



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 356 OF 2017

WILLIAM MUHAVI SHEYWE PLAINTIFF/RESPONDENT

VERSUS

JOHN FOLIO SHUNZA DEFENDANT/APPLICANT

JUDGEMENT

This is an application by William Muhavi Sheywe (applicant) for relief against the claim of the defendant/respondent John Folio Shunza in respect of 3.5 acres of Land Parcel No. KAKAMEGA/LUGARI/327. William Muhavi Sheywe claims to have acquired ownership of 3.5 acres from the parcel of land known as KAKAMEGA/LUGARI/327 as he purchased and has occupied, stayed on and utilised the same exclusively, peacefully and continuously from 1985 to-date. The plaintiff/applicant has since been entitled to the 3.5 acres of the said parcel of land, L.R. NO. KAKAMEGA/LUGARI/327 by virtue of adverse possession, having occupied and used the same exclusively, openly, quietly and uninterrupted for a period of over 12 years and prays that the honourable court does determine and order as follows:-

- (a) That the plaintiff/applicant be declared the owner of 3.5 acres out of land parcel No. KAKAMEGA/LUGARI/327 whose boundaries are clearly marked on the ground and which he occupies and to which he is entitled by virtue of adverse possession and the defendant/respondent be ordered to sub-divide and transfer title to the said portion of land to the plaintiff/applicant.
- (b) That in default of the defendant/respondent transferring the same voluntarily the court do make an order authorising the Deputy Registrar, High Court of Kenya to execute all the documents necessary to effect the sub-division and transfer of the 3.5 acres of land aforesaid to the plaintiff/applicant.
- (c) That the honourable court do make further orders or grant any other relief deemed fit and just.
- (d) That the defendant/respondent be ordered to pay the costs of this summons to the plaintiff/applicant.

The plaintiff submitted that he entered the suit property in 1985 and 1988 respectively as a purchaser. He established his home thereon by constructing houses and planting trees and crops on the suit land with the defendant's knowledge. The plaintiff dispossessed and or discontinued the defendant's possession of the suit property. That since 1985 and 1988 to-date the plaintiff has been and remains on the suit property, a period of over 12 years. The defendant has never used the suit property for the period between 1985 and 1988 to-date. The defendant has never made any or any effective entry on the suit property. He is legally debarred from challenging the plaintiff's title. They urge the court to find that the plaintiff has been in occupation of the suit property since 1985 and 1988 to-date.

Secondly they submit that the plaintiffs said occupation and use of the property was and remains to be peaceful, open, uninterrupted, quiet and exclusive for a period of over 12 years. The plaintiff proved on a balance of probabilities that he entered the suit land as a purchaser in 1985 and 1988 respectively and that is when time started running. By the time the plaintiff filed this suit in 2001 he had already acquired title to the suit property herein as 12 years had accrued in his favour. In fact since 1988 to-date the plaintiff is still in actual physical occupation of the suit property and has acquired title by virtue of adverse possession.

They submit that, the purported agreement for a refund, which was denied by the plaintiff DEx12, has alterations and is suspect and should be disregarded. The figure of Ksh.77,700/= was written in ink by a person unknown to even the purported author of D Ex 12, that is DW 3. In any case time for adverse possession is not and can never be interrupted by mere refund of the purchase price which refund was denied by plaintiff and was not proved by the defendant. As long as the plaintiff remains in actual occupation and use of land for time adverse possession continues running in his favour. The plaintiff is neither seeking specific performance nor claiming for a refund of the purchase price.

The defendant avers that, it is not true that William M. Sheywe has the right to adverse possession of this land. That the plaintiff did not complete his payment of the suit land and was refunded his money in the year 1994. That since that date i.e. 1994, the plaintiff/applicant has not stayed on the said land uninterruptedly or peacefully for a period of twelve years. That the plaintiff has only lived and stayed on the land for a period of eight years. That for these reasons, he cannot claim adverse possession of the land. For he has not completed twelve years-

mandatory requirement. That he had no capacity to dispose off Kakamega /Lugari/327 as alleged or at all. That he has never demarcated and carved off three and half acres of portion of L.R. Kakamega/Lugari/327 as alleged or at all. That the plaintiff has never been in peaceful quiet continuous and uninterrupted occupation and use of the suit land or portion thereafter for over 12 years or at all. That the plaintiff has not acquired title to a portion of the subject matter as averred or at all. That purely on without prejudice to the foregoing, he offered to sell a portion of the aforesaid land in 1988 to the plaintiff, the plaintiff failed to clear the balance and later he, the plaintiff rescinded the agreement. That in 1991 the plaintiff abused him alleging that he could not be his neighbour, he demanded for a refund of money paid to him together with profit. That on 6th November 1991 with the Area Chief Justo Abukuse, as witness, he entered into agreement with the plaintiff whereby he was to refund him the amount received together with interest and on his part the plaintiff was to have no claim against him over the subject matter. That he did proceed in pursuant to the said agreement and deposited the money with J. Okello Advocate and the plaintiff vide registered letter was advised to collect the money. That the plaintiff confirmed to him to have received the refund from J. Okello Advocates, that in the circumstance of purchase price not cleared and later refunded by him, the issue of applying for Land Control Board Consent and Transfer could and cannot arise. That in 1994 vide Kakamega P. M CC. 1309 of 1994, he filed suit to have the plaintiff restrained from interfering with the subject matter herein. That the plaintiff filed defence on 27th January 1995 to the suit. The aforesaid suit - Kakamega PMCC. 1309 of 1994 was on 24th May 1996 referred to the Land Dispute Tribunal and the same has been determined and even an Appeal to the Provincial Appeals Committee concluded and decision filed in court. That this suit should be stayed and or declared Res Judicata. That since 1991 there has been no peace between the plaintiff and his family on one part and himself and his family on the second part. That the plaintiff has occasionally attempted to forcefully use portion of the subject matter.

