



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**ELC NO. 327 OF 2013**

**MARSELLA JEBITOK RUTO ..... PLAINTIFF**

**VERSUS**

**MARY CH EPKURGAT BARAIYWO ..... DEFENDANT**

**JUDGEMENT**

By an originating summons dated 5<sup>th</sup> June 2013 the plaintiff sued the defendant seeking for orders that :

- a) The plaintiff, Marsella Jebitok Ruto has become entitled by adverse possession to that land known as Nandi/Chepkunyuk/422 measuring 1.2 Hectares.
- b) The proprietary rights of the estate of the deceased Jamaio Tabletgoi Kerich and/or the defendant have been extinguished.
- c) The plaintiff Marsella Jebitok Ruto be registered as the sole proprietor of the land in place of the estate of the deceased and/ or the defendant.
- d) Costs be provided for.

Directions were taken and the court ordered that the originating summons be treated as the plaint and the replying affidavit be treated as the defence. The suit then proceeded by way of *viva voce* evidence presented by both parties and their witnesses. The plaintiff testified and called two witnesses.

The plaintiff gave evidence and relied on the affidavit in support of the summons. She stated that the defendant is the administrator of the estate of Jamaio Tabletgoi Kerich who died on 28<sup>th</sup> June 2000 and was the registered owner of land parcel known as Nandi/Chepkunyuk/422 (hereinafter referred to as the suit land).

It was the plaintiff's evidence that they agreed with the deceased and entered into a sale agreement for the suit land in 1972 which was done in the presence elders.

She also produced a copy of the agreement in court. The plaintiff also stated that she immediately took possession of the parcel of land and planted trees and kept livestock.

The plaintiff testified that prior to demise of the deceased in the year 2000 she had been in continuous, exclusive and uninterrupted possession of the land. She also stated that the deceased did not ask her to give back the land to her and therefore continued to be in possession of the suit land. She further gave evidence that she lodged a caution when the sons of the deceased refused to transfer the suit land to her but she later learnt in 2009 that it had been removed by the Registrar when she conducted a search. She stated that she tried to have the land transferred to her but she was told to file succession cause as the seller had died.

It was the plaintiff's evidence that she came to know that the defendant had filed Succession Cause No. Eldoret High Court Succession Cause No 91 of 2010 and was issued with a Grant of letters of Administration dated 26<sup>th</sup> April 2013 in respect of the estate of Chemaiyo Kerich. She stated that she had initially filed an objection in the succession proceedings which she later withdrew opting instead to let the defendant be appointed a legal representative of the estate of the deceased so as to commence the current suit. The plaintiff also stated that the suit land is currently registered in the defendant's name but she is the one in occupation and therefore urged the court to order that she be registered as the owner.

On cross examination the plaintiff confirmed that she bought the land from the deceased but the agreement does not have signatures of the

parties and further that it does not have the number of the parcel that was being bought. She also stated that the land was adjudicated in 1972 and that the deceased got her title in 1976. She also confirmed that she has been living on the suit land since 1972 and that she continued to stay with the deceased on the suit land without any issues.

In re exam the plaintiff stated that she withdrew the objection in the Succession Cause because the defendant was to transfer the land to her which she never did.

PW2 Reuben Kimaru Arap Soi stated that he knows the plaintiff as a neighbor who has been using and cultivating the suit land for over 30 years. He further stated that he knew the deceased who was living on the suit land and was not aware that there was any dispute. On cross examination he stated that the plaintiff stays on plot No. 422.

PW3 Joseph Kiplagat Limo gave evidence and reinforced the plaintiff's evidence that she has been in occupation of the suit plot since 1972 when the deceased sold the land to her.

PW2 also stated that he was present when the sale transaction was done. In support of her case the plaintiff produced documents being a sale agreement, a green card and a certificate of official search. The plaintiff therefore closed her case at that juncture.

### **Defendant's case**

The defendant gave evidence and called 3 witnesses. She stated that the suit land belonged to her late mother Tablettoi whom she said did not sell any land when she was alive. It was the defendant's evidence that she filed a Succession Cause and was issued with a grant of letters of Administration and subsequently got the title to the suit land in her name.

It was the defendant's evidence that the plaintiff filed an objection which was heard and determined and an order issued dated 29<sup>th</sup> November 2011. She also stated that the plaintiff does not stay on the suit land and that the house on the plot does not belong to the plaintiff. It was further the defendant's evidence that plot No. 422 belongs to her and that the plaintiff owns plot No. 421 and 423. The defendant also stated that she has fenced her land but the plaintiff uses a section of her plot for her animals to pass through.

