



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 38 OF 2019

MILTON ABIL JUMA..... PLAINTIFF

VERSUS

KURUSHEM MURUNGA

DANIEL MURUNGA.....DEFENDANTS

JUDGEMENT

The plaintiff filed an originating summons in Kakamega High Court Civil Suit No. 14 of 2009 against the defendants herein seeking orders for adverse possession on land parcel number LR Kakamega/Shamberere/2879. The defendants filed a suit against the plaintiff in Kakamega High Court Civil Suit No. 12 of 2009 seeking eviction orders. By consent of both parties it was agreed that the two suits Kakamega High Court Civil Suit No. 14 of 2009 and Kakamega High Court Civil Suit No. 12 of 2009 be consolidated and the plaint in Kakamega High Court Civil Suit No. 12 of 2009 be the counterclaim.

The plaintiff avers that the acquisition of title to L.R. Kakamega/Shamberere/2879 and 2880 by the plaintiffs was pursuant to a grant made in favour of the 1st defendant herein to administer the estate of the late Petro Murunga who was their father and that their interest in the said titles is subject to the interest of the plaintiff herein by adverse possession. The plaintiff avers that he entered the suit land in or about 1975 and has been in occupation thereof since then by reason whereof the defendants' claim against him is time barred within the meaning of the provisions of the Limitation of Actions Act, Cap 22 Laws of Kenya. The plaintiff further avers that he has filed Kakamega HCCC No. 14 of 2009 seeking to enforce his rights over the suit land as a person in adverse possession by reason whereof the plaintiffs' claim against him has no basis and the same should be dismissed with costs. The plaintiff avers that the defendants have not at any one time between 1975 and the time of filing the suit herein ever occupied and or ever utilized the suit land herein or any portion thereof.

The defendants' state that they are the sole absolute registered owners of LR Kakamega/Shamberere/2879 and 2880 respectively which resulted from Kakamega/Shamberere/632. The defendants obtained the aforesaid land on transmission vide Kakamega High Court Succession Cause No. 88 of 2003, the estate of Petro Murunga Muse their father. In 2003 or thereabout the plaintiff destroyed the boundary between Kakamega/Shamberere/632 and 633 and unlawfully, illegally, without the plaintiffs' consent or probable cause, trespassed on a portion measuring less than half (1/2) an acre of what was Kakamega/Shamberere/632. The plaintiff has since then continued to unlawfully occupy and use the aforesaid portion forcefully by denying the defendants quiet and peaceful possession and use thereby occasioning the plaintiff's loss and damage. The plaintiff did in 2008 or thereabout unlawfully caused caution to be registered against Land parcels LR Kakamega/Shamberere/2879 and 2880. The defendants aver that neither their deceased father nor themselves ever sold a portion of what was Land parcel LR. Kakamega/Shamberere/632 to the plaintiff. The defendants aver that the plaintiff has no purchasers, beneficiaries or otherwise interest in Land Parcel LR Kakamega/Shamberere/632 whatsoever. The defendants claim against the plaintiff is for the eviction and or injunction and removal of the aforesaid caution. The plaintiffs did sue the defendant vide Malava Land Dispute Tribunal Case No. 12/06 which is the subject of Kakamega HCCA 74/07. The defendants counterclaim against the plaintiff is for;

(a) An eviction of the plaintiff or an injunction restraining the plaintiff, his family, agent from trespassing, encroaching whatsoever on land parcel L.R. Kakamega/Shamberere/2879 and 2880.

(b) Removal of caution/restriction on Land Parcels No. Kakamega 2879 and 2880.

(c) Costs of this suit.

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 Kakamega/Shamberere/2879 is the 1st defendant. The issue is whether or not he holds 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 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 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 the instant case the issues for determination are as follows;

1. Whether the applicant/plaintiff has been living on the land for a period of 12 years or more.
2. Whether the applicant/plaintiff has acquired title to the land under adverse possession.
3. Whether the 1st respondent/defendant was holding the title in trust for the applicant.
4. Whether the 1st respondent/defendant should be ordered to transfer the suit land to the applicant by executing all documents of transfer in respect of the land parcel in favour of the applicant/plaintiff.
5. Whether the applicant should be registered as the owner of that suit land measuring 2.7 Ha currently Kakamega/Shamberere/2879.

6. Who should be condemned to pay the costs hereof.

In applying these principles to the present case, the plaintiff testified that he entered the suit land in or about 1975 and has been in occupation thereof since then by reason whereof the defendants' claim against him is time barred within the meaning of the provisions of the Limitation of Actions Act, Cap 22 Laws of Kenya. The plaintiff testified that he purchased the land from one Petro Murunga. The plaintiff avers that the acquisition of title to L.R. Kakamega/Shamberere/2879 and 2880 by the plaintiffs was pursuant to a grant made in favour of the 1st defendant herein to administer the estate of the late Petro Murunga who was their father and that their interest in the said titles is subject to the interest of the plaintiff herein by adverse possession. The plaintiff further avers that he has filed Kakamega HCCC No. 14 of 2009 seeking to enforce his rights over the suit land as a person in adverse possession by reason whereof the defendants' claim against him has no basis and the same should be dismissed with costs. The plaintiff avers that the defendant have not at any one time between 1975 and the time of filing the suit herein ever occupied and or ever utilized the suit land herein or any portion thereof. PW2 a senior chief of that area corroborated the plaintiff's evidence. It is in evidence that the plaintiff has developed the land by building houses and planting crops and trees. DW1 the 1st defendant testified that the plaintiff is using his land forcefully and is cultivating it. He produced the certificate of title DEx3 registered in 2007. That he obtained the same through succession. DW2 the 2nd defendant testified that the plaintiff moved to the suit land in 2003. I find that the plaintiff has been using the said suit land from 1975. It is in evidence that the defendants have never used that portion of the land. 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 1975. 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 defendants have failed to prove their counterclaim on a balance of probabilities and I dismiss the same. 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 Kakamega/Shamberere/2879 and which they occupy and to which they are entitled to by virtue of adverse possession and which the defendant/respondents be ordered to transfer the said portion of land to the plaintiffs/applicant within the next 30 days from the date of this judgement.
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.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 28TH NOVEMBER 2019.

N.A. MATHEKA

JUDGE