



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 609 OF 2014

FRANCIS SHIRIMA OKWALO.....PLAINTIFF

VERSUS

PATRICK OKOTH ECHESA

KASSIM OSORE OSUNDWA.....DEFENDANTS

JUDGEMENT

This is the application of Francis Shirima Okwalo who claims to be in occupation of parcel Nos. N. Wanga/Indangalasia/1113 and E. Wanga/Indangalasia/1114 measuring about 24 acres for determination of the following questions;

1. Whether the applicant has lived on and is in possession of land parcel No. N. Wanga/Indangalasia/1113 and E. Wanga/Indangalasia/1114 since his birth over 32 years ago which are the subdivisions of N. Wanga/Indangalasia/309.
2. Whether the applicant should be declared the absolute owner of the aforesaid parcels which he has individually cultivated and has been in actual possession peacefully. Openly and quietly for a period of 32 years plus.
3. Whether even if the land is currently registered in the name of the 1st respondent and 2nd respondent there is evidence that he they hold it in trust for the applicant and it was not intended at the time of registration to disinherit the applicant.
4. Whether the aforesaid land originally belonged to the applicant's father.
5. Whether the parties here are sons to the original proprietor of the aforesaid parcel of land.
6. Whether the 1st respondent has his separate parcel of land.
7. Whether the interested party Kassim Osore Osundwa bought part of the land in dispute during the pendency of this suit.
8. Whether the 1st respondent and 2nd respondent should be ordered to execute all documents of transfer in respect of the aforesaid parcels in favour of the applicant failure of which an authorized officer of this honourable court be empowered to execute the same in place of the 1st respondent and 2nd respondent.
9. Whether the applicant should be awarded the costs of this originating summons.

This originating summons is supported by the annexed affidavit of PW1 Francis Shirima Okwalo. PW1 testified that he was born on the land and that the 1st defendant subdivided the land and sold it to the 2nd defendant. The plaintiff and the 1st defendant are half brothers. The 1st defendant also lives there and was holding the land in trust. PW2 corroborated the plaintiff's evidence. The plaintiff produced the green cards of N. Wanga/Indangalasia/309 parcel Nos. N. Wanga/Indangalasia/1113 and E. Wanga/Indangalasia/260 as PEx 1, 2 &3.

The 1st defendant testified that the plaintiff is his half brother. He was registered the proprietor of the suit land when the plaintiff was six years old and that he was not holding the same in trust. He confirms that the plaintiff was born on that land and he has never left to go and live elsewhere. He gave the plaintiff 10 acres but the plaintiff refused.

This court has carefully considered the evidence and submissions therein. The 2nd defendant died and the suit against him abated and the plaintiff chose to proceed against the 1st defendant. 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. The court 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 Nos. N. Wanga/Indangalasia/1113 is the 1st 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 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 states that he has had exclusive use of the suit land from 1959 as he was born there. The 1st defendant is his half-brother and the land N. Wanga/Indangalasia/309 before subdivision was registered in trust for the other family members. The 1st defendant subdivide that land to parcel Nos. N. Wanga/Indangalasia/1113 and E. Wanga/Indangalasia/1114 and transferred to the 2nd defendant land parcel No. E. Wanga/Indangalasia/1114. The plaintiff now claims the entire parcel of land before subdivision. Be that as it may the suit against the 2nd defendant abated and he was not substituted even though he is the registered proprietor of land parcel No. E. Wanga/Indangalasia/1114. This court can only deal with land to parcel No. N. Wanga/Indangalasia/1113. It is the plaintiff's evidence that he was born on the said suit land in 1952 and lives there to date. The 1st defendant admits that they are half-brothers and he registered the parcel in his name when he was six years old. He admits that the plaintiff's father inherited his mother. They have had disputes at the tribunal but the award was not adopted DEX1 are the proceedings. I find that indeed the 1st defendant was registered in trust of the other beneficiaries and in this case it is the plaintiff. It is not disputed that both the plaintiff and the 1st defendant reside on the said land parcel No. N. Wanga/Indangalasia/1113. The 1st defendant had even offered the plaintiff 10 acres but the latter refused. I find that the land is

ancestral land and the 1st defendant is holding it in trust. I find that the plaintiff has been in exclusive, continuous and uninterrupted possession, occupation and open use of the said portions of land for a period in excess of 12 years. I find that the plaintiff has established 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 of 12 years. I find that the plaintiff has established his case on a balance of probabilities against the 1st defendant and I grant the following orders;

1. That the plaintiff/applicant be declared the owner of half the portion out of land parcel No. N. Wanga/Indangalasia/1113 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 1st defendant/respondent be ordered to transfer the said portion of land to the plaintiff/applicant.
2. That in default of the 1st defendant/respondent transferring the same voluntarily the court do make an order authorizing the Deputy Registrar of the Court 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 relatives.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 24TH JULY 2019.

N.A. MATHEKA

JUDGE