



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 277 OF 2014

HEMAN JISSI WANGA PLAINTIFF

VERSUS

JOASH JISII MMBAYA DEFENDANT

JUDGEMENT

This is the application of Heman Jisii Wangwa claiming adverse possession for the determination of the following questions;

1. Whether by the year 1987 land parcel Kakamega/Serem/146 was registered in the names of Ahiro Enock Murunga?
2. Whether the plaintiff fulfilled his obligations of purchase of parcel L.P. Kakamega/Serem/146?
3. Whether the plaintiff took possession and occupied the suit land in the year 1983 and if not the said year, to determine the year he took possession?
4. Whether from the date of taking possession the plaintiff remained in peaceful and uninterrupted use thereof?
5. Whether by the year 1991 the ownership of the title L.P. KAKAMEGA/SEREM/146 changed from Ahiro Enock Murunga to Joash Jisii Mmbaya?
6. Whether the plaintiff and the defendant are son and father respectively?
7. Whether title of L.P. KAKAMEGA/SEREM/146 has been extinguished by adverse possession in favour of the plaintiff.
8. Whether the plaintiff purchased the suit land through the defendant?
9. Whether the plaintiff has constructed his house and done extensive development on the suit land?
10. Whether the agreed consideration of the suit land was paid to the seller by the plaintiff through the defendant?

And if all the issues or any of them be determined in favour of the plaintiff the following orders be made.

- (a) A declaration to the effect that the title of the defendant to L.P. KAKAMEGA/SEREM/146 was extinguished by adverse possession in favour of the plaintiff.
- (b) That land parcel KAKAMEGA/SEREM/146 be registered in the name of the plaintiff Heman Jisii Wangwa in specific performance and by adverse possession and he be issued with a title deed to the same.
- (c) Costs of this proceedings be paid by the defendant.

PW1 testified that together with his brother they bought the suit land through their father the defendant and built their homes there in 1983. PEx1 is the sale agreement and PEx2 photos of their homes. In 1990 they entered into another sale agreement and bought the remaining portion PEx3. The land was transferred into their father's name. Their mother passed on in 1992 and he remarried in 1993. Their father resides in the adjacent land and has never resided there. PW2 and PW3 corroborated the plaintiff's evidence.

The defendant submitted that, the claim of the plaintiff is misconceived and reliefs sought do not lie since he is the absolute registered proprietor of all that parcel of land known as L.R. NO. KAKAMEGA/SEREM/146 hereinafter referred to as the suit parcel and the plaintiff

who is his son has been in occupation of the said land with his consent until 1996 when he became hostile to him and purported to chase him away from the suit parcel. He testified that, on 27th of March, 1999 under the chairmanship of the late KASITWELI MULIRO, his clan ABASAMIA decided on a dispute presented to them by the plaintiff over the suit parcel that he give a portion of the land the family of the later NELSON LIBWAMA who was buried on the land. That this is the genesis of his disagreement with the plaintiff. That on 31st of July, 2010 Modline Lundu the chief Shamakhokho Location arbitrated over a dispute concerning the same parcel and it was decided that the claim of the plaintiff and other sons of having given him money to purchase the suit parcel could not be legally proved and that the said land is legally his as per the verdict of the Chief Land Registrar. That the suit land legally belongs to him since he legally acquired it from the original owner vide a valid sale of land agreement dated 17/10/1983 and paid the full purchase price of Ksh. 43,500/= only in two instalments of Ksh. 20,000/= on the date of the said agreement and the balance of Ksh. 23,500/= on 10/12/83. That previously on 22/12/2008 they went before the District Land Registrar Vihiga when the plaintiff as an objector had objected to his application to have the caution he had lodged against the suit parcel claiming an interest as a licensee removed. The dispute was decided in his favour and the caution lodged on the title was removed. That the plaintiff appealed to the Chief Land Registrar and again lost the appeal as the Chief Land Registrar upheld the decision of the District Land Registrar recognizing him as the absolute title holder of the suit parcel. That the plaintiff has also failed to disclose that he previously instituted Hamisi PMCC No. 60 of 2010 against him where he was claiming among other things for a permanent injunction to bury on the suit parcel. That the plaintiff's claim that he has been in open and peaceful occupation of the suit parcel which is hostile to his ownership is therefore not true.

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 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 defendant submitted that, the claim of the plaintiff is misconceived and reliefs sought do not lie since he is the absolute registered proprietor of all that parcel of land known as L.R. NO. KAKAMEGA/SEREM/146 hereinafter referred to as the suit parcel and the plaintiff who is his son has been in occupation of the said land with his consent until 1996 when he became hostile to him and purported to chase him away from the suit parcel. The plaintiff's claim is that he bought the land and the same should be transferred to him. PW1 testified that together with his brother they bought the suit land through their father the defendant and built their homes there in 1983. PEx1 is the sale agreement and PEx2 photos of their homes. In 1990 they entered into another sale agreement and bought the remaining portion PEx3. The land was transferred into their father's name. Their father resides in the adjacent land and has never resided there. PW2 and PW3 corroborated the plaintiff's evidence. PW2 the seller stated that the defendant was buying the land for his sons as PW1 was working in Nairobi. PW1 and his brother are the ones residing on the land. PW3 who is the plaintiff's wife confirms she was given the purchase price by PW1 to take to the defendant and she was present when the money was paid to PW2. I find the plaintiff's case credible and I believe the same. The plaintiff has been in occupation of the suit land for well over 12 years openly and continuously without any interruption. It is the finding of this court that the defendant held it in trust for the plaintiff. I find this suit is merited and I grant the following orders;

1. A declaration to the effect that the title of the defendant to L.P. KAKAMEGA/SEREM/146 was extinguished by adverse possession in favour of the plaintiff.
2. That land parcel KAKAMEGA/SEREM/146 be registered in the name of the plaintiff Heman Jisii Wangwa in specific performance and by adverse possession and he be issued with a title deed to the same.
3. Costs of this proceedings be paid by the defendant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 23RD DAY OF OCTOBER 2018.

N.A. MATHEKA

JUDGE