



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 83 OF 2013

DORCUS INYAMBULA MUNUBI.....APPLICANT

VERSUS

RUTH AUMA VUVIYA.....RESPONDENT

JUDGEMENT

This is the application of Dorcus Inyambula Munubi who claims to be entitled to the whole of title number Kakamega/South Maragoli/Lugovo 925 by adverse possession and for determination of the following issues;

1. Whether or not the applicant has been in occupation of the suit property for more than 12 years.
2. Whether or not the applicant's possession of the suit property has been open continuous, exclusive and peaceful.
3. Whether or not the respondent who is now the registered proprietor holds the same in trust for the applicant.
4. Whether or not the respondent's title has now been extinguished by virtue of adverse possession.
5. Whether or not the respondent should be compelled by an order of this court to transfer the suit property to the applicant.
6. Who is to bear the costs of this application?

PW1 the plaintiff testified that, she lives in parcel of land no. Kakamega/South Maragoli/Lugovo 925 which belonged to one Mzee Elisha Munubi who died in the year 1955. Mzee Elisha Munubi was her father in law. That during adjudication of the late Elisha Munubi had three parcels of land which the land parcels be registered as Peter Munubi - Kakamega/South Maragoli/Lugovo/925 measuring 1.3Ha; Gedion Munubi-Kakamega /South Maragoli/Lugovo/993 measuring 4.2Ha. Apollo Munubi Kakamega /South Maragoli/Lugovo/860. The said land was registered in trust for the other family members. The defendant who is the Late Peter Munubi's wife changed the titles without her knowledge. There was a meeting to try and distribute the family land but the same was not successful. The plaintiff's husband Gideon died and was buried there together with some of her children the plaintiff called three witnesses who are neighbours and relatives to corroborate her story.

The respondent DW1, testified and submitted that, the dispute involved parcel of land no. Kakamega/South Maragoli/Lugovo 925 which belonged to one Mzee Elisha Munubi who died in the year 1955. That at the time of his death he had not distributed his estate to his sons. That at that time land adjudication and registration had not been commenced and people occupied land on the basis of clans and lineage. That during adjudication of the late Elisha Munubi it was agreed that the land parcels be registered as Peter Munubi - Kakamega/South Maragoli/Lugovo 925 measuring 1.3Ha; Gedion Munubi-Kakamega /South Maragoli/Lugovo/993 measuring 4.2Ha. That the land which is now 3 acres, 2 acres was ancestral land willed to us by the late father Elisha Munubi, 1 acre was purchased from Zefa Lugusa on 30/10/1958 making total acreage 3 acres. That when land adjudication issued Peter Munubi who was serving the Bahai International Community and built a permanent house on that Land parcel Kakamega/South Maragoli/Lugovo/925. That with the opening up of the settlement schemes, Peter Munubi acquired another piece of land in Moi's Bridge which was more productive agriculturally and elected to stay there though retaining the legal interest in the land at Kakamega/South Maragoli/Lugovo/ 925. That he lived to the ripe age of 76 years when he passed on and was buried to his Moi's Bridge farm. That as the wife she took out letters of administration. That she has always had the originals of the family land titles in her custody as passed on to her by her deceased husband and his brother Gideon Gudai Munubi who personally intended her to keep for safety. That she ordinarily stays at the family land in Moi's Bridge and none of the children stays at Maragoli but they have a permanent house in Maragoli which they used for holding family meetings and lived there whenever the need arose. That to avoid wastage and pilferage of the interest of the house and protection to the land, her late brother in-law Gideon Munubi requested that he be allowed to take care of the house as caretaker and farm the land accordingly. That she allowed him on good will of the family but on condition that his children do not settle on the piece of land and that when she needed to utilize the land they should move to the land parcel no. Kakamega/South Maragoli/Lugovo 993. That originally Gideon Gudai Munubi used to take care of the house on their behalf when they settled in Moi's Bridge while Gideon Munubi's (deceased) family remained on land parcel Kakamega/South Maragoli/Lugovo/993. That in 2005 she

wrote to the chief of Lugovo sub location and the family of the late Gideon Munubi to relocate to their proper piece of land which they did not respond. That the ancestral land had been agreed on how to be shared upon by the sons of the late Elisha Munubi as all members were present in the family meeting as per copy of the minutes dated 9th June 2001 and 30th October 2004. That the applicant knows very well the land parcel land Kakamega/South Maragoli/Lugovo/993 is registered under the name of her late husband Gideon Gudai Munubi. The applicant is the beneficiary of parcel land Kakamega/South Maragoli/Lugovo 993 being the widow of Gideon Gudai Munubi(deceased) and not as claimed in her pleadings parcel land Kakamega/South Maragoli/Lugovo 925.DW2 and DW3 all relatives of the parties stated that their brother Mzee Elisha Munubi died before subdividing the land to his dependents. They confirm that the plaintiff lives on the suit land parcel Kakamega/South Maragoli/Lugovo 995 and their father Mzee Elisha Munubi and brother Gideon Gudai Munubi were buried there.

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 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, 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 60 years. Her children and husband died and were buried there. The defendant testified that, originally Gideon Gudai Munubi (the plaintiff's husband) used to take care of the house on their behalf when they settled in Moi's Bridge while Gideon Munubi's (deceased) family remained on land parcel Kakamega/South Maragoli/Lugovo 993. That in 2005 she wrote to the chief of Lugovo sub location and the family of the late Gideon Munubi to relocate to their proper piece of land which they did not respond. If the plaintiff's family was there with the defendant's permission as care takers one wonders why she would allow them to bury their kin there and not on their land parcel Kakamega/South Maragoli/Lugovo/ 993. Surely a period of over 60 years is too long a time to insist that the plaintiff and her family were mere caretakers. Indeed the witnesses have testified that the defendant has never lived there and had once constructed a structure which is unfinished. I find that, for over 60 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 respondent's right over a portion of land title No. Kakamega/South Maragoli/Lugovo 925 got extinguished by operation of law/adverse possession upon expiry of twelve (12) years when the applicants were in possession thereof.
2. A declaration that the registration of the respondent as owner of land title No. Kakamega/South Maragoli/Lugovo 925 was unlawful.
3. A declaration that upon the expiry of the twelve (12) years from the date of the said registration, Kakamega/South Maragoli/Lugovo 925 was held and is currently held in trust for the applicant.
4. An order that the Kakamega/South Maragoli/Lugovo 925 in applicant and that the applicant should be registered as owner thereof under section 38 of the Limitation of Actions Act Cap 22 Laws of Kenya.
5. An order that the respondent do sign all relevant documents to facilitate submission and transfer of Kakamega/South Maragoli/Lugovo 925 to the applicant and that in default the deputy registrar of this honourable court to sign the same.
6. An order that each party to bear its costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 19TH DAY OF SEPTEMBER 2018.

N.A. MATHEKA

JUDGE