



REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT AT KAKAMEGA

ELC CASE NO. 18 OF 2017

MARY SHIRAKO OLUMAAPPLICANT/PLAINTIFF

VERSUS

WERE MUSIE ODONGORESPONDENT/DEFENDANT

JUDGEMENT

This application is by Mary Shirako Oluma who claim to have acquired title to the whole of land parcel No. BUNYALA/NAMIRAMA/1300 containing by measurement approximately 0.51 hectares having purchased and lived on, occupied, utilised and or used the whole of the said parcel of land exclusively, peacefully, continuously, openly and uninterrupted from 1993 to-date, a period of 25 years. The applicant has since been entitled to the said parcel of land by virtue of adverse possession having lived on, occupied and used the same exclusively, openly, quietly and uninterrupted for a period of over 12 years and that this hounourable court does determine and order as follows:-

- a. That the applicant be declared the owner of the whole of land parcel No. BUNYALA/NAMIRAMA/1300 having purchased the same in 1993 where after she has lived on, occupied and used the said parcel of land from then to-date and the applicant is hence entitled to the said parcel of land by virtue of adverse possession and the respondent be ordered to transfer title to the said parcel of land to the applicant.
- b. That the court issues a declaration that the respondent is holding title to land parcel No. BUNYALA/NAMIRAMA/1300 in trust for the applicant and the respondent be ordered to transfer title to the said parcel of land to the applicant and in default of the respondent transferring the same voluntarily the court do make an order authorising the Deputy Registrar of the High Court of Kenya at Kakamega to execute all the documents necessary to effect the transfer of title to the aforesaid parcel of land into the name of the applicant.
- c. The respondent pays the costs of this originating summons to the applicant.
- d. That the honourable court does make further orders or grant any other relief deemed fit and just.

The respondent/defendant submitted that, sometimes back in the year 1994 they entered an agreement with the applicant herein and the applicant had only paid him Ksh. 15,000/= in August (1994) and she was to clear the balance of Ksh. 20,000/= in December (1994) as they had agreed on a purchase price of Ksh. 35,000/=.That in year 1995 she gave him Ksh. 4000 only leaving the balance of Ksh. 16,000/=.That the applicant herein took the original documents of this L.R. NO. BUKHAYO/NAMIRAMA/1300. That he has on several occasions requested and demanded from the defendant/respondent to pay him the balance but she has adamantly refused.That upon the sale of the parcel the respondent took possession of the same developed it and living there with her family. That he has come before this honourable court to seek for justice and that the applicant herein be compelled to pay him the balance of Ksh. 16,000/= plus 14% interest with effect from the date of the agreement. DW2 witnessed payment of the first installment and does not know what happened thereafter.

This court has considered the application 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 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 appellatant 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, it is not disputed that the suit land is registered in the name of the defendant. It is also not in dispute that the plaintiff has resided on that land for a period of over 25 years. It is not disputed that sometimes back in the year 1994 the parties herein entered into a land sale agreement. The plaintiff testified she paid in full and she took possession of the suit parcel of land and according to the plaintiff she cleared the balance and the defendant now refuses to transfer the same. PW1 who worked at the chief's office at the material time confirmed that the plaintiff paid the balance on Kshs 4000/= in his presence and the defendant confirmed the purchase price had been paid in full. She produced the agreement and the mutation form. The defendant states there is a balance of Kshs. 16000/- and he is now demanding the same with interest. I find that the defendant is trying to unjustly enrich himself. One wonders why he would give the plaintiff the original documents of the suit land if he had not received the full purchase price. I find that, for over 25 years the plaintiff's family has been in occupation of the said piece of land. The 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 PW1 still resides on the suit land. I find that the plaintiff has established her case on a balance of probabilities and I grant the following orders;

1. A declaration that the plaintiff/applicant is the owner of the whole of land parcel No. BUNYALA/NAMIRAMA/1300 having purchased the same in 1993 where after she has lived on, occupied and used the said parcel of land from then to-date and the applicant is hence entitled to the said parcel of land by virtue of adverse possession and the respondent is ordered to transfer title to the said parcel of land to the applicant.

2. A declaration that the respondent is holding title to land parcel No. BUNYALA/NAMIRAMA/1300 in trust for the applicant and the respondent is ordered to transfer title to the said parcel of land to the applicant and in default of the respondent transferring the same voluntarily the Deputy Registrar to execute all the documents necessary to effect the transfer of title to the aforesaid parcel of land into the name of the applicant.

3. The respondent to pay the costs of this originating summons to the applicant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 20TH DAY OF SEPTEMBER 2018.

N.A. MATHEKA

JUDGE