



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 234 OF 2015

JAMES MISHENI.....PLAINTIFF

VERSUS

AUGUSTINO AMOS KUMARUTI

BAKARI MALOBA MZEE OWONGA.....DEFENDANTS

JUDGEMENT

This is the application of James Misheni who claims that he is entitled to a total aggregate of 5.875 acres from L.R. Nos. South Wanga/Ekero/2801 and 4307 both registered in the name of Augustino Amos Kumaruti and the whole of L.R. No. South Wanga/Ekero/1586 measuring approximately 0.125 acres registered in the name of Bakari Maloba Mzee Owonga by virtue of having 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 and in a peaceful manner for determination of the following questions;

1. If the 1st respondent is the registered proprietor of L.R. No. South Wanga/Ekero/2801 and 4307;
2. If the applicant has had the exclusive use of a total of 5.875 acres of both parcel of land registered in the name of the 1st respondent in an open, peaceful and uninterrupted manner for a period in excess of 12 years.
3. If the 2nd respondent is the registered proprietor of L.R. No. South Wanga/Ekero/1586;
4. If the applicant has had the exclusive use of the entire parcel of land registered in the name of the 2nd respondent measuring approximately 0.125 acres in an open, peaceful and uninterrupted manner for a period in excess of 12 years.
5. If the exclusive use of the portions of land registered in the names of the respondents has been adverse to the proprietary interests of the respondents.
6. When did time necessary to constitute adverse possession in favour of the applicant begin to run;
7. If having had the exclusive use of the portions of land registered in the names of the respondents whether the applicant has acquired ownership of the same through prescription;
8. If the proprietorship of the respondents with respect to the extent of the portions claimed by the applicant is subject to his prescriptive rights.

The plaintiff testified that his homestead comprises of L.R. No. South Wanga/Ekero/450 in the name of his late father Mushieni Jibengu and measuring approximately 2 acres, L.R. No. South Wanga/Ekero/2801 & 4307 in the name of the 1st respondent and the portions therefrom under his use and occupation measuring in aggregate approximately 5.875 acres and the entire L.R. No. South Wanga/Ekero/1586 in the name of the 2nd respondent and measuring approximately 0.125 acres. He produced copies of certificates of search vide L.R. No. South Wanga/Ekero/450 PEx1; L.R. No. South Wanga/Ekero/2801 PEx2; L.R. No. South Wanga/Ekero/4307 PEx3 and L.R. No. South Wanga/Ekero/1586 Pex4. That as depicted by an extract of the map annexed hereto as exhibit PEx5. That he has had exclusive use of 5.875 acres of land from plots 2801 and 4307 in the name of the 1st respondent and the entire plot 1586 registered in the name of the 2nd respondent for a period in excess of well over 12 years. That the portions measuring 5.875 and 0.125 acres combined with the 2 acres comprising of plot 450 bring the total size of his homestead to 8 acres. That as he 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 and in a peaceful manner he has acquired ownership of the same

through prescription.

This court has carefully considered the evidence and submissions therein. The defendants were served but failed to attend court or give any evidence. 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 No. L.R. Nos. South Wanga/Ekero/2801 and 4307 is Augustino Amos Kumaruti; and of L.R. No. South Wanga/Ekero/1586 measuring approximately 0.125 acres registered in the name of Bakari Maloba Mzee Owonga. The issue is whether or not they hold good titles 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 defendants 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 5.875 acres of land from plots 2801 and 4307 in the name of the 1st respondent and the entire plot 1586 registered in the name of the 2nd respondent for a period in excess of well over 12 years. That the portions measuring 5.875 and 0.125 acres combined with the 2 acres comprising of plot 450 bring the total size of his homestead to 8 acres. That as he 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 and in a peaceful manner he has acquired ownership of the same through prescription. The plaintiff has produced proceedings of the Land Disputes Tribunal PEx 6a, proceedings of the Kakamegas CM's court PEx6b and a court order PEx 6c. All these documents and proceedings seem to suggest that this was a boundary dispute. The plaintiff cannot now turn round and suggest that he has acquired the land through adverse possession. I find that the plaintiff has 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. 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 24TH JULY 2019.

N.A. MATHEKA

JUDGE