



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 242 OF 2017

ANDREW LUKORITO.....PLAINTIFF/APPLICANT

VERSUS

SEBETAYO MAKOKHA NGOME.....DEFENDANT/RESPONDENT

JUDGEMENT

The application is of one Andrew Lukorito who claims to be entitled to the land 2 acres of land out of land parcel No. Kakamega/Chemuche/116 as he has occupied, utilized and/or stayed on the said portion of land exclusively, peacefully and continuously and uninterruptedly from 1986 to date a period exceeding 12 years. The plaintiff has since been entitled to the said suit land by virtue of adverse possession. The plaintiff therefore prays that this honourable court does determine following issues:-

- (a) Whether the applicant has been in possession of the land parcel No. Kakamega/Chemuche/116 since September 1986.
- (b) Whether there was an agreement of sale between the respondent and the applicant.
- (c) Whether the applicant has continued to be in adverse possession of the said land parcel since then and an order to be that he be registered as the proprietor of the said piece of land as the title of the proprietor over the two acres has been extinguished by the operation of the provision of Limitation of Actions Act.
- (d) That even if the said piece is currently registered in the name of the respondent, there is evidence that he is not in occupation of the said piece of land.
- (e) Whether upon the expiry of 12 years the respondent is holding the said portion in trust of the applicant.
- (f) That the defendants/respondents be condemned to pay the costs of this summons.

PW1, the plaintiff testified that, on or about 15th February 1982 he purchased 2 acres of land from the respondent in three installments of which he completed payment on 28th March 1987. The purchase price was Kshs. 21,000/=. (PEx1 is a copy of the agreement and translation). That the portion of land that he purchased is contained on land parcel No. Kakamega/Chemuche/116. The respondent was to appear before the land board with his wife but never did and never transferred the land. PW2 corroborated the plaintiff's evidence.

DW1 confirms that he is the registered proprietor of all that parcel of land comprised in title land parcel No. Kakamega/Chemuche/116. He admits that he intended to sale a portion of the land to the applicant but his family refused and he was ordered to refund the money which he did through his advocate. This was ordered by the court in Senior Principal Magistrates Court Kakamega 517 of 1993 (DEX 6)

This court has considered this case, the 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.

The plaintiff testified that he purchased 2 acres of land out land parcel No. land parcel No. Kakamega/Chemuche/116 in the year 1982. The plaintiff moved onto the land purchase in 1986. The plaintiff has occupied and utilized the land openly, continuously and peacefully for a period exceeding 12 years. The plaintiff's portion of land is clearly demarcated. Be that as it may, the defendant has produced court proceedings and judgment of Senior Principal Magistrates Court Kakamega 517 of 1993 (DEX 6) filed way back in 1993 the period of 12 years could not have lapsed between 1986 when the applicant took possession and 1993 when judgement was entered that he be refunded the purchase price. The applicant ought to have appealed that decision or enforce the judgement for his refund if he has not received the same. The plaintiff/applicant has failed to establish on a balance of probabilities that he has occupied, utilized and/or stayed on the said portion of land exclusively, peacefully and continuously and uninterruptedly from 1986 to date a period exceeding 12 years. I find that the plaintiff has failed to prove his case on a balance of probabilities and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 20TH DAY OF NOVEMBER 2018.

N.A. MATHEKA

JUDGE