



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 290 OF 2013

WILSON W. WATAKOPLAINTIFF

VERSUS

MATHIAS M. MUMASABA.....DEFENDANT

JUDGEMENT

The plaintiff/applicant claims to be entitled to be registered as the proprietor of land parcel title No. N. Wanga/Khalaba/819 having acquired the same by adverse possession and for determination of the following questions;

1. Whether the defendant is the registered proprietor of a parcel of land title No. N. Wanga/Khalaba/819 with effect from 18/6/1985.
2. Whether the plaintiff has been in possession of the whole of the said defendant's parcel openly, continuously and as of right and without interruption by any person for now a period of 28 years.
3. Whether the defendant's title to the parcel of land title N. Wanga/Khalaba/819 stood extinguished after the plaintiff's 12th year of such occupation by adverse possession.
4. Whether the defendant after his title having been extinguished as aforesaid now holds the same as trustee for the plaintiff.
5. Whether the plaintiff is now entitled to be registered as the proprietor of the parcel title No. Wanga/Khalaba/819 by way of adverse possession.

PW1 testified that he lives on land parcel title No. Wanga/Khalaba/818 but he is claiming parcel title No. Wanga/Khalaba/819 which belonged to his uncle who he had no children. His father is very old and owns land parcel title No. Wanga/Khalaba/818. He uses the suit land and is hence entitled to it. He has produced the green card of land parcel title No. Wanga/Khalaba/733 and land parcel title No. Wanga/Khalaba/818 (PEX 1 and 2). He confirms that in 1979 there was a dispute over the said land.

The defendant/respondent stated that he is the sole absolute registered owner of land L.R. N. Wanga/Khalaba/819 measuring 4.05 Ha, PEX1 is a copy of the title deed. That he purchased the above land from Francis Draka Ambundo in 1985, who was the registered owner. That he did comply with all legal and procedural requirements prior to being registered absolute owner of the aforesaid land. That from the records at the Lands office Francis Draka Ambundo acquired the parcel LR. N. WANGA/KHALABA/819 from Sikanga Ekumba. That the plaintiff herein sued him and Francis Draka Ambundo vide Kakamega CMC 137/79 claiming for the land, PEX3 is a copy of the amended plaint. That the above case – Kakamega CMCC 137/1979 was finalized in 2010 or thereabout for want of prosecution. That the plaintiff also referred the dispute in 1984 involving the same subject matter to the District Officer Mumias for arbitration. That he has always enjoyed the interest and rights as registered owner of the land including mortgaging the same, PEX4 is a copy of the letter from AFC.

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 a parcel of land title No. N. Wanga/Khalaba/819 is the defendant (DEx1 is the title deed). 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’s/applicant’s case is that he lives on land parcel title No. Wanga/Khalaba/818 and he is claiming parcel title No. Wanga/Khalaba/819 which belonged to his uncle who had no children. His father is very old and owns land parcel title No. Wanga/Khalaba/818. He uses the suit land and is hence entitled to it. He has produced the green card of land parcel title No. Wanga/Khalaba/733 and land parcel title No. Wanga/Khalaba/818 (PEX 1 and 2). He confirms that in 1979 there was a dispute over the said land in court. His evidence is that he was born there and has never been evicted. I find that the plaintiff has not shown any evidence of beneficial interest over the suit land parcel title No. Wanga/Khalaba/819. Indeed his homestead is on his father’s land parcel title No. Wanga/Khalaba/818. It has been demonstrated in evidence that the suit land had a series of disputes as far back as 1979. If the plaintiff is planting sugar cane on the suit land he is doing so illegally and must stop. 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. I find that the defendant is the legal registered owner 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 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