



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL SUIT NO. 37 OF 2006 (O.S)

IN THE MATTER OF L.R NO. KERICHO/NYAMANGA/131

AND

IN THE MATTER OF SECTION 36 OF THE LIMITATION OF

ACTIONS ACT CAP 22 OF THE LAWS OF KENYA

RECHO CHEMUTAI CHERUTO.....APPLICANT

VERSUS

KIPRONO ARAP BOIT.....RESPONDENT

JUDGMENT

Introduction

1. The Applicant instituted this suit against the Respondent by way of Originating Summons brought under Section 36 of the Limitation of Actions Act Cap 22 of the Laws of Kenya seeking a determination of the following questions:

a) That the Applicant is entitled to all that parcel of land comprised in L.R No. KERICHO/NYAMANGA/131 registered in the name of the Respondent by virtue of the applicant's adverse possession of the same by being in open, quiet and peaceful occupation of the same for a period of 50 years.

b) That a permanent injunction do issue restraining the Respondent either by himself, his agents, servants, assignees, representatives or nominees from trespassing into, constructing any structures or erecting any buildings, cultivating, farming or in any way interfering with the Applicant's quiet occupation and enjoyment of all that parcel of land comprised in L.R No. KERICHO/NYAMANGA/131

c) That the said applicant should be registered as a proprietor of the said parcel of land in place of the Respondent who is at present the registered proprietor thereof

d) That the costs of this suit be provided for.

2. The Originating Summons is supported by the applicant's affidavit sworn on the 17th May, 2006 and Further Affidavit sworn on the 8th May, 2007.

3. In the said affidavit the applicant depones that she is the owner of all that parcel of land comprised in L.R No. KERICHO/NYAMANGA/131 measuring 1.6 hectares jointly with her late husband. She depones that in 1965 they allowed the Respondent who is her younger brother to come and stay with them on the said parcel of land.

4. She later discovered that during the adjudication process the Respondent caused himself to be registered as the proprietor of the suit land by way of first registration thereby extinguishing the applicant's rights over the said parcel of land which constitutes her matrimonial home. She depones that inspite of the said registration of the suit land in the Respondent's name, she has been living on the said parcel of land openly, continuously and peacefully for a period of over 50 years.

5. She further depones that even though the Respondent is the registered owner of the suit land, he has his own parcel of land at Kokwen village in Fort Ternan Division of Kericho County.

6. Despite being served with the Originating Summons, the Respondent only entered appearance but did not file any replying affidavit.

7. The court directed that the matter proceeds by way of *viva voce* evidence and the applicant was the only witness. In her testimony the applicant reiterated the contents of her witness statement and produced a number of documents as exhibits. Among the said documents are an extract of the register in respect of land parcel number KERICHO.NYAMANGA/131, a copy of her husband's death certificate. Proceedings of the Land Disputes Tribunal among others. She testified her late husband inherited the suit land from his father. She testified that she was surprised to discover that the Respondent had been registered as the sole proprietor of the suit land. She prayed that the Respondent's name be cancelled from the register and the said title be registered in her name. She also testified that she would like the Respondent to be evicted from the suit land.

Issues for Determination

8. The main issues for determination are as follows:

1. Whether the applicant herein has been in open and uninterrupted occupation and/or possession of Land Parcel No. KERICHO/NYAMANGA/131 for a period of more than 12 years.
2. If so, has the said occupation been adverse to the title of the said land parcel?
3. Has the applicant therefore acquired title to the land parcel No. KERICHO/NYAMANGA/131 under the Limitation of Actions Act against the registered proprietor?
4. Can the respondent now be compelled to transfer the said parcel of land parcel no. KERICHO/NYAMANGA/131 to the applicant herein?
5. Who should bear the costs of this suit?

Analysis and Determination

9. With regard to the first issue, the applicant's evidence which has not been challenged clearly demonstrates that she has been in open and uninterrupted occupation of the suit property since the early 1950s.

10. In order to determine the second issue, the applicant needs to prove that she has met the conditions for adverse possession. In the case of **Ann Itumbi Kiseli V James Muriuki Murithi 2013) eKLR** the court restated the position on adverse possession as follows:

“Adverse possession has been defined as a method of gaining legal title to real property by actual, open, hostile possession of it to the exclusion of its owner for the period prescribed by statute. For one to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his rights to the land by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for which he intended to use it”.

11. My finding is that having established that the applicant has been in open, continuous and uninterrupted occupation of the suit land in a manner adverse to the registered owner's title it follows that she has acquired the said title by adverse possession in line with section 38 (1) of the Limitation of Actions Act. The said Act provides as follows:

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts mentioned in section 37 or land comprised in a lease under any of those Acts, he shall apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

The applicant is therefore entitled to have the suit property registered in her name.

12. The upshot is that the applicant has proved her case on a balance of probabilities. Consequently, I enter judgment for the applicant as prayed in the Originating Summons and make the following orders:

1. That the applicant has acquired title to portions of land parcel no. KERICHO/NYAMANGA/131 measuring 1.6 hectares by adverse possession.
2. That an order be and is hereby issued directing the respondent to transfer all that parcel of land known as KERICHO/NYAMANGA/131 to the applicant within 30 days failing which the Executive Officer of this honourable court shall be authorized to sign the transfer on behalf of the respondent to the applicant.
3. As the suit involves siblings, each party shall bear their own costs.

Dated, signed and delivered at Kericho this 27th day of February, 2018.

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J.M ONYANGO

JUDGE

In the presence of:

1. Cherotich for the Applicant
2. No appearance for the Respondent
3. Court Assistant - Rotich