



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 171 OF 2013

JOSIAH MALIKA NENGANE.....PLAINTIFF/APPLICANT

VERSUS

MARY MAREBA MEYA

WILLIAM ELONDAGA.....DEFENDANTS/RESPONDENTS

JUDGEMENT

This is the application of Josiah Malika Nengane who claims to be entitled to the land parcel No. KISA/MWIKALIKHA/2013 by adverse possession. The ownership of No. KISA/MWIKALIKHA/2013 is claimed by the applicant and for the determination of the following;

1. Whether the applicant has occupied the portion now comprising Land Parcel No. KISA/MWIKALIKHA/2013 or a part thereof openly, peacefully and exclusively for a period of over 12 years.
2. Whether the title of the prior registered owner and current or subsequent owner of Land Parcel No. KISA/MWIKALIKHA/2013 or a portion thereof has been extinguished.
3. Whether the applicant should thus be declared the owner thereof by adverse possession.
4. Whether the 2nd Respondent should be compelled to execute the transfer of the whole of the parcel or a portion thereof to the applicant and in default the Deputy Registrar of this court to be empowered to do so.
5. Whether the respondents should pay the cost of these summons.

PW1 the plaintiff testified that in 1999 he bought the suit land from 1st Defendant and produced the sale agreement as PEX1 and he paid the full purchase price. He took possession of the same. He used his father Francis Nengane to buy the land for him. PW2 confirms that the plaintiff is his son and he was the one who bought the land on his behalf. PW3 a neighbor corroborated the plaintiff's evidence. He confirms that the 1st defendant is his mother and the 2nd defendant is his grandchild. He was a witness during the sale agreement PEX1.

The 1st defendant/respondent DW1 testified that, she is not aware that the Applicant bought any land from her late husband. At one point she states that she does not know the plaintiff and then again states that he has leased the land for ten years and is still living there. She has since sold the land to the 2nd defendant.

DW2, the 2nd defendant/respondent submitted that he legally acquired the suit land in 2008 and it was subdivided in 2013. The plaintiff refused to move out and he is occupying just a portion of his land. The plaintiff had leased the land for ten years which are now over. DW3, the 1st Defendant's son confirms that the land was leased to the plaintiff and not sold.

This court has considered the applicant's and the respondents' 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) e KLR 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 June 2013 claiming to be entitled to the land parcel No. KISA/MWIKALIKHA/2013 by adverse possession. Both the plaintiff and defendants gave viva voce evidence and called witnesses.

It is not in dispute that land parcel KISA/MWIKALIKHA/2013 is registered in the name of the 2nd Defendant herein, William Eronda Matala, whilst the second land parcel L.R. KISA/MWIKALIKHA/2012, is registered in the names of the 1st Defendant herein Mary Mareba Meya. In his testimony the plaintiff stated that he bought the land in 1999 from Mary Mareba Meya and took possession immediately. He produced the sale agreements as exhibits PEx 1. I have perused the said agreement. It is clear that the 1st defendant sold a portion of the land L.R. KISA/MWIKALIKHA/542 measuring 1.8 acres to the plaintiff at an agreed amount of kshs. 95,000/= . This was witnessed by the Assistant Chief. The 1st defendant mischievously subdivided the land and sold the same portion to the 2nd defendant after succession of her late husband's estate. She cannot now turn around and claim that the plaintiff has leased the land for ten years. This is extreme dishonesty and cannot be allowed. The 2nd defendant should have observed due diligence and cannot purport to have bought land with the plaintiff already residing there a fact he was well aware of. I suggest he pursues the 1st defendant for the refund of the money.

I find that, from the year 1999 the plaintiff's said occupation and use of the property has been peaceful, open, uninterrupted, quiet and exclusive which is a period of over 12 years. It is not in dispute that he still resides on the suit land. I find that the plaintiff has established his case on a balance of probabilities and I grant the following orders;

1. A declaration that the defendants/respondents proprietary interests in the said land have been extinguished by virtue of the plaintiff's/applicant's adverse possession of the same.
2. That the title deed issued in the names of William Eronda Matala as the sole proprietor of land parcel No. KISA/MWIKALIKHA/2013 be cancelled and or revoked and the same and/or 1.8 acres be transferred to the plaintiff/applicant herein as the sole proprietor.
3. That costs to be borne by the defendant.

It is so ordered.

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

N.A. MATHEKA

JUDGE