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 14th September, 2001 claiming to have acquired ownership of 3.5 acres out of land parcel L.R NO. KAKAMEGA/LUGARI/327 by virtue of adverse possession. The defendant/respondent filed a replying affidavit sworn on the 31st day of August, 2002 and a further affidavit sworn on the 15th day of December, 2008. Directions were sought and granted in which, the originating summons and supporting affidavit became the plaintiff while the replying affidavit and further affidavit became the defence. Both the plaintiff and defendant gave viva voce evidence and called witnesses.

It is not in dispute that vide agreements dated 28th January 1985 and 15th April 1988 the plaintiff purchased portions of land measuring 3.0 acres and 1.0 acre respectively totaling to 4.0 acres out of land parcel number KAKAMEGA/LUGARI/327. Save for a balance of Ksh.7,400/= the plaintiff paid to the defendant a total sum of Ksh.37,850/= as consideration for 3.5 acres of land. Immediately after executing the said agreements, the plaintiff immediately took vacant possession and use of the said portions of land measuring 3.0 acres and 0.5 acres in 1985 and 1988 respectively. A boundary demarcating the plaintiff's portion of land measuring 3.5 acres was marked out on the ground by the defendant himself in 1988 and the plaintiff immediately established his home thereon and he has been staying there since 1985 to-date. The plaintiff also immediately took possession of and started cultivating food crops on his said portion of land and continues to do so to-date. It is the plaintiffs case, therefore, that since 1985 and 1988 to-date he has been and continues to be in peaceful, open, unhindered, uninterrupted and exclusive possession, use, occupation and or utilization of a portion of land measuring 3.5 acres out of KAKAMEGA/LUGARI/327. The plaintiff has therefore acquired title to the said portion of land by virtue of adverse possession and the defendant only holds title thereof in trust for the plaintiff and he should be compelled to transfer it to the plaintiff.

Though the defendant admitted having sold to the plaintiff the portion of land measuring 3.5 acres out of his parcel of land L.R NO. KAKAMEGA/LUGARI/327 and the plaintiff having settled thereon since 1985 to-date with boundaries clearly demarcated on the ground the defendant contended that he rescinded the said transactions. The defendant also claimed that the purchase price paid had been deposited with M/S J. Okello & Co. Advocates for the plaintiff to be refunded. It is the defendant's case, therefore, that in view of the rescission of sale

of land agreements dated 28th January 1985 and 15th April 1988 at the instance of the plaintiff and the refund of the purchase price herein to the plaintiff, the plaintiff should not continue staying on his land. The plaintiff's case is based on adverse possession. Therefore, the main issue for determination is whether or not the plaintiff has acquired title to the 3.5 acres out of L.R NO. KAKAMEGA/LUGARI/327 by virtue of adverse possession. Whether or not the sale of land agreements herein were rescinded or not is not relevant. Similarly, whether or not the plaintiff was refunded the purchase price by the defendant or any other person refunded is not relevant. The plaintiff is not seeking specific performance of the contract.

The defendant submitted that on 6th November 1991 with the Area Chief Justo Abukuse, as witness, he entered into agreement with the plaintiff whereby he was to refund him the amount received together with interest and on his part the plaintiff was to have no claim against him over the subject matter. That he did proceed in pursuant to the said agreement and deposited the money with J. Okello Advocate and the plaintiff vide registered letter was advised to collect the money. That the plaintiff confirmed to him to have received the refund from J. Okello Advocates and in the circumstance of purchase price not cleared and later refunded by him, the issue of applying for Land Control Board Consent and Transfer could and cannot arise. That in 1994 vide Kakamega P. M CC. 1309 of 1994, he filed suit to have the plaintiff restrained from interfering with the subject matter herein. That the plaintiff filed defence on 27th January 1995 to the suit. The aforesaid suit - Kakamega PMCC. 1309 of 1994 was on 24th May 1996 referred to the Land Dispute Tribunal and the same has been determined and even an Appeal to the Provincial Appeals Committee concluded and decision filed in court. That this suit should be stayed and or declared Res Judicata.

I find that since 1991 there has been no peace between the plaintiff and his family on one part and himself and his family on the second part. The plaintiff's said occupation and use of the property has not been peaceful, open, uninterrupted, quiet and exclusive for a period of over 12 years. From 1985 to 1991 is a period of only 6 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