



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC NO. 400 OF 2014

FLORENCE MAKUNGU HARUN)

NITAS ACHANGA INGATSO) ::::::::::::::::::::::::::::::::::: PLAINTIFFS

VERSUS

STANLEY MAFOLI MUSINDI)

SOLOMON MUNYASI ATIANYI) ::::::::::::::::::::::::::::::::::: DEFENDANTS

JUDGEMENT

This matter was brought to court by way of originating summons application of FLORENCE M. HARUN and NITAS A. LUNGATSO who claim to be entitled to the whole of L.P. No. ISUKHA/LUBAO/569 by adverse possession for the determination of the following questions and award on the following orders.

- (a) The ownership of the whole of L.P. No. ISUKHA/LUBAO/569 claimed by the applicants for reasons set out in their affidavit filed herewith and upon other reasons as may be adduced.
- (b) A declaration that the applicants are in adverse possession of the L.P. No. ISUKHA/LUBAO/569.
- (c) A declaration that the respondents right and interest in the whole land extinguished by operation of land adverse possession.
- (d) A declaration that the title deed held by the respondents is an illegality hence the need for cancellation/deregistration and the same be registered in the applicants.
- (e) That this court do further order as follows:-
 - (i) That the whole L.P. No. ISUKHA/LUBAO/569 be transferred to and registered in the applicants names as sole absolute owners.
 - (ii) The respondent be directed to sign all transfer documents in default the Deputy Registrar of this Hon. Court be authorised to do so.
 - (iii) The respondents do pay costs of this suit.

The brief facts are that, on or about 14th September, 1976 PW1's deceased husband Harun Imbayi Mugotse entered into a land sale agreement with Jacob Mukhoyani now deceased for sale of L.P. No.

ISUKHA/LUBAO/569 at a consideration purchaser price of Ksh. 8,000/= which was paid. Her deceased husband took full possession of the L.P No. ISUKHA/LUBAO/569. The deceased proprietor by then Jacob Mukhoyani dodged her husband now deceased and never co-operated in signing land transfer documents concerning the L.P No. ISUKHA/LUBAO/569 to facilitate transfer of the same in his name and title deed issued. Her father passed away before he was issued with a title deed for the L.P No. ISUKHA/LUBAO/569 because the seller now deceased namely Jacob Mukhoyani became adamant and refused to effect transfer of the land parcel to him to be issued with a title deed. The 1st applicant/plaintiff herein carried out succession vide cause No. 454/02 and was unable to effect transfer. The previous proprietor one Jacob Mukhonga later sold the L.P No. ISUKHA/LUBAO/569 to the respondents/defendants who are now the title holders of the land parcel.

PW1 testified that, the deceased previous proprietor sold the L.P. NO. ISUKHA/LUBAO/569 to the respondents without their knowledge and or consent hence rendering them landless. Since 1976 the applicants have been peacefully in occupation/use of the whole land. Since 1976 they have been occupying the land parcel uninterrupted by the respondents or any other person. The respondents herein have never occupied the land parcel but are title holders. They are claiming the suit land through adverse possession and that the title deed of the land parcel in the respondents' names be cancelled.

PW2, the 2nd applicant/plaintiff stated that his father Haron Imbayi bought LP No. ISUKHA/LUBAO/569 from one Jacob Mukhoyani at a consideration purchase price of Ksh. 8,000/= . Jacob Mukhoyani now deceased bought land elsewhere and was unreachable and never affected transfer of the land parcel to his deceased father. The defendants used fraudulent means to obtain title Deeds for the land parcel without his consent and or knowledge. That he has been residing on the land parcel from then to date. The defendants herein are in possession of Title Deeds which he is not aware how they were obtained. The defendants herein have been threatening them with eviction. That they have no other land parcel apart from the one they is claiming. They are staying and or have stayed on the land parcel since 1976 to date and it is where their homestead is constructed hence therefore they are claiming adverse possession of the land parcel. Since they have stayed on the same for a period of more than 12 years.

PW3 testified that, one Haron Imbayi now deceased who is the father to the 2nd plaintiff and the late husband to the 1st plaintiff bought the L.P. NO. ISUKHA/LUBAO/569 from one Jacob Mukhoyani also now deceased who upon selling the land vacated the same and relocated elsewhere hence making it difficult for the plaintiffs to effect transfers of the same and be issued with a title deed. The LP No. ISUKHA/LUBAO/569 was brought at a purchase price of Ksh. 8,000/= of the land parcel which was fully paid and the plaintiff possession of the same and resides there to date. The plaintiffs are his neighbours and have lived on the LP No. ISUKHA/LUBAO/569 from the year 1976 to date and are in adverse possession of the land parcel. The defendant's fraudulently processed Title Deeds and were issued with a Title Deed without the plaintiffs' consent and/or knowledge purporting to have bought the same from the same person Jacob Mukhoyani now deceased.

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.

In applying these principles to the present case, it is a finding of fact in that, L.P. No. ISUKHA/LUBAO/569 as at 5th January 2014 was registered in the names of one Jacob Mukhoyani as per a copy of official search and had a caution placed in favour of Haron Imbayi. PW1 testified that her deceased husband Haron Imbayi entered into land sale agreement with one Jacob Mukhuyani now deceased on the sale of LP No. ISUKHA/LUBAO/569 and bought the same at a purchase price of Ksh. 8,000/= which was fully paid. The deceased seller Jacob Mukhoyani relocated elsewhere and he was never found to effect transfer of the land parcel to the 1st plaintiff's deceased husband. The defendant's claim to have bought the same land parcel NO. ISUKHA/LUBAO/569 from the deceased Jacob Mukhoyani. That upon purchase of the land parcel they took full possession of the land constructed houses and that is where they reside to date. The defendants fraudulently processed title Deeds of the land parcel without her consent and or knowledge and are now threatening them with evictions.

The plaintiff states that she has stayed on the land parcel from 1976 to date and is now claiming adverse possession of the same, since she has stayed for a period of more than 12 years. PW2 and PW3 corroborated PW1's evidence.

The defendants' were served but failed to attend court and the matter proceeded for hearing. Their replying affidavit/defence is a mere denial. This court finds that the plaintiffs' have been staying on that land since 1976 when her deceased husband Haron Imbayi entered into land sale agreement with one Jacobo Mukhuyani now deceased on sale of LP No. ISUKHA/LUBAO/569 and bought the same at a purchase price of Ksh. 8,000/= which was fully paid. The plaintiffs' are still in possession of the land to date. Their stay was open and uninterrupted until 1997 when the first court case was filed. The defendants have not provided any evidence to the contrary. I find that the plaintiffs' have established their case on a balance of probabilities and I proceed to make the following orders;

1. That the whole original L.P. No. ISUKHA/LUBAO/569 (later subdivided to other pieces), be transferred to and registered in the applicants names as sole absolute owners.
2. The defendants/ respondent be directed to sign all transfer documents in default the Deputy Registrar of this Hon. Court be authorised to do so.
3. The defendants/respondents do pay costs of this suit.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 15TH DAY OF NOVEMBER 2017.

N.A. MATHEKA

JUDGE