



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 39 OF 2019

ANDREW MUKULU.....PLAINTIFF

VERSUS

MIRIAM IJAI

ENOS ARADI.....DEFENDANTS

JUDGEMENT

The plaintiff herein Andrew Mukulu instituted the suit vide an originating summons dated 13th October, 1992 together with a supporting affidavit in support thereof against the defendant herein Mirriam Ijai claiming to have acquired title of a portion of land known as Isukha/Shirere/586 measuring 0.25 acres or thereabouts plus all the developments thereon by virtue of adverse possession having purchased the same from the defendant's late husband Enos Keya Kenadoso in 1972.

The plaintiff seeks the following orders:-

- (a) That the plaintiff/applicant be declared the owner of a portion of land measuring 0.25 acres or thereabouts of land parcel Isukha/Shirere/589 which he occupies and to which he is entitled by adverse possession.
- (b) That the existing boundaries which were jointly marked by the plaintiff/applicant and the defendant/respondent's late husband, the said Enos Keya Kinadoso at the time of the purchase be restrained and that the land be subdivided and an order made for the defendant/respondent as the administrator of the deceased's estate to transfer 0.25 acres of the Land No. Isukha/Shirere/589 to the plaintiff/applicant.
- (c) That in default of the defendant/respondent transferring the same voluntarily, the court do make an order authorizing of the portion of land aforesaid to the plaintiff/applicant.
- (d) That this honourable court do make further orders or grant any relief it may deem just to grant in the circumstances.
- (e) That the defendant/respondent pays the costs of this summons to the plaintiff.

PW1, testified that in 1972 he bought a portion of Isukha/Shirere/589 from the said Enos Keya Kinadoso and took possession and put up rental houses. In 1984 he added another portion of the plot but the seller died in 1986 without transferring the same to him. He produced the copy of the register, the agreements and receipts to show he paid in full. The deceased had houses on the remaining portions and the plaintiff assisted in collecting the rent of those tenants and sharing it amongst the deceased's wives PW3 and DW1. PW2 a neighbour confirmed that the plaintiff bought the land in 1972 and took possession. He put up two permanent residential houses and rented them out to tenants. PW3 corroborated the plaintiff's evidence. She confirmed that her deceased husband sold the plot to the plaintiff and the rent from the houses belonging to her husband was divided between the two widows.

DW1 the 1st defendant testified that she knew the plaintiff and he used to collect rent and share it among them. She is not aware of any sell agreement between her husband and the plaintiff. DW2 the Assistant Chief confirmed that the 1st defendant lived on the plot and her husband was Enos Keya. The defendant submitted that, the plaintiff has not occupied and utilized the said parcel of land or any part thereof as is required in a case of adverse possession. The plaintiff never occupied the land. That PW2, his own witness and a neighbor said that. The plaintiff testified that he merely collected rent from a building on the said parcel of land. There was no evidence tendered to prove that the rent was actually from the said parcel of land. The receipts produced have no plot number and do not indicate the period of time required. No tenant was called to testify that he paid rent to the plaintiff for a period exceeding 12 years. That the plaintiff testified that he constructed a house on the parcel of land in 1972 and even purported to produce a purported agreement for construction of a house. The agreement is dated 4/3/1972. The said agreement does not disclose the plot number either. That the defendant testified and said that the plaintiff was contracted by her husband to construct rental houses on the suit parcel of land which was done. It is the defendant's case that she also participated in the purchase of the land, jointly with her deceased husband. That is why she is still occupying and utilizing the said premises.

She filed a succession cause, Kakamega HCC Succession Cause No. 286 of 1986 in which she clearly shared the deceased's property; retaining the suit parcel and letting her co-widow keep the land at Chavakali. Had her husband sold the land, as alleged by the plaintiff, he would have informed her of the fact. He had not by the time he died in 1986. The plaintiff never complained during the defendant's husband's lifetime regarding ownership of the land. He started attempting to assert his claim in 1993 or thereabouts when he lodged a caution against the said title.

That the defendants submitted that time started running in 1991, when the defendant obtained registration as owner of the land. The 1st defendant was not even the only registered owner of the land, she jointly owned it with Gerishom Enonda, and Elphas Aradi. This suit was filed in 1992, about one year after the said registration. They therefore submit that the mandatory period of 12 years had not run as against the defendants before the suit was filed. The suit was therefore filed prematurely and should be dismissed for that reason alone. The defendant obtained restoration following a succession cause filed by 1st defendant as indicated above. The plaintiff who alleges that he bought the land from the 1st defendant's husband ought to have challenged the succession cause as indicated above. This has not been done to date. It follows that the plaintiff's claim is misplaced and ought to fail. The green card produced in court clearly indicates that there was a person by the name Hudson Kagota Mbwanga who lodged a caution against the title on 30/6/1981 claiming a purchaser's interest. This particular purchaser moved while the deceased was alive. That was also expected of the plaintiff herein since he never tried to assert ownership during those days, his claim amounts to an afterthought. He only cautioned the land on 8/8/1991.

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. 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. Isukha/Shirere/589 are the defendants. The issue is whether or not they hold 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, PW1, testified that in 1972 he bought a portion of Isukha/Shirere/589 from the said Enos Keya Kinadoso and took possession and put up rental houses. In 1984 he added another portion of the plot but the seller died in 1986 without transferring the same to him. He produced the copy of the register, the agreements and receipts to show he paid in full. The plaintiff's witness, PW3, one Esinas Mbone who is the 1st defendant's co-widow testified that the plaintiff used to collect rent from the remaining portion of the land and share it between her and the 1st defendant. This is consistent with the 1st defendant's case. This is proof that the plaintiff was in possession of the suit premises. PW2 testified that there was no dispute between the plaintiff and the seller's family until this suit was filed in 1992. Indeed I have perused the court records and find that it is while this suit was in court that the defendants evicted the plaintiff's tenants. I find that the plaintiff had been in constructive occupation and/or possession of the suit portion of land peacefully and continuously from 1972 to 1991 when he placed a caution on the land. This is a period of over 12 years.

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 defendants and I grant the following orders;

1. That the plaintiff/applicant be declared the owner of half the portion out of land parcel land parcel Isukha/Shirere/589 whose boundaries are to be determined by the County Land Surveyor on which he occupies and to which he is entitled to by virtue of adverse possession and which the defendants/respondents be ordered to transfer the said portion of land to the plaintiff/applicant.
2. That in default of the defendants/respondents 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 neighbours.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 23RD JULY 2019.

N.A. MATHEKA

JUDGE