



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 49 OF 2016

EVANS ASAVA AMBASA PLAINTIFF

VERSUS

HAMISI KUTI WASIKE

HADIJA SAGINA WASIKE

JAUSIKU AMISI KUTI DEFENDANTS

JUDGEMENT

This is the application of Evans Asava Ambasa who claims to have acquired title to 1.25 acres of land parcel number Butso/14610 by way of adverse possession for the determination of the following questions;

1. Whether the said Evans Asava Ambasa has acquired title to 1.25 acres of land parcel number Butso/14610 by way of adverse possession.
2. Whether the said Evans Asava Ambasa should be declared the legal owner of 1.25 acres of land parcel number Butso/14610.
3. Whether the said Hamisi Kuti Wasike, Hadija Sagina Wasike and Jausika Amisi Kuti holds title for 1.25 acres of land parcel number Butso/14610 in trust for Evans Asava Ambasa.
4. Whether the title deed held by Hamisi Kuti Wasike, Hadija Sagina Wasike and Jausika Amisi Kuti for the 1.25 acres of land parcel number Butso/14610 should be cancelled and a new title deed for the same be issued to Evans Asava Ambasa.
5. Whether the said Evans Asava Ambasa bought legally 1.25 acres of land parcel number Butso/14610 from Hamisi Kuti Wasike.
6. Who shall bear the costs of this suit.

It is based on the sworn affidavit of Evans Asava Ambasa . PW1 testified that in the year 1986 he bought the suit land from the 1st defendant and they signed an agreement PEx1. They used foot steps to determine the boundary and later a surveyor came and surveyed the same and determined it was 11/4 acres. He has stayed and occupied the same for over 32 years. The same was subdivided as per the green card PEx2 but the 1st defendant has now refused to transfer the same to him. He has produced photos to show his homestead and developments on the suit land PEx3. He states that he paid the full purchase price in two installments. The 1st defendant instead transferred it to the 2nd and 3rd defendants who are his daughters.

The 1st defendant/respondent testified and submitted that in the year 1986, he sold a portion of land measuring 50 x 100 meters and not 1.25 acres to the plaintiff/applicant by then comprised in L.R. No. Butso/1607 at a price of Ksh. 28,500/= and he paid Ksh. 20,000/= leaving a balance of Ksh. 8,500/= unpaid to date. That he allowed the applicant/plaintiff take possession of the portion of land he bought but soon thereafter, they started having squabbles as the plaintiff/applicant never finished paying the purchase/sale price.

The 3rd defendant/respondent submitted and testified that she was informed by the 1st defendant/respondent that in the year 1986, he sold a portion of land measuring 50 x 100 meters and not 1.25 acres to the plaintiff/applicant by then comprised in L.R. No. Butso/1607 at a price of Ksh. 28,500/= and he paid Ksh. 20,000/= to him leaving a balance of Ksh. 8,500/= unpaid to date. That he allowed the applicant/plaintiff to take possession of the portion of land he bought but soon thereafter, they started having squabbles as the plaintiff/applicant never finished paying the purchase/sale price. That the plaintiff/applicant has never had a peaceful, continuous open

occupation of the portion of land he bought. That the 1st defendant/respondent sub-divided L.R. No. Butso/Shikoti/1607 creating other numbers among them being L.R. No. Butso/Shikoti/14610. That on or about 2nd February, 2016, he transferred L.R. No. Butso/Shikoti/14610 to them as a gift free of any encumbrances. That it is not true as the plaintiff/applicant alleges that he occupies and developed a portion of land measuring 1.25 acres but 50 x 100 meters and that he has been having squabbles with himself and the other respondents over the portion of land he occupies. That the applicant has not occupied a portion of land measuring 1.25 acres peacefully, continuously either for a period of over 12 years or 30 years as he is the one together with the other respondents that has been occupying the land save for an area measuring 50 x 100 meters that he occupies but with a lot of squabbles. The applicant has no right over 1.25 acres as he claims. That the applicant is not entitled to a portion measuring 1.25 acres out of L.R. No. Butso/Shikoti/14610 hence cannot have it sub-divided so as to get what he is claiming.

The 2nd defendant submitted that she was informed by the 1st defendant/respondent that in the year 1986, he sold a portion of land measuring 50 x 100 meters and not 1.25 acres to the plaintiff/applicant by then comprised in L.R. No. Butso/Shikoti/1607 at a price of Ksh. 28,500/= and he paid Ksh. 20,000/= to him leaving a balance of Ksh. 8,500/= unpaid to date. That DW1 allowed the applicant/plaintiff take possession of the portion of land he bought but soon thereafter, they started having squabbles as the plaintiff/applicant never finished paying the purchase/sale price. That the plaintiff/applicant has never had a peaceful, continuous open occupation of the portion of land he bought.

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 joint registered owners of land parcel number Butso/Shikoti/14610 are the 2nd and 3rd 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, the plaintiff states that he has had exclusive use of the suit land from 1986. PW1 testified that in the year 1986 he bought the suit land from the 1st defendant and they signed an agreement PEx1. They used foot steps to determine the boundary and later a surveyor came and surveyed the same and determined it was 1.25 acres. He has stayed and occupied the same for over 32 years. The same was subdivided as per the green card PEx2 but the 1st defendant has now refused to transfer the same to him. He has produced photos to show his homestead and developments on the suit land PEx3. He states that he paid the full purchase price in two installments. The 1st defendant admits that he did enter into a sale agreement with the plaintiff but only sold him a plot of 50 by 100 feet and not 1.25 acres as he claims. That the applicant is not entitled to a portion measuring 1.25 acres out of L.R. No. Butso/ Shikoti/14610 hence cannot have it sub-divided so as to get what he is claiming. DW2 and DW3 all corroborated his evidence. I have carefully perused the sale agreement PEx1 and it appears they used steps as measurements and not a surveyor. The plaintiff took possession and I am satisfied that he paid the purchase price in full. It was not until 2016 that the plaintiff transferred the land to his daughters DW2 and DW3. One wonders why he transferred the entire land parcel to them when he alleged that he had sold 50 by 100 feet to the plaintiff. The defendants are being dishonest and I believe the plaintiff. DW1 never followed up the balance of the purchase price for over 30 years and it is only now that he brings it up. I find that in the year 1986, the 1st defendant sold a portion of land measuring 1.25 acres to the plaintiff/applicant by then comprised in L.R. No. Butso/ Shikoti/1607 at a price of Ksh. 28,500/= and he was paid in full. For these reasons, 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 from 1986. 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 1.25 acres of land parcel number Butso/ Shikoti/14610 and 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 within the next 3 months from the date of this judgment.
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. Costs to the plaintiff.

It is so ordered.

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

N.A. MATHEKA

JUDGE