



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 251 OF 2017

TERESIA ATURWA ATONYIPLAINTIFF

VERSUS

FANUEL M. LIHANDADEFENDANT

JUDGEMENT

This is the application of Teresia Aturwa Atonyi is brought under Order XXXVI Rule 3 and 7 of the Civil Procedure Rules for the determination of the following issues:-

1. Whether the applicant, Teresia Aturwa Atonyi, has acquired title over the whole of the parcel of land known as Isukha/Shitoto/1420 by way of adverse possession and the applicant should be registered as proprietor thereof.
2. Who should be condemned to pay the costs of these proceedings.
3. Any other further reliefs that this honourable court may deem just to grant.

This originating summons is supported by the affidavit of Teresia Aturwa Atonyi. The plaintiff testified that, parcel of land known as Isukha/Shitoto/1420 to which these proceedings relate is registered in the name of the defendant/respondent (certified photocopy of the certified copy of its register marked PEx1). That she bought the land from Petre Atinya and moved there in the 1969. That she never sold the land to the defendant and never received money from him to fund her husband's memorial. She admits signing the transfer documents but she does not know how to read. She claims to have given the documents to the defendant to check for her if they were in order. She did not appear before the land control board. That she has been in occupation of the whole of the piece of land aforementioned for a period in excess of twelve (12) years. That her occupation of the whole of the parcel of land aforementioned has been peaceful and continuous. That the respondent has not been in occupation or use of the suit land at any one given point in time. That even if the respondent is registered as proprietor of the suit land, the respondent's legal right, if any has been extinguished by virtue of adverse possession. That she has acquired title to the whole of the said suit land by way of adverse possession. PW2 the brother in law confirmed that the plaintiff has lived on the suit land from 1969.

The defendant testified that he bought the suit land from the plaintiff in 1994. They went to the Land Control Board in 1995. He produced the title DEx1, application for consent DEx2, transfer DEx3 minutes of the board DEx4 and the green card DEx5. The plaintiff moved out and the defendant allowed her back in 2005 to carry out her husband's memorial. DW2 confirms that the plaintiff sold the land to the defendant in 1994. The plaintiff moved to another location and DW2 helped her construct her house there. DW3 a senior village elder corroborated the defendant's evidence that she sold the land to the plaintiff in 1994 and moved out. She then returned in 2005 and refused to move out. DW4, the senior

chief of the location corroborated the defendant's evidence. The defendant confirms that at no time has the plaintiff had continuous exclusive and peaceful use of the suit land from 1969.

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 Isukha/Shitoto/1420 is the 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 applying these principles to the present case, the plaintiff testified that, parcel of land known as Isukha/Shitoto/1420 to which these proceedings relate is registered in the name of the defendant/respondent (certified photocopy of the certified copy of its register marked PEx1). That she bought the land from Petre Atinya and moved there in the 1969. That she never sold the land to the defendant and never received money from him to fund her husband's memorial. She admits signing the transfer documents but she does not know how to read. She claims to have given the documents to the defendant to check for her if they were in order. The defendant gave evidence that, he bought the suit land from the plaintiff in 1994. They went to the Land Control Board in 1995. He produced the title DEx1, application for consent DEx2, transfer DEx3 minutes of the board DEx4 and the green card DEx5. The plaintiff moved out and the defendant allowed her back in 2005 to carry out her husband's memorial and she refused to vacate thereafter. The defendant called three witnesses inter alia a neighbour, an elder and a chief who all collaborated his evidence. I find that the plaintiff is not being truthful. I find that she voluntarily sold her land and fully participated in the transfer only to change her mind later and return to the suit land. For these reasons, I find that the plaintiff has not 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 1969. I find that the plaintiff has failed to establish that her 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 failed to established her case on a balance of probabilities against the defendant and I dismiss it with costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE