



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 259 OF 2014

JACKSON OMBOKO LUGO.....PLAINTIFF

VERSUS

BENJAMIN OTI TERA.....DEFENDANT

JUDGEMENT

This is the application of JACKSON OMBOKO LUYO who claims to be entitled to a portion of land title No. W. Bunyore/Emusire/930 measuring 0.2 Ha. in area by adverse possession. The ownership of a portion of land title No. W. Bunyore/Ebusakami/817 measuring 0.2 ha in area together with all the developments thereon claimed by the applicant for reasons set out in his affidavit seeking for orders:

- (a) A declaration that the respondent's right over a portion of land title No. W. Bunyore/Emusire/930 measuring 0.2 ha in area got extinguished by operation of law/adverse possession upon expiry of twelve (12) years when the applicant was in possession thereof.
- (b) A declaration that the registration of the respondent as owner of land title No. W. Bunyore/Emusire/930 was unlawful.
- (c) A declaration that upon the expiry of the twelve (12) years from the date of the said registration, a portion measuring 0.2 Ha out of land title No. Bunyore/Emusire/930 was held and is currently held in trust for the applicant.
- (d) An order that the 0.2 Ha of land parcel No. W. Bunyore/Emusire/930 vests 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.
- (e) An order that the respondent do sign all relevant documents to facilitate submission and transfer of 0.2 Ha out of land title No. W. Bunyore/Emusire/930 to the applicant and that in default the deputy registrar of this honourable court to sign the same.
- (f) An order that the respondent be condemned to pay costs of this suit.
- (g) Such further orders of relief as thus honourable court may deem just and reasonable to grant.

PW1 testified that she is the wife of the plaintiff having obtained letters of administration (PEx3). She got married in 1985 and has been living and is still living on 0.2 Ha out of land title No. W. Bunyore/Emusire/930. The defendant who is the registered owner lives on the other side of the land and they are separated by a road. Her father in law's brother was holding the land in trust for the family. PW2 a neighbor corroborated the plaintiff's evidence. The defendant was served but failed to attend court to give oral evidence.

In his statement of defence the defendant avers that, he is the registered owner of all that parcel known as W. BUNYORE/EMUSIRE.930. That he bought the land from the then registered owner Rasto Angadi on 14th July 1967. That after purchasing the parcel from the then registered owner, he effected transfer to him after following all the relevant procedure. That upon purchasing the said land he started occupying and making good use of his land. That in 1980 or thereabout the Applicant encroached on part of his land, which action led him to inform the area chief. That on 12th April 2003 he lodged a complaint against the Applicant at Mwicho Patrol Base to the effect that he had trespassed on the lower part a portion of his land and after pleading with him to withdraw the complaint against him, he then lodged a complaint to the Land Registrar Vihiga over the disputed portion on 27th July 2004. That on the 23rd March, 2004 the applicant did file a reference before the Luanda Land Dispute Tribunal claiming ownership of the lower portion of his land to wit West Bunyore/Emusire/930 and a finding was arrived at in favour of the Applicant. That being aggrieved with the findings of Luanda Land Dispute Tribunal he lodged an Appeal before the Western Provincial Appeals Committee No. 1 of 2005 same of which set aside the decision of Luanda Land Dispute Tribunal award. That upon the decision of Provincial Appeals Committee having been read he lodged and or filed an application before the Senior Resident Magistrate's Court at Vihiga in Misc. No. 16/04 for the same to be adopted thus an application dated 24th September 2007 same of which was duly served upon the Applicant's Counsel.

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 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, it is not disputed that the defendant is the registered owner of all that parcel known as W. BUNYORE/EMUSIRE.930. The defendant avers that he bought the land from the then registered owner Rasto Angadi on 14th July 1967. That after purchasing the parcel from the then registered owner effected transfer to him after following all the relevant procedure. The plaintiff's case is that he has been in occupation of the land from 1976 and his wife PW1 is now the administrator of the estate and still resides there. This has been corroborated by PW2. I find that, from the year 1976 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 his 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. W. Bunyore/Emusire/930 measuring 0.2 ha in area 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. W. Bunyore/Emusire/930 was unlawful.
3. A declaration that upon the expiry of the twelve (12) years from the date of the said registration, a portion measuring 0.2 Ha out of land title No. Bunyore/Emusire/930 was held and is currently held in trust for the applicant.
4. An order that the 0.2 Ha of land parcel No. W. Bunyore/Emusire/930 vests 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 0.2 Ha out of land title No. W. Bunyore/Emusire/930 to the applicant and that in default the deputy registrar of this honourable court to sign the same.
6. An order that the respondent pays costs of this suit.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 18TH DAY OF SEPTEMBER 2018.

N.A. MATHEKA

JUDGE