



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 240 OF 2012

SAMSON PAUL ONUNGA.....APPLICANT

VERSUS

RAPHAEL WECHE OKUBO.....RESPONDENT

JUDGEMENT

This is the application of Samson Paul Onunga who claims to be entitled to the whole of land parcel LR. West Bunyore/Ebusiekwe/517 by adverse possession for the determined of the following questions and award of the following orders:-

- (a) The ownership of the whole land parcel LR NO. W. Bunyore/Ebusiekwe/517 claimed by the applicant for reasons set out in his affidavit filed herewith and upon other reasons as may be adduced.
- (b) A declaration that the applicant purchased the whole land parcel LR. No. W. Bunyore/Ebusiekwe/517 in 1984, took vacant possession, has continued to be in open, peaceful, uninterrupted adverse possession to date.
- (c) A declaration that the respondent holds the whole land parcel LR. NO. W. Bunyore/Ebusiekwe/517 in trust for the applicant to whom it should be transferred/registered as sole absolute owner.
- (d) A declaration that the respondent's right and interest in the whole land extinguished by operation of law/adverse possession.
- (e) That this court do further order as follows:-
 - (i) That the whole land parcel LR No. W. Bunyore/Ebusiekwe/517 be transferred to and registered in the names of the applicant as sole absolute owner.
 - (ii) That the respondent be directed to sign all transfer documents in default the Deputy Registrar of this court be authorized to do so.
 - (iii) That the respondent do pay costs of this suit.

PW1 the applicant testified that, he bought the suit land parcel LR No. W. Bunyore/Ebusiekwe/517 and paid for it in 1984 before taking possession. (PEX1 & 2 is the green card and sale agreement). He lives there and has cultivated the land. PW2 a neighbor and the plaintiff's employee corroborated his evidence.

The defendant/respondent testified and submitted that, he is the lawful and registered owner of all that parcel of land known as Land Reference No. W/BUNYORE/EBUSIEKWE/517. That he bought the suit property following a Sale Agreement dated 19th June, 1993 between the Late Ezekiel Munala Ngota and himself, a copy of DEX 3 was produced. That under the said Sale Agreement, Ezekiel Munala Ngota agreed to sell the suit property to him at an agreed price of Kenya Shillings Sixty Thousand (Kshs. 60,000/=) which agreement was duly witnessed by Agnesi Aronya and Airen Okwisa. That prior to purchasing the suit property, Ezekiel Munala Ngota furnished to him with consents dated 12th June 1993 from his brothers and wife, who indicated that they had no objection to the sale of the suit property, DEX6 are copies of the consents. That thereafter he immediately conducted an official search at the District Lands Office and was issued with a Certificate of Official Search by the Land Registrar – Kakamega dated 24th May 1993, showing that the suit property belonged to one Wellington Ngota, then deceased, who was the father of Ezekiel Munala Ngota DEX2 is a copy of the Certificate of Official Search. That following the Sale Agreement and nature of proprietorship of the suit property at the time the family of the Late Wellington Ngota embarked on an application to Court for the administration of his estate, a copy of the Sale Agreement was specifically annexed to the relevant petition. That subsequent to the Grant of Letters of Administration Intestate. That Mr. Munala subsequently transferred the suit property to him and he thereafter applied and was issued with a Title Deed by the District Land Registry - Kakamega which title neither showed any encumbrances nor any entries whatsoever DEX1 a copy of the Title Deed. That however, during the first quarter of 1996, he discovered that some persons

who, at the time, were unknown to him, had begun farming on land, and he verbally asked them to harvest their crops and stop trespassing on the suit property. That the said occupants, viz, the Applicant herein and other parties, did not heed his instructions, and he made a report of the matter to the Chief of West Bunyore

That consequently, on 16th December 1996, a Council of Elders Meeting of West Bunyore Location was held in the presence of the Applicant, Ezekiel Munala Ngota, the Chief, the Assistant Chief, other village elders and himself. That in the above mentioned meeting, it was resolved that the Applicant should desist from trespassing upon his property herein, and he was directed to call in surveyors to establish the boundaries of the said property. DEx 8 are copies of the minutes of the meeting of that date and a typed copy for clarification purposes with regard to legibility thereof. That nevertheless, the Applicant herein failed to comply and/or ignored the entiredirective of the Council of Elders and continued to trespass on the suit property, by growing his crops therein, despite his warnings to cease so trespassing. The defendant called six witnesses and they all corroborated his evidence. They confirmed there was no structure on the house and DW2 the wife of the seller testified that the applicant/plaintiff was a relative and used to lease the land for cultivation.

This court has considered the application, 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, it is not disputed that the suit land Land Reference No. W/BUNYORE/EBUSIEKWE/517 is registered in the name of the defendant. That he bought the suit property following a Sale Agreement dated 19th June, 1993 between the Late Ezekiel Munala Ngota and himself, a copy of DEx 3 was produced. That under the said Sale Agreement, Ezekiel Munala Ngota agreed to sell the suit property to him at an agreed price of Kenya Shillings Sixty Thousand (Kshs. 60,000/=) which agreement was duly witnessed by Agnesi Aronya and Airen Okwisa. That prior to purchasing the suit property, Ezekiel Munala Ngota furnished to him with consents dated 12th June 1993 from his brothers and wife, who indicated that they had no objection to the sale of the suit property, DEx. 6 are copies of the consents. That thereafter he immediately conducted an official search at the District Lands Office and was issued with a Certificate of Official Search by the Land Registrar – Kakamega dated 24th May 1993, showing that the suit property belonged to one Wellington Ngota, then deceased, who was the father of Ezekiel Munala Ngota DEx2 is a copy of the Certificate of Official Search. Subsequently and after obtaining letters of administration the seller transferred the suit property to him and he thereafter applied and was issued with a Title Deed by the District Land Registry - Kakamega which title neither showed any encumbrances nor any entries whatsoever DEx1 a copy of the Title Deed. All the defendant's witnesses testified that there is no structure on the suit land. The plaintiff produced a sale agreement dated 20th May 1984, however he is not being truthful that he resides on this land. The same has not been established. It has come out in evidence that he used to cultivate the land on and off. It has not been established that, the said occupation and use of the property has been peaceful, open, uninterrupted, quiet and exclusive which is a period of over 12 years. I find that the plaintiff has failed to establish his case on a balance of probabilities and I dismiss his case with costs.

It is so ordered.

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

N.A. MATHEKA

JUDGE