



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 15 OF 2016

JULIUS AMUGUNE OKANDA.....PLAINTIFF

VERSUS

JAMES MUNANDI ATSIBILWA.....DEFENDANT

JUDGEMENT

At all material times relevant to this suit the plaintiff was the registered proprietor of all that parcel of land known as L.R. NO. West Bunyore/Ebusamia/2409. The plaintiff avers that he lawfully purchased the said parcel of land from Reuben Okanga Atibirwa in 1999 and due process was adhered to in the acquisition of the said parcel of land. It is the plaintiff's case that the defendant has without any reasonable cause or excuse persistently removed boundary's features separating their land parcel No. West Bunyore/Ebusamia/2408 and the defendant's 2409, and trespassed onto and cultivated on the plaintiff's parcel of land aforesaid without the consent and or authority of the plaintiff. As a result of the defendant's conduct aforesaid the plaintiff has been denied the use and enjoyment of his property rights and has suffered loss and damage for which he holds the defendant wholly liable. The plaintiff seeks an eviction of the defendant from the aforesaid parcel of land L.R. No. West Bunyore/Ebusamia/2409 and an order of injunction restraining the defendant, his agents and or servants from trespassing, encroaching and or interfering with the plaintiff's parcel of land aforesaid. Despite demand and notice of intention to sue, the defendant has refused to vacate the plaintiff's parcel of land aforesaid. For these reasons wherefore the plaintiff prays for judgment against the defendant for the following orders:-

- (a) An eviction order of the defendant from L.R. No. West Bunyore/Ebusamia/2409 and or any part thereof.
- (b) A permanent order of injunction restraining the defendant, either by himself, his agents and or servants and or any other person acting through him from trespassing onto encroaching into and or cultivating L.R. No. West Bunyore/Ebusamia/2409.
- (c) Costs of the suit.

The defendant avers that he has together with the rest of his family members been living and using the land from time immemorial and have occupied the same for a period of more than 40 years therefore the prayers sought are inconsequential. The defendant avers that a notice of objection to the alleged sale was given to both parties in respect of the alleged sale but the plaintiff did not heed to the notice. The defendant avers that upon learning of the intended transaction between the plaintiff and Reuben Okanga Atsibilwa, the defendant together with his mother one Repha Nyakoha proceeded to the office of the District Officer, Emuhaya Division who notified the plaintiff and the alleged seller in respect of the alleged sale and the District Officer gave them a notice to halt the intended transaction but the two disregarded the same. The defendant avers he together with her mother lodged a complaint with the Land Registrar who agreed with them and notified the plaintiff together with the seller one Reuben Okanga Atsibilwa, a father to the defendant that their action was wrong. The defendant avers that he was born on the original land parcel number East Bunyore/Ebusamia/219 and has together with the other family members used the land for over 40 years. The defendant avers that land Parcel number East/Bunyore/Ebusamia/2409 was secretly and fraudulently sub-divided by the plaintiff together with the said Reuben Okanga Atsibilwa without their knowledge to give rise to land parcel number East Bunyore/Ebusamia/2409 among others. That the plaintiff avers that aforesaid subdivision was only indicated on the map and there has been no common boundary on the ground sub-dividing the said land parcel number East Bunyore/Ebusamia/219 as the plaintiff together with the alleged seller knew that if the same were to be placed on the land aforesaid the defendant together with other family members would object. The plaintiff is therefore using the court to regularize a fraudulent act. The defendant avers that the said subdivision was by fraud to deny the rightful beneficiaries their share of the estate.

The defendant claim is therefore for a declaration that he has together with the other family members had been in quiet and peaceful occupation of the original land parcel number East Bunyore/Ebusamia/219 and that they had acquired title to the original land parcel number East Bunyore/Ebusamia/219 by way of adverse possession. That upon having acquired title to the original land parcel number East Bunyore/Ebusamia/219 by adverse possession the said Reuben Okanga Atsibilwa was incapacitated to deal with East Bunyore/Ebusamia/219 as his own as he was holding title to the said land in trust for the defendant together with the defendant's other family members and the said Reuben Okanga Atsibilwa was incapacitated to deal with the same land parcel number East Bunyore/Ebusamia/219 as his own and as such

the sub-division of the said land parcel is null and void and therefore the resultant titles be cancelled and the land be registered in the name of the defendant. The defendant prays for the dismissal of the plaintiff's suit and that judgment be entered in his favour as prayed for in the counter claim for orders that;

(a) A declaration that he has together with the other family members had been in quiet and peaceful occupation of the original land parcel number East Bunyore/Ebusamia/219 and that they had acquired title to the original land parcel number East Bunyore/Ebusamia/219 by way of adverse possession.

(b) That upon having acquired title to the original land parcel number East Bunyore/Ebusamia/219 by East Bunyore/Ebusamia/219 as his own as he was holding title to the said land in trust for the defendant together with the defendant's other family members and the said Reuben Okanga Atsibilwa was incapacitated to deal with the said land parcel number East Bunyore/Ebusamia/219 as his own and as such the sub-division of the said land parcel is null and void and therefore the resultant titles be cancelled and the land be registered in the name of the defendant.

(c) Cost of the suit.

(d) Any other relief that this honourable court deem fit and just to grant.

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 known as L.R. No. West Bunyore/Ebusamia/2409 is the plaintiff. The issue is whether or not he holds a good title by virtue of the defendants 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 appellants 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 defendant in his counterclaim must show that the plaintiff 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 avers that he lawfully purchased the said parcel of land from Reuben Okanga Atibirwa in 1999 and due process was adhered to in the acquisition of the said parcel of land. It is the plaintiff's case that the defendant has without any reasonable cause or excuse persistently removed boundary's features separating their land parcel No. West Bunyore/Ebusamia/2408 and the defendant's 2409, and trespassed onto and cultivated on the plaintiff's parcel of land aforesaid without the consent and or authority of the plaintiff. The plaintiff has produced a sale agreement and an affidavit from the seller to confirm this sale. He also produced a letter from the Chief confirming that he had bought the plot. DW1, the defendant states that he lives on the suit land and that the land was transferred through fraudulent means. He produced evidence to show that the plaintiff was summoned several times over the said suit parcel. His father died in 2012 and he is not aware that he subdivided the land. He therefore claims adverse possession in his counterclaim. I have perused the documents produced as exhibits before me. I am satisfied that the plaintiff was a bona fide purchaser for value. I see no evidence of fraud in the manner in which he acquired the title. I find his title valid and he is entitled to exclusive use of the suit land.

I find that the defendant 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 of 12 years as his father voluntarily subdivided and sold the land to the plaintiff. I find that the defendant has failed to establish his case on a balance of probabilities and I dismiss the counterclaim. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. The defendant is to vacate from L.R. No. West Bunyore/Ebusamia/2409 within the next 6 (six) months from the date of this judgement and in default of eviction order to issue forthwith.
2. A permanent order of injunction restraining the defendant, either by himself, his agents and or servants and or any other person acting through him from trespassing onto encroaching into and or cultivating L.R. No. West Bunyore/Ebusamia/2409.
3. Costs of the suit to the plaintiff.

It is so ordered.

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

N.A. MATHEKA

JUDGE