



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 139 OF 2016**

**JOHN PATRICK OMUKUBA.....PLAINTIFF**

**VERSUS**

**ALI CHIBOLE MMBWANA.....DEFENDANT**

**JUDGEMENT**

This is the application of John Patrick Omukuba who claims to be entitled or acquired title of a portion of land measuring 1.31 Ha or thereabouts from Land Parcel known as Butsotso/Shikoti/933 by way of adverse possession and for determination of the following issues.

1. Whether the applicant has acquired title to or become entitled by adverse possession to a portion of land measuring 1.31 Ha or thereabouts from the parcel of land known as Butsotso/Shikoti/933.
2. Whether the respondent holds title to the said portion of land measuring 1.31 Ha in respect of parcel of land known as Butsotso/Shikoti/933 in trust for the applicant.
3. Whether the applicant has been in possession of the said portion of the suit land measuring 1.31 Ha or thereabouts continuously, openly, peacefully, without force and uninterrupted for a period exceeding 12 years.
4. Whether the applicant should be registered as the proprietor of the said portion of land measuring 1.31 Ha curved from land parcel known as Butsotso/Shikoti/933 in place of the respondent.
5. Whether the title of the respondent's land measuring 1.31 Ha in respect of land parcel known as Butsotso/Shikoti/933 got extinguished by operation of law on expiry of 12 years after the applicant took possession thereof.
6. Whether the registration of the respondent is the proprietor of the whole land parcel No. Butsotso/Shikoti/933 should be cancelled and the said land measuring 1.31 Ha or thereabouts be transferred and registered to the applicant.
7. Whether the respondent should be ordered to execute all such documents of transfer as shall facilitate transfer into the applicant's name the said portion of land measuring 1.31 Ha or thereabouts to the applicant John Patrick Omukuba.
8. Whether the respondent should be condemned to meet costs of the suit.

It is based on the following grounds that the applicant has been in occupation and utilization of the said portion of land measuring 1.31 Ha or thereabouts from land parcel known as Butsotso/Shikoti/933 since 1977 continuously, openly, peacefully and uninterrupted which is a period in excess of 12 years on which he has extensively done developments in total exclusion of the respondent. That the applicant took possession of the said portion in 1977 or thereabouts and has been in actual occupation and utilization and settled thereon with his family. That there are defined boundaries separating the said portion from the rest of the land. That the respondent has never lived and occupied the said portion of the suit land since 1977 or thereabouts. That the respondent has never been successful in evicting the applicant from his said portion of the suit land.

PW1 testified that he is the registered owner of land parcel known as Butsotso/Shikoti/1872 (PEX1 and PEX2 is a copy of the title deed and the green card). That he bought the said land from Indetie Matara in 1977 and settled his family thereon and have occupied and utilized the said land since then to date. That the respondent is his neighbor and the proprietor of land parcel known as Butsotso/Shikoti/933 sharing a common boundary with his said parcel of land. That there has existed a defined and distinct boundary between the said parcels of land known as Butsotso/Shikoti/1872 and Butsotso/Shikoti/933 since time immemorial. That it is until sometimes in 2000 when the respondent herein alleged that a portion of his parcel of land known as Butsotso/Shikoti/933 had been incurved into his said parcel of land known as Butsotso/Sikoti/1872. That since 1977 when he took possession of his land parcel No. Butsotso/Shikoti/1872 he was not aware of such allegations since his parcel of land was whole and there was a boundary already established between the respondent's land and his said land. That the respondent herein lodged a claim before the District Land Registrar and the District Surveyor Kakamega claiming that he had

encroached on a portion of his land and the said District Land Registrar and District Surveyor Kakamega indeed visited their parcels of land on the ground and made a report dated 2/2/2016. That the District Land Registrar and District Surveyor made the said report upon the court in Kakamega CMCCC Award No. 253 of 2002 made the order on 20/11/2012. That prior to the issuance of the court order on 20/11/2012 he had already occupied and utilized the disputed portion of land in respect of land parcel known as Butso/933 for a period exceeding 12 years and he is still using the said portion of land which forms part of his land parcel known as Butso/1872. PW2 a neighbour testified that the plaintiff has lived there since 1977.

DW1 the defendant testified that the plaintiff was his neighbour. They had a land dispute and the defendant was awarded the disputed portion. He produced the award in Kakamega CMCCC Award No. 253 of 2002 made on 20/11/2012 as DEx 4. His title was registered in 1999 as per the green card produced as DEx1.

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 known as Butso/933 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 applicant submitted that, he has been in actual possession of his entire land since 1977 or thereabouts to date. That he has extensively developed his land by putting up houses and fenced the said land where he has planted various species of trees and crops. That he has settled his entire family thereon and their stay has been peaceful, open, continuous and without interference. That the respondent had never succeeded in evicting him from the suit portion of land since he took possession in 1977 or thereabouts to date. That the respondent has never utilized and or occupied the disputed portion of land since he took possession in 1977. That the respondent's claim over the disputed portion of land measuring 1.31 Ha has been extinguished by operation of law by virtue of having been in actual occupation and utilization for a period not exceeding 12 years. That the respondent's title to the disputed area of land is subject to his right under sections 37 and 38 of the Limitation of Actions Act Cap 22 Laws of Kenya. That he is seeking orders declaring him to have acquired title to a portion of land measuring 1.31 Ha from the land parcel known as Butsotso/Shikoti/933 by way of adverse possession. However the plaintiff admits that the defendant herein lodged a claim before the District Land Registrar and the District Surveyor Kakamega claiming that he had encroached on a portion of his land and the said District Land Registrar and District Surveyor Kakamega indeed visited their parcels of land on the ground and made a report dated 2/2/2016. That the District Land Registrar and District Surveyor made the said report and the court in Kakamega CMCCC Award No. 253 of 2002 was made on 20/11/2012. DW1 the defendant testified that the plaintiff was his neighbour. They had a land dispute and the defendant was awarded the disputed portion. He produced the award Kakamega CMCCC Award No. 253 of 2002 made on 20/11/2012 as DEx 4. The plaintiff went on appeal and the High Court dismissed his claim. The defendant's title was registered in 1999 as per the green card produced as DEx1. I find that there has been a long standing boundary dispute in this matter between the litigants. The plaintiff is the registered owner of land parcel known as Butsotso/Shikoti/1872 and he obtained his title in 1981 PEx1. No evidence has been adduced to prove that he bought the land in 1977 and took possession then. I find that the plaintiff has encroached on the defendant's parcel of land and cannot now claim adverse possession. This matter has been litigated on and the decision upheld. The plaintiff should not be allowed to keep what is not his. I find that the plaintiff has failed to establish possession that was continuous and was not broken for any temporary purposes or any endeavours to interrupt it for a period on 12 years. I find that the plaintiff has not established his case on a balance of probabilities and I dismiss the case with no orders as to costs as the parties are neighbours.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26<sup>TH</sup> JUNE 2019.**

**N.A. MATHEKA**

**JUDGE**