



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 253 OF 2017

JUMA WANGWERO OTEMBO.....PLAINTIFF

VERSUS

CALISTUS MUSIKO.....DEFENDANT

JUDGEMENT

This is the application of Juma Wangwero Otemba who claims to have acquired 2 acres from the land parcel No. S. Wanga/Lureko/2680 which was created from L.R. No. S. Wanga/Lureko/390 as his father purchased for him and occupied, utilized and stayed on the same peacefully and continuously from 1973 to-date. The plaintiff/applicant has since been entitled to the said portion of 2 acres of the land by virtue of adverse possession having occupied and used the same exclusively, openly, quietly and uninterrupted for a period of over 12 years and prays that the honourable court does determine and order as follows:-

- (a) That the plaintiff/applicant be declared the owner of 2 acres out of land parcel No. S. Wanga/Lureko/2680 whose boundaries are clearly marked on the ground and which he occupies and to which he is entitled to by virtue of adverse possession and which the defendant/respondent be ordered to transfer the said portion of land to the plaintiff/applicant.
- (b) That in default of the defendant/respondent transferring the same voluntarily the court do make an order authorizing the deputy registrar, High Court of Kenya to execute all documents necessary to effect the subdivision and transfer of the 2 acres of the aforesaid land to the plaintiff/applicant.
- (c) That the honourable court do make further orders or grant any other relief deemed fit and just.
- (d) That the defendant/respondent pay the costs of this summons to the plaintiff/applicant.

PW1 the plaintiff produced the green card of the suit land as PEx2. PW2 and PW3 corroborated the plaintiff's evidence and state that PW1's father bought 2 acres but was now occupying about 1 acre only.

The defendant submitted that it is true land parcel No. South Wanga/Lureko/390 originally belonged to his late father John Lutome (deceased) and he is a beneficiary to the estate of his said father. That the portion of land subject of sale if any, was 1.0 acre but not 2.0 acres as claimed and any agreement to the contrary is a forgery. That he has never entered into any agreement of land sale with the plaintiff, thus the applicant's claim is misplaced and or misdirected. That the plaintiff applicant has had to agitate his claim before against his mother Mrs. Inganga Lutome before the Land Disputes Tribunal, at divisional and Provincial levels and his claim for 2.0 acres failed for lack of merit, the present suit equally lacks merit and is therefore merely meant to delay the course of justice and waste precious judicial time. That at no time has he or any member of the deceased's family interfered with the 1.0 acre which the applicant's family have and still rightfully occupy and utilize to date. That the orders sought if allowed shall only serve to unjustly award to plaintiff reliefs over what he is not entitled to and shall unnecessarily inconvenience him and other dependants of his father's estate. That in any event the applicant lacks the necessary locus standi to bring this suit.

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. No. S. Wanga/Lureko/2680 is the defendant. 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 Sergon 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 claims to have acquired 2 acres from the land parcel No. S. Wanga/Lureko/2680 which was created from L.R. No. S. Wanga/Lureko/390 as his father purchased for him and occupied, utilized and stayed on the same peacefully and continuously from 1973 to-date. The plaintiff/applicant has since been entitled to the said portion of 2 acres of the land by virtue of adverse possession having occupied and used the same exclusively, openly, quietly and uninterrupted for a period of over 12 years. The plaintiff testified that in 2002 the defendant destroyed his crops and moved the boundary and he now occupies a smaller portion. There was a matter in Mumias of malicious damage where the defendant was convicted. Be that as it may the plaintiff has produced the green card of the suit land as evidence. This court cannot ascertain what size of land was purchased. Indeed the plaintiff's witnesses said they used their feet to determine the boundary and the land was never surveyed. It is not disputed that the plaintiff and his family have occupied part of land parcel No. S. Wanga/Lureko/2680 which was created from L.R. No. S. Wanga/Lureko/390 the acreage cannot be established from the evidence adduced before me. I find that the plaintiff and his family was in possession of a portion the suit land continuously and openly for a period of over 12 years. I find that the plaintiff has proved his case on a balance of probabilities to that extent and I grant the following orders;

1. That the plaintiff/applicant be declared the owner of a portion out of land parcel No. S. Wanga/Lureko/2680 whose boundaries are to be determined by the County Land Surveyor and which he occupies and to which he is entitled to by virtue of adverse possession and which the defendant/respondent be ordered to transfer the said portion of land to the plaintiff/applicant.

2. That in default of the defendant/respondent transferring the same voluntarily the court do make an order authorizing the deputy registrar, High Court of Kenya to execute all documents necessary to effect the subdivision and transfer of the portion of the aforesaid land to the plaintiff/applicant.

3. No orders as to costs as the parties are neighbours.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH JUNE 2019.

N.A. MATHEKA

JUDGE