



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 194 OF 2013 CONSOLIDATED WITH ELC CASE NO. 537 of 2014

JAMEN LANGWEN ACHINA)

ELIZABETH ASENSA KEYA (suing in her own capacity as administrator of

DAVID KEYA AJINA (alias) KEYA ACHINA).....PLAINTIFFS

VERSUS

ELGANA IDANYUKHU MUSWAYI.....DEFENDANT

JUDGEMENT

The Originating Summons ELC case No. 537 of 2014 was brought under order 36 rules 2 and 7 of the Civil Procedure Act Chapter 21 of the Laws of Kenya by way of an the application of ELGANA IDANYUKHU MUSWANYI who claims to be the occupier of Land parcel No. KAKAMEGA/KAPSOTIK/378 measuring 0.42 Ha for the determination of the following questions:-

1. The plaintiff has been in possession of Land Parcel Number KAKAMEGA/KAPSOTIK/378 measuring 0.42 HA and has developed and lived on the land aforesaid for a period of over Thirty (30) years.
2. That the plaintiff legally bought the aforesaid parcel of land from one KEYA ACHINA during the year 1973 and has continued to be in adverse possession of the said land for a period of over thirty (30) years and that an order that he be registered as the proprietor of the land in terms of section 7, 17 and 38 chapter 22 of the Laws of Kenya as the title of the proprietor has been extinguished by the operation of the provisions of section 17 chapter 22 of the Laws of Kenya aforesaid.
3. That even if the land parcel number KAKAMEGA/KAPSOTIK/378 is currently registered in the joint names of the 1st defendant and the 2nd defendant's deceased's husband the defendants herein are not in occupation of the aforesaid land and the same should be registered in the name of the plaintiff who has been in adverse possession peacefully, uninterrupted and without evasion or secrecy ever since 1973.
4. That the costs of this originating summons be awarded.
5. That any other order be made as this honourable court may deem fit and just to grant.

On the 8th May 2017 the above matter was consolidated with ELC Case No 193 of 2013 and the matter was to proceed by way of plaint by consent of the parties. The plaintiff's claim was stated as follows; at

all material time the 1st plaintiff and the late DAVID KEYA AJINA alias KEYA ACHINA were and are joint registered proprietors of the parcel of land known as KAKAMEGA/KAPSOTIK/378 measuring 0.42 HA or thereabouts (PEx 1 is copy of the title deed, PEx 2 the copy of certificate of confirmation of grant and PEx3 copy of the official search dated 1st March 2011). The plaintiffs' aver that the defendant herein without any colour of right or justification forcefully trespassed on the suit land in 2005 or thereabouts unlawfully demolished the plaintiffs' houses that were on the said parcel of land and put up his own without permission and or consent of the plaintiffs. The plaintiffs' claim against the defendant is for an order of eviction to issue against him to vacate the plaintiffs' said land known as KAKAMEGA/KAPSOTIK/378. In the alternative the plaintiffs pray for an order of permanent injunction to issue restraining the defendant, his workers, family members and any other persons claiming under him from interfering with the plaintiffs' occupation and or enjoyment of the suit parcel of land. The plaintiffs further claim for general damages against the defendant for unlawful trespass on the suit land. The plaintiff avers that there are no proceedings pending or previous proceedings in any court of law over the same subject matter between the same parties other than KAKAMEGA HC MISC CIVIL APPLICATION NO. 1 OF 2006 which arose from TIRIKI WEST LAND DISPUTE TRIBUNAL which was concluded in favour of the plaintiff on 16th December 2012 and another case filed in KAKAMEGA HCCC NO. 59 OF 2011 (OS) that is pending hearing and final determination. The latter matter has been consolidated with the present one.

This court has carefully considered both the plaintiffs' and the defendant's case and submissions therein. The plaintiffs' relied on the following cases in their submissions. Philip Ayaya Alluchio vs Chrispinus Ngabo (2014) eKLR Ernest Kopia Shitsili Vs Leonidah Achitsa Wangula (2014) eKLR and Joseph Ngah Njiru & 3 Others Vs, Zakayo Macharu Kariuki & 8 Others (2010) eKLR.

The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Section 26 (1) of the Land Registration Act states as follows:

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

- a. ***On the ground of fraud or misrepresentation to which the person is proved to be a party;***
or
- b. ***Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”***

This court in considering this matter referred to the case of **Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR** where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. **Hon Justice Munyao Sila** in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.

Be that as it may, 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.

Looking at the facts of this case it is not disputed that the 1st plaintiff and the late DAVID KEYA AJINA alias KEYA ACHINA were and are joint registered proprietors of the parcel of land known as KAKAMEGA/KAPSOTIK/378 measuring 0.42 HA or thereabouts (PEx 1 is copy of the title deed, PEx 2 the copy of certificate of confirmation of grant and PEx3 copy of the official search dated 1st March 2011). That the defendant testified that he legally bought the aforesaid parcel of land from one KEYA ACHINA during the year 1973 and has continued to be in adverse possession of the said land for a period of over thirty (30) years and that an order that he be registered as the proprietor of the land in terms of section 7, 17 and 38 chapter 22 of the Laws of Kenya as the title of the proprietor has been extinguished by the operation of the provisions of section 17 chapter 22 of the Laws of Kenya aforesaid. That even if the land parcel number KAKAMEGA/KAPSOTIK/378 is currently registered in the joint names of the 1st plaintiff and the 2nd plaintiff's deceased's husband the plaintiffs herein are not in occupation of the aforesaid land and the same should be registered in the name of the plaintiff who has been in adverse possession peacefully, uninterrupted and without evasion or secrecy ever since 1973. It is in evidence and is not disputed that the plaintiffs live in Matunda and have never resided in the suit land. It is after the title was issued to them in 2005 that the matter went for litigation. I believe the defendant has been in possession of Land Parcel Number KAKAMEGA/KAPSOTIK/378 and lived on the land aforesaid for a period of over Thirty (30) years to the exclusion of the plaintiffs and has been in adverse possession peacefully, uninterrupted and without evasion or secrecy ever since 1973. The plaintiffs' case has no merit and I dismiss the same. I find that the defendant has established his counterclaim on a balance of probabilities and I grant the following orders;

1. That land parcel number KAKAMEGA/KAPSOTIK/378 is currently registered in the joint names of the 1st plaintiff and the 2nd plaintiff's deceased's husband be registered in the name of the defendant who has been in adverse possession peacefully, uninterrupted and without evasion or secrecy ever since 1973.

2. That there will be no orders as to costs.

It is so ordered

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 16TH DAY OF NOVEMBER 2017.

N.A. MATHEKA

JUDGE