occupation and use of the whole parcel of land known as S. WANGA/LUREKO/695 for a period of over 12 years.
2. Whether their use and/or occupation of the land was within the respondent's knowledge.
3. Whether the applicants have acquired title to the said parcel by adverse possession.
4. Whether the registration of the respondent as proprietor of land parcel NO. S. WANGA/LUREKO/695 should be cancelled and the applicants' names entered in the register as proprietors thereof.
5. Whether the respondent should be condemned to pay costs of this summons.

The defendant/respondent submitted that, during land demarcation and adjudication in the year 1967, He was registered as the first and sole owner of land parcel No. S/WANGA/LUREKO/695 measuring 4.5 acres or thereabout. That further he has been utilizing the suit land exclusive of the applicant's family. That the applicants trespassed onto his land in the year 2004 without his consent and they opted to sue him at the Mumias Tribunal where the elders verdict was in their favour and being the aggrieved at Western Provincial, the judgment was in his favour and the applicants allowed 60 days right of appeal but to date no appeal has been filed.

The plaintiffs/applicants testified and submitted that they are the administrators of the estate of one Zakariah Kweyu who was their father. That their father passed away in 2002. That their father was the registered owner of land parcel No. S. WANGA/LUREKO/422. That the respondent is the registered proprietor of land parcel NO. S. Wanga/Lureko/695, PE_{x1} is a copy of the register. That there is no marked boundary features separating land parcel No. S. WANGA/LUREKO/695 and 422. That the defendant has all along been aware of their use of the said parcel of land. That the defendant has never been in occupation of suit land. That the defendant attempted to take control of the suit land in 2004 after the death of their father at which time his right to reclaim it had already been extinguished. That their use and occupation has been open, continuous and uninterrupted save as above for a period of over 20 years.

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. S. Wanga/Lureko/695 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 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 plaintiffs/applicants are administrators of the estate of the late Zakary Kweyu. That during the lifetime and after the death of their late father been in use of the suit land to date. That there is no marked boundary between their late father’s land parcel No. S. Wanga/Lureko/422 and S. WANGA/LUREKO/695 and have occupied and used the said parcel of land for a period of more than 12 years. That the respondent has never occupied the suit land since it was registered in his name in 1967. That the plaintiffs’ use of the aforesaid parcel of land has been continuous, peaceful and with the respondent’s knowledge. That the plaintiffs’ father had been in occupation and use thereof for a period of more than 12 years at the time he passed away in 2002. In their testimony the plaintiffs’ stated they have stayed on the land from the 1970’s. 2nd defendant testified that their father had court cases over the land from 1981. I find that their occupation has not been peaceful. The plaintiffs cannot trespass on their neighbour’s land and then demand to be given the same. In 2007 there were a series of disputes in the tribunal over the same matter. I find that the plaintiffs have failed to establish that their 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 1970 when the defendant returned to 1981when disputes started is a period of about 11 years. I find that the defendant is the legal registered owner and his title is good. I find that the plaintiffs have failed to establish their case on a balance of probabilities and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 7TH DAY OF MAY 2019.

N.A. MATHEKA

JUDGE