



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 329 OF 2013

CHAIRMAN, SECRETARY/HEADTEACHER

TREASURER, COMMITTEE ST. PATRICK'S

EBUBERE PRIMARY SCHOOL

EBUBERE PRIMARY SCHOOL.....APPLICANTS/PLAINTIFFS

VERSUS

ISAYA MUSUNGU NAMBIKHWI.....RESPONDENT/DEFENDANT

JUDGEMENT

This is the application of Eburere Primary School of P.O. Box 43, Shianda which claims to be entitled to the whole land, LR No. East Wanga/Mung'anga/943 measuring approximately 0.86 Ha by adverse possession and for reasons set out in the affidavit filed herewith and other reasons for determination of the following issues and make orders as follows:-

- (a) A declaration that the applicant purchased approximately 0.86 Ha portion of LR. E. Wanga/Munganga/152 from Barnabas Mango Okola in the 1980's and took vacant possession.
- (b) A declaration that the portion measuring approximately 0.86 Ha purchased comprised of L.R. E. Wanga/Munganga/152, on subdivision was comprised and E/Wanga Munganga/921, which was later subdivided and the portion is now L.R. E. Wanga/Munganga/943.
- (c) A declaration that Barnabas Mango Okola rights/interest in the aforesaid land got extinguished at the expiry of 12 years by operation of the law/adverse possession while the applicant was in possession.
- (d) A declaration that Moses Barnabas Mango Okola at the expiry of 12 years held the land in trust for the applicant and had no right to transfer to the applicant, who now holds in trust for the applicant.
- (e) An order that the respondent holds the whole land parcel LR. E/Wanga/Mung'anga/943 in trust and on behalf of the applicant and be ordered to transfer the whole land parcel to the applicant.
- (f) An order that in default of the respondent executing relevant transfer documents the Deputy Registrar of this court be authorized to sign the same.
- (g) An order that the respondent do pay costs of this suit.
- (h) Such further orders or reliefs as the Hon. Court may deem fit.

PW1, the Chairman of Eburere Primary School testified that, they bought land parcel No. East Wanga/Mung'ang'a/943 from the late Barnabas Mango Okola where he was a witness for both the seller and the buyer. They bought the land parcel because as a clan they felt that the nearest school, Bumini Primary School was far from their village and that they needed a school in their village to help pupils from their village. They as a clan were informed by Jared Opiyo Osundwa that Barnabas Okola had approached him and offered to sell 2 acres of his land to a willing buyer. They entered into a land sale agreement dated 04/3/1980 and bought the parcel of land on behalf of Eburere Primary School at a consideration of Ksh. 20,000/= which amount they paid in full PEx 1. The school took vacant possession and started the construction of the school in 1981 which begun as a nursery and became fully operational in 1983 when the government posted teachers to the school. The school has since developed with permanent buildings and learning has continued without any interruption since it was first established to date. The school has also utilized the parcel of land peacefully without any interruption since it took vacant possession of the

land in 1981 and has planted trees, dug a borehole and has been planting food crops every season since 1981. PW2, Jared Opiyo Osundwa confirms that as a clan they bought land parcel No. East Wanga/Mung'ang'a/943 from the late Barnabas Mango Okola where he was a witness for both the seller and the buyer. They bought the land parcel because as a clan they felt that the nearest school, Bumini Primary School was far from their village and that they needed a school in their village to help pupils from their village. He is a member of the PTA of the School. PW3, Clement Were Mukhula a member of the PTA and a witness in the sale agreement testified that, the school bought land parcel No. E. Wanga/Mung'anga/943 on 4th March, 1980 and it was established in 1981 as a nursery before becoming fully operational with government teachers in 1983. The school has since then developed with 12 permanent classes, administration block, 30 toilets, as compared to the first mud building when the school was established. Learning has continued peacefully without any interruptions according to the records since 1981 when it was first established. The school has been utilizing the parcel of land since it took vacant possession in 1980 according to the school records. It has since planted trees, dug a borehole and has been planting food crops every season. PW4, Moses Esilaba Akhwale was the head teacher at the plaintiff's school in 2009 and corroborated the evidence of PW1.

The defendant testified that he bought the suit land in 1982 DEx2 is the agreement. He put up a church and leased the land to the plaintiff who put up a school. They were to pay kshs. 9000/= per month. The land was later transferred to him and he produced the transfer documents as exhibits DEx 4 to 6. He lives about 7kms away and now wants to sell the land to the school. The disagreement started when the school changed their sponsorship from the apostolic church to the Catholic Church.

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 LR No. East Wanga/Mung'anga/943 measuring approximately 0.86 Ha 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 plaintiffs 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 plaintiffs testified that, they bought land parcel No. East Wanga/Mung'ang'a/943 from the late Barnabas Mango Okola where PW1, PW2 and PW3 were witnesses for both the seller and the buyer. They bought the land parcel because they as a clan felt that the nearest school, Bumini Primary School was far from their village and that they needed a school in their village to help pupils from their village. They as a clan were informed by Jared Opiyo Osundwa that Barnabas Okola had approached him and offered to sell 2 acres of his land to a willing buyer. They entered into a land sale agreement dated 4th March, 1980 and bought the parcel of land on behalf of Eubere Primary School at a consideration of Ksh. 20,000/= which amount they paid in full PEx 1. The school took vacant possession and started the construction of the school in 1981 which begun as a nursery and became fully operational in 1983 when the government posted teachers to the school. The defendant states that the said sale agreement PEx1 is a forgery. That he bought the suit land in 1982 and invited the plaintiff as a tenant. I have carefully perused the sale agreement PEx1 and the same is dated 1980. PW1, PW2 and PW3 are all witnesses to the agreement. No evidence has been adduced to prove the same is a forgery. I am satisfied that they paid the purchase price in full. The defendant has not called any witnesses to corroborate his evidence that the plaintiff was a mere tenant. Indeed he never demanded his rent nor did he take any steps until 2011 DEx10 when he states he sent a demand letter. The defendant's subsequent conduct is indeed suspect. I find that the sale agreement entered in 1982 by the defendant was after the plaintiff had bought the suit land and had taken possession. I find that the plaintiff entered into a land sale agreement dated 4th March, 1980 and bought the parcel of land on behalf of Eubere Primary School at a consideration of Ksh. 20,000/= which amount they paid in full. The school took vacant possession and started the construction of the school in 1981 which begun as a nursery and became fully operational in 1983 when the government posted teachers to the school. The school has since developed with permanent buildings and learning has continued without any interruption since it was first established to date. The school has also utilized the parcel of land peacefully without any interruption since it took vacant possession of the land in 1981 and has planted trees, dug a borehole and has been planting food crops every season since 1981. For these reasons, I find that the plaintiffs have 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 from 1981. I find that the plaintiffs have established 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. I find that the plaintiffs have established his case on a balance of probabilities against the defendant and I grant the following orders;

1. That the plaintiffs/applicants be declared the owner L.R. E. Wanga/Munganga/943 and which they occupy and to which they are entitled to by virtue of adverse possession and which the defendant/respondent be ordered to transfer the said portion of land to the plaintiffs/applicants within the next three (3) months from the date of this judgment.
2. That in default of the 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 plaintiffs/applicants.
3. No orders as to costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE