



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 222 OF 2013

BENEDICTOR ETABALE MASABA.....PLAINTIFF/APPLICANT

VERSUS

EDWIN N. OPANGA

EDWARD O. KATAYI

SILVANO I. KATAYI.....DEFENDANTS/RESPONDENTS

JUDGEMENT

This is the application of Benedicto Etabale Masaba who claims to be entitled to the 0.073 Ha of land out of parcel No. BUTSOTSO/SHIKOTI/16389 and 16390 by adverse possession. The ownership of a portion measuring 0.073 Ha falling within L.P. Nos. Butsotso/Shikoti/16389 and 16390 is claimed by the applicant and for the award of the following orders:-

- (a) A declaration that the respondents' rights over a portion of land title No. Butsotso/Shikoti/16389 and 16390 measuring 0.073 Ha in area got extinguished by operation of law/adverse possession upon expiry of twelve (12) years.
- (b) A declaration that upon expiry of twelve (12) years from the date of the said occupation by the applicant a portion measuring 0.073 Ha out of land title No. Butsotso/Shikoti/16389 and 16390 was held and is currently held in trust for the applicant.
- (c) An order that the 0.073 Ha of land parcel No. Butsotso/Shikoti/16389 and 16390 vests in the applicant and thereof under section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya.
- (d) A declaration that the registration of respondents as the owners of land title no. Butsotso/Shikoti/16389 and 16390 is unlawful.
- (e) An order cancelling the sub-division of land parcel No. Butsotso/shikoti/6759 into Land Parcel Nos. Butsotso/Shikoti/16389 and 16390 for the restoration of title number Butsotso/Shikoti/6759.
- (f) That upon restoration of title number Butsotso/Shikoti/6759, an order do issue compelling the 1st respondent to sign all relevant documents to facilitate the subdivision and transfer of 0.073 Ha of land to the plaintiff/applicant and that in default the Deputy Registrar of this honourable court to sign the same.
- (g) An order that the respondents be condemned to pay costs of this suit.
- (h) Such other orders or relief as this honourable court may deem just and reasonable to grant.

PW1 the plaintiff testified that in 1992 he bought the suit land from one Silanus Opanga Mukabana and produced the sale agreements as PEx1. He took possession of the same until 2013 when he was chased away. The seller died in 1996 before transferring the same to him even after he paid the full purchase price. PW2 confirms that the plaintiff is his nephew and he was using the land and had been told that the plaintiff had bought the land.

The 1st respondent DW1 testified that, he is not aware that the Applicant bought any land from his late father Silvanus Opanga Mukabana on 15th May 1992 or any other date. That it is not also true that the Applicant is in occupation or use of any part or portion of the suit land. That he was registered as proprietor of the suit property herein on 4th October 2012 and automatically the claim for adverse possession by the applicant has been defeated and does not apply or arise. That the Applicants claim if any has been overtaken by events and or is time barred. That the Applicants claim is fictitious and suspect as his late father Silvano Opanga Mukabana was mentally sick which sickness was the cause of his death. That his late father had no mental capacity to transact in or sell his land to the Applicant herein or any other person in the

year 1992 or thereabout. That it is not also true that his step mother Erica Museshi could have been party to the sale of the family land as by the time of the alleged sell his stepmother was not at home having been chased away by his father because of his mental condition. That the purported land sale agreements annexed to the application herein are therefore fictitious and manufactured by the Applicant to suit his case. That the applicant has never used the suit land in any way as the trees on the land were planted in the sixties by his late grandfather Musa Nduku Maramba. That the applicant lives about 2 kilometers from their home and he did not attend or participate in his late father Silvano Opanga Nduku burial arrangements. That it is also surprising that the Applicant did not participate the "makumbusho" ceremony of his late father Silvano Opanga Nduku, in which ceremony all the debtors to the deceased are invited to state their claims against the estate of a deceased person. That the Applicant cannot therefore come 19 years down the line to claim that he bought land from his father when he has taken no interest in the family of whomever he bought land from.

The 2nd and 3rd respondents submitted that they are the registered proprietors of land parcel L.R. Butso/Shikoti/6757, having legally acquired the same on 28/9/2012. That the claim for adverse possession over land which they legally acquired on 28/9/2012 a period of about three years ago is therefore unfounded in law. That if the applicant has any claim against the 1st respondent he should be specific and deal with the 1st respondent directly instead of dragging them into a dispute, they are not party to. That the applicant is not in occupation of any part of their land and his claim is therefore unfounded in law. That they observed due diligence when they bought the subject land and did an official search at the lands office Kakamega and found that the said land was clean observed all other requirements including appearing at the Land Control Board where the consent to transfer was obtained. That if indeed the applicant had a claim to the suit property herein then he should have been diligent and placed a caution or restriction at the Lands office.

This court has considered the applicants' and the respondent's evidence and submissions herein. 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 by way. In applying these principles to the present case, the plaintiff brought this suit against the defendant by way of originating summons dated 6th August 2013 claiming to be entitled to the 0.073 Ha of land out of parcel No. BUTSOTSO/SHIKOTI/16389 and 16390 by adverse possession. Both the plaintiff and defendant gave viva voce evidence and called witnesses.

It is not in dispute that land parcel BUTSOTSO/SHIKOTI/16389 is registered in the joint names of the 2nd and 3rd Defendants herein, Silvano Inyangala Katayi and Edward Okinda Katayi, whilst the second land parcel L.R. BUTSOTSO/SHIKOTI/16390, is registered in the names of the 1st Defendant herein Edwin Nduku Opanga. In respect of land parcel L.R. BUTSOTSO/SHIKOTI/16389 the 2nd and 3rd Defendants were registered as proprietors of the said land parcel as per copy of Green Card produced by the Plaintiff as exhibit. In respect of the second land parcel L.R. BUTSOTSO/SHIKOTI/16390 the 1st Defendant herein as per a copy of Green Card produced by the Plaintiff was registered as proprietor of the same on 04/10/2012. In his testimony the plaintiff stated that he bought the land in 1992 from one Silvanus Opanga and took possession immediately. He produced the sale agreements as exhibits PEx 1. I have perused the said agreements. The acreage seems to have been altered. No explanation was given by the Plaintiff to explain why the said land sale agreements had those important details in respect of size/acreage, date and consideration price were altered. It is also surprising that though the Plaintiff alleges that the seller from whom he bought the suit land herein Silvanus Opanga died in the year 1996 and that the land sale agreement was entered into in the year 1992, from the year 1992 to the year 1996 when the seller Silvanus Opanga allegedly died did not go and regularize his land sale agreement and have it properly done and executed and or signed by all parties therein or come up with another land sale agreement all together. It is also curious that for a period of over four years before the death of the seller that the Plaintiff never sought or purposed to have his land sale agreement properly executed and/or concluded. This leaves doubt in my mind as to whether the plaintiff actually took possession of the suit property at all or between 1992 upto 2013 when he was allegedly chased away. It was not until 2012 that he placed a caution on this land. The plaintiff's said occupation and use of the property has not been established to have been peaceful, open, uninterrupted, quiet and exclusive for a period of over 12 years. I find that the plaintiff has failed to establish his case on a balance of probabilities and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 24TH DAY OF JULY 2018.

N.A. MATHEKA

JUDGE