



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 376 OF 2014

STEPHEN MURUNGA SIUNDU.....PLAINTIFF

VERSUS

RIDAH ALIVITSA

MARY LUNGAHI.....DEFENDANTS

JUDGEMENT

This is the application of Stephen Murunga Siundu who claims to be entitled by adverse possession to land parcel KAKAMEGA/VIYALO/1369 and or to the new parcels created therefrom being N. MARAGOLI/VIYALO/1682 and N. MARAGOLI/VIYALO/1683 for the determination of the following questions:-

1. Whether Stephen Murunga Siundu was and or has been in continuous and uninterrupted occupation and use of land parcel KAKAMEGA/VIYALO/1369 from the year 1954 and or for a period of 12 years and whether he has in his said possession and use by the year 2004.
2. Whether by the year 2004, the title of Charles Isandula Vigedi in land parcel KAKAMEGA/VIYALO/1369 had been extinguished by adverse possession in favour of Stephen Murunga Siundu as by law provided.
3. Whether if the title of Charles Isandula to land parcel KAKAMEGA/VIYALO/1369 had been extinguished by the year 2004 Stephen Murunga Siundu had become the owner by way of adverse possession and whether if so he became the owner on expiry of 12 years from 1973 when Charles Isandula Vigedi was registered owner.
4. Whether subdivision of land parcel KAKAMEGA/VIYALO/1369 by the 1st defendant Charles Isandula Vigedi into parcel N. MARAGOLI/VIYALO/1682 and N. MARAGOLI/VIYALO/1683 had any legal effect to the operation of adverse possession in favour of Stephen Murunga Siundu to the original title in which the interest of Charles Isandula had been extinguished.
5. Whether titles N. MARAGOLI/VIYALO/1682 and N. MARAGOLI/VIYALO/1683 are valid having been created from title KAKAMEGA/VIYALO/1369 which had already been extinguished on adverse possession.

PW1 the plaintiff testified that he is 65 years old and was born on that land and his mother is buried there. The 1st defendant/respondent is his uncle's wife and she also lives there with her family. PW1 has produced that the land has since been subdivided into two and belongs to the respondents PEx1,2 &3. He produced a photograph showing his house is on the said land PEx4. PW2 and PW2 corroborated his evidence.

The 1st defendant/respondent testified and submits that the plaintiff/applicant herein came to reside on KAK/VIYALO/1369 as a nephew of Charles Wisandula Biket her husband, as much as the applicant stayed on the land for more than twelve years, his stay was permissive and was not exclusive as the 1st respondent stays on the said parcel with her children and her husband Charles Wisandula Biket was buried there. The same denotes permissive stay to which in the case of Wilson Kazungu Katana & 101 Others vs. Salim Abdalla Bakshwein and Ali Abdalla Bakshwein Civil Appeal No. 11 of 2014 where court cited the case of Samuel Miki Waweru vs. Jane Njeri Richu Civil Appeal No. 122 of 2001 (UR) and as dictum court noted that:-

“..... it is trite law a claim of adverse cannot succeed if the person asserting the claim is in possession with permission of the owner”

Thus the permissive and non-exclusive stay of the applicant by the 1st respondent's husband (deceased) paved way for the applicant's stay to be peaceful and open which does not necessitate the stay to be adverse.

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 defendants 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.

The applicant by way of originating summons brought a suit of adverse possession against the respondents for LP N/MARAGOLI/VIYALO/1369 later subdivided. The 1st respondents vehemently oppose the said summons. From the green cards produced as exhibits it is clear that the original respondents Charles Isandula Vigedi and Jamin Magomere Savayo are the registered proprietors of LP N/MARAGOLI/VIYALO/1682 and KAK/VIYALO/1683 being a subdivision of LP N/MARAGOLI/VIYALO/1369. They were later substituted by their legal representatives, Ridah Alivitsa and Mary Lungahi respectively. The plaintiff testified that he was born on that parcel of land in 1953 and has lived there ever since. This has not been disputed. I find from the evidence adduced that, the applicant has been in possession and occupation of the parcels of land for period in excess of 12 years in an open, peaceful and uninterrupted manner. His mother was buried there and find that the respondent holds the land in trust for the applicant. The 2nd defendant/respondent failed to attend court and explain how he acquired part of the said suit land. 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/applicant is the owner of the portion of land parcel No. LP N/MARAGOLI/VIYALO/1682 and KAK/VIYALO/1683 being a subdivision of LP N/MARAGOLI/VIYALO/1369 having lived on, occupied and used the said parcel of land from 1953 to-date and the applicant is hence entitled to the said portion 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 respondents are holding title to land parcel No. LP N/MARAGOLI/VIYALO/1682 and KAK/VIYALO/1683 being a subdivision of LP N/MARAGOLI/VIYALO/1369 in trust for the applicant and the respondents are ordered to transfer title to the said portion of land to the applicant and in default of the respondents 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 respondents 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 24TH DAY OF OCTOBER 2018.

N.A. MATHEKA

JUDGE