



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CAS.E NO. 374 OF 2014**

**BENSON KITALA FIKETI.....PLAINTIFF**

**VERSUS**

**JULIUS ASWANI WERAMOLIO.....DEFENDANT**

**JUDGEMENT**

This is the application of Benson Kitale Fiketi who claims to have acquired title to the entire 1.6 ha (one point six hectares) of land parcel number Kakamega/Shamberere/187 by way of adverse possession for the determination of the following questions;

1. Whether the said Benson Kitale Fiketi has acquired title to the whole of land parcel number Kakamega/Shamberere/187 by way of adverse possession.
2. Whether the said Benson Kitale Fiketi should be declared the legal owner of the whole of land parcel number Kakamega/Shamberere/187.
3. Whether the defendant/respondent herein Julius Aswani Weramolio holds title to the whole of land parcel number Kakamega/Shamberere/187 in trust for Benson Kitale Fiketi who has acquired title to the parcel of land by way of adverse possession.
4. Whether the plaintiff/applicant bought land parcel number Kakamega/Shamberere/187 from the late Mayikuba Swali.
5. Who shall bear the costs of this application.

It is based on the sworn affidavit of Benson Kitale Fiketi and he testified that, he bought land parcel number Kakamega/Shamberere/187 from the late Maikuva Swali in the year 1983. That the purchase price was paid in instalments and he produced copies of the agreement as PEx1. That he paid the first instalment in the year 1983 to the late Maikuva Swali and he entered the parcel of land immediately. That when the late Maikuva Swali died in the year 1991 he was the one who buried him. That the respondent Julius Aswani Weramolio was nowhere. That the late Maikuva Swali died and he did not have any child to inherit him and hence he acted as his next of kin and buried him on land parcel number Kakamega/Shamberere/187. That the late Maikuva Swali had transferred land parcel number Kakamega/Shamberere/187 to himself before he died (copies of the transfer forms and consent of the Land Control Board PEx 2,3 & 4). That he registered the documents with the land registrar but he failed to collect the title deed after paying the registration fees and stamp duty (copy of the payment receipt PEX 5). That the respondent obtained title to land parcel number Kakamega/Shamberere/187 fraudulently and he was registered as the owner fraudulently (copy of the land register PEx 6). That since the year 1983 he has been doing farming activities on land parcel number Kakamega/Shamberere/187. That he has been doing sugar cane farming since the year 1992 on the parcel of land (payment statements and contract PEx 7 & 8). That he has also planted eucalyptus trees on the parcel of land which are currently mature for harvesting. That he has also planted cyprus and indigenous trees on the parcel of land. That the defendant/respondent has never stepped on land parcel number Kakamega/Shamberere/187 even though he has title deed to the same. That the respondent is holding title to land parcel number Kakamega/Shamberere/187 in trust for him since he has acquired title to the same by way of adverse possession. PW2 testified that the plaintiff has been his neighbour from 1983 to date.

The defendant submitted that the plaintiff never bought the suit parcel from his late father in the year 1983. That his father Maikuva Swali died in the year 1991 and it is him who buried his father and not the applicant. That after the death of his father he filed a succession cause in respect of his late father's estate and acquired grant for letters of administration which to date have never been challenged by the applicant by virtue of his purchase. That the plaintiff does not and has never been in neither use or occupation of land parcel registration number KAKAMEGA/SHAMBERERE/187 as the parcel is occupied by one Flora. That the plaintiff cannot allege to be in adverse possession when there are several suits filed in court over the suit property vide Kakamega CMCC No. 504 of 2008 and 88 of 2010 over the same subject matter. In his statement the defendant said that only surviving son of the deceased. However in court he testified that the deceased was his

uncle.

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/187 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 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 plaintiffs testified that, he bought land parcel number Kakamega/Shamberere/187 from the late Maikuva Swali in the year 1983. That the purchase price was paid in instalments and he produced copies of the agreement as PEX1. That he paid the first instalment in the year 1983 to the late Maikuva Swali and he entered the parcel of land immediately. That the late Maikuva Swali had transferred land parcel number Kakamega/Shamberere/187 to him before he died (copies of the transfer forms and consent of the Land Control Board PEX 2,3 & 4). That he registered the documents with the land registrar but he failed to collect the title deed after paying the registration fees and stamp duty (copy of the payment receipt PEX 5). That the respondent obtained title to land parcel number

Kakamega/Shamberere/187 fraudulently and he was registered as the owner fraudulently (copy of the land registered PEx 6). That since the year 1983 he has been doing farming activities on land parcel number Kakamega/Shamberere/187. That he has been doing sugar cane farming since the year 1992 on the parcel of land (payment statements and contract PEx 7 & 8). That he has also planted eucalyptus trees on the parcel of land which are currently mature for harvesting. That he has also planted cyprus and indigenous trees on the parcel of land. That the respondent has never stepped on land parcel number Kakamega/Shamberere/187 even though he has title deed to the same. That the respondent is holding title to land parcel number Kakamega/Shamberere/187 in trust for him since he has acquired title to the same by way of adverse possession. PW2 testified that the plaintiff has been his neighbour from 1983 to date. For these reasons, I find that the plaintiff has been in exclusive, continuous and uninterrupted possession, occupation and open use of the said portion of land for a period in excess of 12 years from 1993. 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 defendant and I grant the following orders;

1. That the plaintiff/applicant be declared the owner Kakamega/Shamberere/187 and which he occupies and to which he are entitled to by virtue of adverse possession and which the defendant/respondent be ordered to transfer the said portion of land to the plaintiff/applicant within the next 30 days from the date of this judgement.
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 plaintiff/applicant.
3. No orders as to Costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26<sup>TH</sup> NOVEMBER 2019.**

**N.A. MATHEKA**

**JUDGE**