



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 340 OF 2010**

**LIVINGSTONE NGAIRA ANJILA.....PLAINTIFF**

**VERSUS**

**STEPHEN LIKAMI LIPANG.....1<sup>ST</sup> DEFENDANT**

**PATRICK MAJIMBO LIKAM.....2<sup>ND</sup> DEFENDANT**

**DAVID OKUMU.....3<sup>RD</sup> DEFENDANT**

**GENERAL SUPRITENDANT P.A.G KENYA.....4<sup>TH</sup> DEFENDANT**

**P.A.G CHURCH- SHIBIRIRI.....5<sup>TH</sup> DEFENDANT**

**KIZITO SHITSAMA.....6<sup>TH</sup> DEFENDANT**

**JUDGEMENT**

This case in summary is that, the plaintiff is the registered absolute proprietor of Land Parcel No. Butso/ Shikoti/1281. That the defendants have unlawfully and without any colour of right and/or the plaintiff's consent trespassed onto Land Parcel No. Butso/ Shikoti/1281 demarcated the same and apportioned themselves various portions thereof which they have put to their use and started erecting structures thereon as a consequence of which the plaintiff has been deprived the use of his land and has and continues to suffer great loss and damage, full particulars whereof are well within the defendant's knowledge. The plaintiff's claim against the defendants is for;

- a) A declaration that the Plaintiff is the lawfully registered absolute proprietor of Land Parcel No. Butso/ Shikoti/1281.
- b) An eviction order against the Defendants, their agents, servants, employees from Land \_\_\_\_\_ Parcel \_\_\_\_\_ No. Butso/ Shikoti/1281 and a permanent injunction restraining the Defendants, their agents, servants, employees or any other person claiming through them once evicted from trespassing and/or laying claim to Land Parcel No. Butso/ Shikoti/1281.
- c) Costs of this suit.
- d) Interest on (a) and (b) above at court rates.

PW2 and PW3 corroborated the plaintiff's evidence. It is their evidence that the plaintiff was a bonafide purchaser for value. PW2 was the owner of the land through inheritance and he sold the land to the plaintiff.

The 3<sup>rd</sup> to 5<sup>th</sup> defendants never entered appearance or file any papers in defence. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants in their defence dated 3/2/2011 have denied the claim and deny knowledge of acquisition of the suit land by the Plaintiff. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants aver that they have been on the suit land since 1964. Consequently the Plaintiff has no proper valid claim against them. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants aver that the Plaintiff has no valid title to the suit property. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants aver that the purported acquisition of the suit property was fraudulent. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants aver that the suit is bad in law, incompetent does not disclose a reasonable cause of action and or is otherwise an abuse of the due process of the court and should be struck out.

The 6<sup>th</sup> Defendant avers that the Plaintiff has not disclose how he obtained the said parcel of land which according to the knowledge of the 6<sup>th</sup> Defendant was owned by the 1<sup>st</sup> Defendant in trust of his deceased sister, Teresina Linani Ikocheli. The 6<sup>th</sup> Defendant avers that the property in question was sold to him legally and procedurally by the 1<sup>st</sup> Defendant and that the Plaintiff's claim is baseless. The 6<sup>th</sup>

Defendant contends that before purchasing the suit property from the 1<sup>st</sup> Defendant, he performed the necessary and requisite searches and inspections on the title to the suit property and the searches did reveal that the said parcel was owned by the deceased Teresina Linani Ikochehi. The 6<sup>th</sup> Defendant contends therefore that he is a bona fide purchaser for value without notice of any defect on the title to the suit property, if any, or the want of title on the part of the 1<sup>st</sup> Defendant.

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. Hon Justice Munyao Sila 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.

The issues for determination in this case are as follows;

1. Whether the Plaintiff has a good title to the suit land
2. Whether the acquisition of the suit property by the Plaintiff was fraudulent.
3. Whether the Amended Plaintiff raises a reasonable cause of action or whether it is incompetent and or bad in law.
4. Whether on a balance of probability the plaintiff has proved his case.

The 1<sup>st</sup> and 2<sup>nd</sup> defendants in submissions stated that, the Plaintiff did not specify the date and year when the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were alleged to have trespassed on his land. An order for eviction requires that a party by evidence and more so by his pleadings demonstrate when an alleged act of trespass occurred in order to bring the case within the provisions of the limitation of Actions Act. Simply put a party who has been in trespass for over 12 years will not be evicted by any court of competent jurisdiction since the law of adverse possession will stand in his favour.

They submit that, the agreement dated 26/1/2003 and produced as Exhibit 1(a) Chrisantus Muleka Ikochehi was the owner of the suit land and sold it to the Plaintiff while according to the agreement dated 26/ 12/2006 and produced in court as Exhibit 1(b) the Plaintiff was buying the land from an intending administrator of the estate of the originalowner of the land Teresina Linani Ikochehi. That the two agreements are a clear testimony of falsification and the same cannot form the basis of a legally binding agreement for purchase of land. We further submit that to purport to sell land belonging to a deceased person before you are appointed an administrator is to commit an offence of intermeddling with the deceased’s property contrary to section 45(1) of the Law of Succession Act Cap 160 Laws of Kenya. By purporting to sell to the Plaintiff herein LR. NO.BUTSOTSO/SHIKOTI/1281Chrisantus Muleka Ikochehi was intermeddling with the estate of Teresina Linani Ikochehi. As a matter of fact in law he had no capacity to transfer the land to the Plaintiff herein.

The 6<sup>th</sup> Defendant submitted that, he entered into agreement of sale on land Parcel No.Butsotso/Shikoti/1281/Kakamega by the 1<sup>st</sup> Defendant on 23/1/2009 Exhibit marked la, b, c and he paid in full purchase price of Kshs. 110,000.00.The 6<sup>th</sup> Defendant when buying the land did personal inspection and inquiry and established that the land was a family land held in the Trust of Teresina Linani Ikochehi the deceased sister of the 1<sup>st</sup> Defendant, Stephen Likami Lipanga. The 6<sup>th</sup> Defendant testimony in court informed the court that the Plaintiff has been trying to negotiate with his witness who is the 1<sup>st</sup> Defendant by awarding him a piece of land on this land Parcel No. Butsotso/Shikoti/1281suit measuring 0.25 acre by the letter dated 8/7/2013 so that he can withdraw the suit from the 1<sup>st</sup> Defendant and the 6<sup>th</sup> Defendant fail to have the witness in the matter. Further the 6<sup>th</sup> Defendant is not interested in the land by virtue of having trespassed or

occupying the same by force or apportioned himself but it's after purchasing from the defendant, Stephen Likami Lipanga and paid full price of Kshs. 110,000/- for part of the size 25 x 25m. He allowed him in the land by demarcating it on 5/10/2010 as the owner of part of parcel No. Butsotso/Shikoti/1281 pending the title deed to be obtained from his deceased sister in trusty Teresina Linani Ikocheli.

The 6<sup>th</sup> Defendant is asking this Court to consider the adverse possession to the 1<sup>st</sup> defendant portion that was mentioned by the Administrator and the seller of the land Chrisantus Muleka Ikocheli. Since the Defendant he entered in the land in 1985 as testified by both the Plaintiff witnesses and also the title on respect of the suit land got extinguished on expiry of 12 years after the 1<sup>st</sup> Defendant took possession. The 6<sup>th</sup> Defendant completed the purchase by paying the final Kshs. 20,000/- on 5/10/2010 which was witnessed by the late Linus Tom Loti and Alice Mutenyo the wife of the 2<sup>nd</sup> Defendant in the suit. He relied on the English case of Bishops gate Motor Finance Corp Vs Transport Brakes Limited {1949 1 KB 332 quoted favourably in Symbion E. A. Printers Ltd vs Casey J. K. Mbuaua & Another [2009] 1 eKLR where Denning LJ stated;

“a person who take in good faith and for value without notice should get a better title”.

They submit before this court that the 1<sup>st</sup> Defendant do indemnify the 6<sup>th</sup> Defendant by issuing a full refund of the purchase price namely Kshs. 110,000/- to the 6<sup>th</sup> Defendant as consideration for purchase of the land.

This court finds that it is not in dispute that, the Plaintiff herein has the title deed of the suit land obtained through the Succession Cause No. 200 of 2003 by Administrator Chrisantus Muleka Ikocheli who transferred the land Parcel No. Butsotso/Shikoti/1281 to the Plaintiff under R.L. 7. The plaintiff produced all the relevant documents to prove his claim. The Plaintiff herein testified that he bought the land Parcel No. Butsotso/Shikoti/1281/Kakamega from Chrisantus Muleka Ikocheli who is the Administrator of the Estate of Teresina Linani Ikocheli on the sale agreement dated 26/1/2003 and 19/12/2006 both marked as PExhibit 1. PW1 produced the title, green card and search of the said suit land (PEx 2, 3 & 4). PW2 Chrisantus Muleka Ikocheli, the Administrator of the estate and the seller of the same testified that the 1<sup>st</sup> Defendant, Stephen Likami Lipanga came to stay on this land in 1985 and he was given a portion of this land but he did not pursue. The PW3, Petro Nyangweso Omumani, the village elder, in his testimony and his statement filled on 16<sup>th</sup> November, 2011 in Court stated that the 1<sup>st</sup> Defendant came to stay in this land in 1985 and he was given a portion of the land but he has not pursued it. I see no evidence that the certificate of title obtained by the plaintiff was acquired illegally, unprocedurally or through a corrupt scheme. I see no contradictions in the green card.

Be that as it may, the 6<sup>th</sup> Defendant purchased the said land through the 1<sup>st</sup> Defendant who was not the administrator of the deceased Teresina Linani Ikocheli estate but the step brother. I find that the 1<sup>st</sup> defendant had no proper title to pass on and the sell was void ab initio. The 6<sup>th</sup> Defendant cannot lay any claim on this land and it is upto him to pursue the 1<sup>st</sup> Defendant. It has come out in evidence that the 1<sup>st</sup> Defendant had his own land elsewhere where he buried his wife. In his evidence in court, the Plaintiff, demonstrated that during the pendency of this suit he offered the 1<sup>st</sup> defendant 0.25 acres of the suit land after the 1<sup>st</sup> Defendant requested for the same. He produced letters to that effect (PEx 5 & 6). At the trial he withdrew the same as the 1<sup>st</sup> defendant refused to accept. It therefore shows that the 1<sup>st</sup> defendant was there by virtue of permission from the plaintiff and cannot now claim adverse possession.

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 Sergon 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.*

Applying this principle to the present case I find that the 1<sup>st</sup> Defendant was there with the permission of the plaintiff and the latter was not dispossessed of the suit land. For those reasons I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. A declaration that the Plaintiff is the lawfully registered absolute proprietor of Land Parcel No. Butsotso/Shikoti/1281.

2. The Defendants, their agents, servants, employees are to vacate the suit land parcel No Butsotso/Shikoti/1281 within the next 3 (three) months from the date of this judgement and in default eviction notice to issue forthwith.

3. Costs of this suit to the plaintiff.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 11<sup>TH</sup> DAY OF JULY 2018.**

**N.A. MATHEKA**

**JUDGE**