REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 327 OF 2017

FRANCIS AMOYI MAKOKHA.....PLAINTIFF

VERSUS

LEONIDA ASHONO INGOI.....1ST DEFENDANT

MAURICE ASHIONA INGOI.....2ND DEFENDANT

JUDGEMENT

In this originating summons Francis Amwoyi Makokha claims to be entitled to title No. Butsotso/Indangalasia /354 by adverse possession for the determination of the following questions:-

1. The ownership of title No. Butsotso/Indangalasia/354 claimed by the plaintiff for reasons set out in his affidavit and on other reasons to be adduced at the hearing of this summons.

2.The legality and validity of the transfer of land title No. BUTSOTSO/INDANGALASIA/354 by the 1st defendant to the 2nd defendant.

He seeks the orders that;

(a) A declaration that the defendants' right over title No. Butsotso/Indangalasia/354 got extinguished by adverse possession.

(b) A declaration that upon expiry of 12 years the piece of land was held and is currently held in trust for the plaintiff.

(c) A declaration that the transfer of the said title by the 1st defendant to the 2nd defendant was fraudulent and the registration should be cancelled.

(d) An order under section 38 of the Limitation of Actions Act Cap 22 of the Laws of Kenya that the plaintiff herein be registered as owner of title No. Butsotso/Indangalasia/354.

(e) An order that the defendants be condemned to pay the costs of this suit.

(f) Such further order or relief this honourable court may deem fit to grant.

The 2nd defendant submitted that, he duly purchased the whole of the parcel of land known as No. Butsotso/Indangalasia/354 from the 1st respondent herein.That all the relevant documents were duly signed to enable an instrument of transfer to be registered in his favour. That he paid the whole of the agreed purchase price.That he is the current registered proprietor of the whole of the suit land.That the sale of the said land was regular.That at the time he bought the said land nobody was occupying the same.That it is not true that the applicant has planted food crops and trees on the said land. That he is a total stranger of the matter pleased by the application in respect of the suit land regarding adverse possession.That he is an innocent purchaser for valuable consideration of the suit land without any notice respecting the applicant's interest, if any, in the said land.

The plaintiff stated in his supporting affidavit, that he was in occupation of the suit land from 1972 to the date of filing the suit in 1996. In total the applicant had been in occupation of the suit land for 24 years before instituting the suit herein. That the 1st respondent disposed of the suit land without considering the applicant's interests in the suit land. This court issued an injunctive order on the 18/6/1997 and contrary to the said order the respondents proceeded to uproot the applicant's cane and proceeded to register the 2nd respondent as the owner of the suit land. That in doing this, the respondents were in contempt of this honourable court orders and the punishment of the contemnor is for him not to be heard. They relied on the case of Mawani vs. Mawani 1977 KLR 159 as quoted in the case of John Kundu Khisa vs.

Kenedy Khisa Kindu (2013) eKLR where the court held that where a party is in contempt , he should not be heard until after he purged the contempt of this order, their evidence should be overlooked and purged out from the court record.

In the case of Kimani Ruchine vs. Swift Ritherford & Company Ltd as cited in Gachira vs. Gachira at Nyeri Civil appeal No. 325 of 2003 the principles governing adverse possession were well stated at page 302 (attached herewith).

They submit that the applicant gave sufficient evidence that he had been in continuous and uninterrupted possession of the suit land before filing this suit. In the Gachira case the court did not allow the prayer of adverse possession because the appellant had not proved continuous and uninterrupted possession unlike the current suit where the applicant has proved exclusive, continuous and uninterrupted possession. In the above cited case the court was of the view that possession could have been by way of fencing or cultivation depending on the nature, situation or other characteristics of the land.

The suit land is an agricultural land and the applicant had cultivated the land and planted cane as admitted by the respondents in the replying affidavits and witnesses who testified in court.

The 2nd respondent in his evidence in court stated that he purchased the suit land in the year 1996 and he admitted that he found cane on the land. Simply put he admits that the suit land was not in vacant possession. At the time he was purchasing the suit land, the applicant's interest was already in existence.

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.*
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> *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.*
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> *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 defendantshad 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 herein instituted this suit by an originating summons dated 18/9/1996 claiming title of land parcel No. BUTSOTSO/INDANGALASIA/354 by way of adverse possession. The originating summons was supported by a supporting affidavit sworn by the applicant. The 1st and 2nd respondents opposed the said application by filing replying affidavits sworn on 12/11/1996 and 5/11/1996 respectively. The applicant testified and relied on his statement filed in court on 6/11/2014 as his evidence in chief. He called two witnesses in support of his case.

In applying these principles to the present case,it is not disputed that the suit land is registered in the name of the 2 nd defendant. It is also not in dispute that the plaintiff has resided on that land for a period when he planted sugar cane. In evidence all the 4 witnesses called by the 1 st defendant/respondent did testify that actually the applicant had cane on the suit land but he was told to remove the same. The land was ancestral land and the 1st defendant inherited the same and sold it to the 2nd defendant. The plaintiff is a relative and has his own land on which he resides. Indeed the plaintiff testified that the he does not reside on the suit parcel of land but would occasionally cultivate the same. However he could not point out exactly where he was cultivating on land parcel number No. Butsotso/Indangalasia/354. I find that the plaintiff has failed to establish his case on a balance of probabilities. He has not shown that he was in possession of the suit land continuouly for 12 years. I find this suit has no merit and l dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 9TH DAY OF OCTOBER 2018.

N.A. MATHEKA

JUDGE