



REPUBLIC OF KENYA

IN THE ENIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 54 OF 2018

RAMADHAN OTIMI MUKONZO.....APPLICANT/PALINTIFF

VERSUS

1. JOHN WESONGA OLUNGA

2. CEPHAS OBULEMIRE MIRIMO...RESPONDENTS/DEFENDANTS

JUDGEMENT

This is the application of Ramadhan Otimi Mukonzo on behalf of the estate of the late Salim Mukonzo Keya who claims to be entitled the entire land title number South Wanga/Ekero/5175, South Wanga/Ekero/5176 and South Wanga/Ekero/3856 sub divisions of South Wanga/Ekero/373 by way of adverse possession and for the determination of the following questions:-

- a) Declaration that the respondent holds in trust for the applicant and the larger family of Mukonzo Salim Keya the whole of land parcels number South Wanga Ekero/5175 and 5176 and South Wanga/Ekero/3856 sub divisions of South Wanga/Ekero/373.
- b) A declaration that the respondents' rights over the entire land parcels South Wanga/Ekero/5175, South Wanga/Ekero/5176 and South Wanga/Ekero/3856 sub divisions of South Wanga/Ekero/373 as occupied by the applicant and the larger family of Mukonzo Salim Keya got extinguished by way of adverse possession as the land has been occupied continuously, uninterrupted, peaceful for a period of over 12 years by the applicant and the larger family of Salim Mukonzo Keya.
- c) Declaration that upon expiry of 12 years the respondents held title to land parcel No. South Wanga/Ekero/5175, South Wanga/Ekero/5176 and South Wanga/Ekero/3856 subdivisions of South Wanga/Ekero/373 and currently holds the titles for the applicant.
- d) An order under Section 38 of the Limitation of Actions Act Cap 22 of the Laws of Kenya that the applicant be registered as the owner of South Wanga/Ekero/5175 and South Wanga/Ekero/5176 and South Wanga/Ekero/3856 sub divisions of South Wanga/Ekero/373 0.8 Ha of land to be sub divided from South Wanga/Ekero/373 and the applicant be issued with a title deed.
- e) An order that the respondents be condemned to pay costs of the suit.

The plaintiff, Ramadhan Otimi Mukonzo testified that he was born in 1977 on the suit land parcel No. South Wanga/Ekero/373 and has lived there all his life. That the land title number South Wanga/Ekero/5175, South Wanga/Ekero/5176 and South Wanga/Ekero/3856 sub divisions of South Wanga/Ekero/373. That his grandfather one Iddi Keya Opete bought the land from one Pofiki Olunga who was the father of the 1st defendant in 1971. That upon sale the seller vacated the suit land and went to live somewhere else. His father Salim Mukonzo Keya took the 1st respondent to the land Disputes Tribunal and the latter was ordered to transfer the land to him. The order was adopted by the SRMC Misc Award No. 10 of 2010 PEx7.

This court has carefully considered the evidence and submissions therein. The defendant was served but failed to attend court to adduce oral evidence or file any response. 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 South Wanga/Ekero/5175 and South Wanga/Ekero/5176 is the 2nd defendant and South Wanga/Ekero/3856 is the 1st defendant being sub divisions of South Wanga/Ekero/373 0.8 Ha. The issue is whether or not they 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 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 was born in 1977 on the suit land parcel No. South Wanga/Ekero/373 and has lived there all his life. That the land title number South Wanga/Ekero/5175, South Wanga/Ekero/5176 and South Wanga/Ekero/3856 sub divisions of South Wanga/Ekero/373. That his grandfather one Iddi Keya Opete bought the land from one Pofiki Olunga who was the father of the 1st defendant in 1971. That upon sale the seller vacated the suit land and went to live somewhere else. His father Salim Mukonzo Keya took the 1st respondent to the land Disputes Tribunal and the latter was ordered to transfer the land to him. The order was adopted by the SRMC Misc Award No. 10 of 2010 PEx7. His evidence has not been challenged. 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. I find that the plaintiff has established that his possession with his family 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. Declaration that the respondents hold in trust for the applicant and the larger family of Mukonzo Salim Keya the whole of land parcels number South Wanga Ekero/5175 and 5176 and South Wanga/Ekero/3856 sub divisions of South Wanga/Ekero/373
2. That the plaintiff/applicant be declared the owner South Wanga Ekero/5175 and 5176 and South Wanga/Ekero/3856 sub divisions of South Wanga/Ekero/373 and which they occupy and to which they are entitled to by virtue of adverse possession and which the defendants/respondents be ordered to transfer the said suit land to the plaintiff/applicant within the next 30 days from the date of this

judgement.

3. No orders as to Costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 17TH DECEMBER 2019.

N.A. MATHEKA

JUDGE