



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

Environment & Land 48 of 2012

Elizabeth SavalaPlaintiff

Versus

Hezekiah Kirahi Liyosi

James Khashamba Defendants

JUDGEMENT

This is the application of Elizabeth Savala who claims to be entitled to registration as proprietor of land parcel Nyang'ori/Banja/1039 through adverse possession and issue thereof of title deed in her name for determination of the following questions:-

1. Whether the 1st defendant sold the portion of land which later was registered as Nyang'ori/Banja/1039 to the plaintiff and her husband and if so whether it was in the year 1972.
2. Whether the plaintiff took possession of the sold portion and if so whether she so took possession in 1972.
3. Whether the plaintiff has been in continuous and uninterrupted possession, use and occupation of the suit land and if so whether the period has run from the year 1972.
4. Whether the sale agreement the 1st defendant made with the plaintiff and or her late husband is valid to secure the transfer of title of suit land to the plaintiff.
5. Whether if the sale agreement has become invalid the invalidity affects the plaintiff's right to claim title to the suit land through adverse possession.
6. Whether the subdivision of the original parcel known as Nyang'ori/Banja/1013 in the year 1996 to create the suit land had adverse effect to the plaintiff's claim to tile of the resulting portion thought adverse possession.
7. Whether after 6th September, 1996 when title known as Nyang'ori/Banja/1039 was created the plaintiff continued in quiet and uninterrupted occupation, possession and use thereof and whether if so such occupation, possession and use remained in place until 17th November, 2011?
8. Whether the 1st defendant sold the suit land to the 2nd defendant and effected transfer and issue of title deed to the later on 21st October, 2010 and whether as of that date the 1st defendant had any valid title to the suit land to transfer to the 2nd defendant.
9. Whether the 2nd defendant is an innocent purchaser for value of the suit land and whether the 2nd defendant's title to the suit land can be defended and or defeat the plaintiff's claim for title to the suit land.
10. Whether the award of the tribunal in Hamisi Land Disputes Tribunal claim No. 33 of 2011 later adopted by Hamisi Senior Principal Magistrate's Court in Misc. Award No. 13 of 2011 which gave the plaintiff the land is a competent order for transfer of suit land to the plaintiff and issue of title deed to her and if not whether the proceeding have any adverse effect to the plaintiff's claim in this summons.
11. Whether the plaintiff has proved her claim to the required standard for title to the suit land through adverse possession?

The plaintiff prays for orders that:-

(a) A declaration be made that the plaintiff Elizabeth Savala is rightfully entitled to registration as proprietor through adverse possession of land parcel known as Nyang'ori/Banja/1039 and that the registration of the 2nd defendant James Kashamba Aludira thereon as proprietor be cancelled and the title deed earlier issued to him be recalled and cancelled or dispensed with.

(b) Costs incurred be recovered from the defendants.

PW1 in her testimony states that, her husband bought the suit land as per the sale agreement PEx1. She took possession of the suit land in 1972 and is still living there. In 2011 she took the matter to the tribunal and she was awarded the same and the award was adopted as per PEx. 2 and 3. She was also arraigned in court over a criminal charge concerning the suit land and was acquitted PEx 4 and 5 is the charge sheet and proceedings. The defendants were served but failed to attend court and the matter proceeded ex parte.

The 2nd defendant in his replying affidavit states that, he is the registered owner and proprietor of all that parcel of land known as Nyang'ori/Banja/1039 as per a copy of the title deed attached herewith and marked JKA 1. That, the 1st defendant and him entered into an agreement of sale of all that parcel of land known as Nyang'ori/Banja/1039 as per a copy of the said agreement attached herewith and marked JKA 2. That upon entering into the said agreement, they made an application to the Tiriki West Land Control Board and a letter of consent dated 15/9/2010 was issued for the transfer of the said parcel of land from the vendor's name to his. That the plaintiff herein filed before the Vihiga Land Disputes Tribunal Land Case No. 13 of 2011 claiming ownership of his said parcel of land and that she also filed an application at the Principal Magistrate's court at Hamisi Application Number 13 of 2011 for the adoption of the decision of the said tribunal which had given judgment in her favour. That the application for adoption was heard and the court adopted the decision of the tribunal as a judgment of the court from which a decree can issue.

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 plaintiff testified that her husband bought the land way back and she took possession in 1972. She lives there to date. She has built a home there and carries out business there. 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. The 2nd defendant/respondent failed to attend court and explain how he acquired the said suit land when it was not vacant. He claims in his replying affidavit that the tribunal had no jurisdiction to determine the matter, however, he never challenged the award. I find that the plaintiff has proved her case on a balance of probabilities and I grant the following orders;

1. A declaration that the plaintiff/applicant Elizabeth Salava is rightfully entitled to registration as proprietor through adverse possession of land parcel known as Nyang'ori/Banja/1039 and that the registration of the 2nd defendant James Kashamba Aludira thereon as proprietor be cancelled

2. 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 20TH DAY NOVEMBER 2018.

N.A. MATHEKA

JUDGE