On cross examination the defendant clarified that the deceased is not her mother but her cousin who sold part of her land to pay school fees for the defendant. She confirmed that she stays in Kabyet which is in another sub county. She also stated that it is about 30 kms

from the suit land and that she normally goes to work on the land. It was further the defendant's evidence that she stayed with Tablettoi the deceased but moved back to Kabyet in 1989 but went and fenced the suit land in 2014. She also stated that the plaintiff had no relation with the deceased so she could not be made an administrator.

DW2 gave evidence in support of the defendant's case and stated that the house on the suit land was built by the defendant but did not know the year the defendant started staying with the deceased.

DW3 also gave evidence and stated that the plaintiff started claiming the suit land after the death of the deceased and that nobody stays on the suit land. He stated that the defendant built the house on the suit land in year 2000. DW4 who is a Chief of Chepkunyuk Location stated that nobody has been using the suit land.

The defendant denied the plaintiff's claim over the land. She stated that she used to live with the deceased as a young child on the suit land. She stated that the house they lived on is still on the land to date. She stated that they left the land in 1990 for Kabiyeet Area where the deceased stayed till her death in the year 2000.

Counsel for the plaintiff therefore submitted that from the evidence on record that the plaintiff had proved her claim against the defendant on a balance of probabilities.

### **Defendant's submission**

The defendant's Counsel however submitted that the plaintiff had failed to prove that she is entitled to the suit land by way of adverse possession as she had not satisfied the threshold for the same. It was Counsel's submission that the objection was determined by the court. He stated that the plaintiff is mischievous in claiming the suit land under adverse possession yet she had previously indicated that she purchased the suit land. Counsel therefore urged the court to dismiss the plaintiff's case with costs to the defendant. Counsel cited authorities in support of the defendant's case.

### **Analysis and determination**

The plaintiff's case is that she has acquired the suit land by adverse possession having been in continuous and uninterrupted possession since 1972 when she purchased it from the deceased one Tablet Koi Kerich.

The issues for determination are as to whether the plaintiff purchased the suit land from the deceased Tablet koi Kerich and whether she took possession and has been in continuous and uninterrupted possession of the suit land for a period of more than 12 years.

In order for an applicant to benefit from the doctrine of adverse possession a party must establish that the owner has lost his/her right to the land either by dispossession or by having discontinued his/her dispossession as was held in the case of **Mombasa Court of**

**Appeal Civil Appeal No. 72 of 1982 Wanje-v- Saikwa (No. 2) (1984) KLR page 284-293** . The Court held that :-

- "1. In order to acquire by the statute of limitations a title to land to which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it.*
- 2. What constitutes dispossession of a proprietor are acts done which are inconsistent with the purpose for which he intended to use it.*
- 3. A person who occupies another person's land with that person's consent cannot be said to be in adverse possession as in reality he has not dispossessed the owner of the land and the dispossession is not illegal"*

According to the evidence by the plaintiff, she purchased the land from the deceased in 1972 and took possession of the land which is in between two other parcels belonging to the family of the plaintiff and merged them together. It was the plaintiff's evidence that since the land adjudication process had already been done, the title deed was issued in the name of the deceased in 1976. Essentially time started running after the adjudication and registration of the deceased as an owner,

The plaintiff enclosed the parcel of land together with her adjacent parcels effectively dispossessing the deceased. In 1990 the plaintiff lodged a caution on the parcel of land

claiming a purchaser's interest. This fact of lodging a caution as far back as 1990 reinforced the plaintiff's claim that she had actually purchased the suit land.

The plaintiff would not have lodged the caution to claim that she had purchased the suit land if she had not done so. The plaintiff's witnesses both confirmed that it is the plaintiff who has been utilizing the land since the 1970s after she purchased it. DW3 and DW4 in their evidence gave contradictory evidence as to when and who put up the house on the suit plot. They even contradicted the defendant who said that the house was in the suit land when she was growing up. DW3 stated that the house was built by the defendant in 2000 while DW4 said that the house was put up by the defendant in 2014. This materially contradicts the defendant's assertions that the structure on the parcel of land was a house she allegedly lived in with the deceased prior to the year 1990. These witnesses further stated that it is the defendant who put up a fence in 2014. It is instructive to note that in 2014 this suit had already been filed and the proceedings would show that the court issued an injunction against the defendant from fencing or putting up a house on the suit land.

The defendant appeared untruthful. First she said the deceased was her mother, a fact she later changed. Secondly she said that there is a house on the parcel of land built by the deceased in the 1970s which still stands on the land. This fact was denied by her own witnesses who stated that it is the defendant who put up a structure on the suit land in 2014. DW2 also contradicted her own evidence in chief and stated that she was married in the 1960s and went to live in her matrimonial home in Kabyet, far from the area where the suit land is situated. The defendant and her witnesses sole aim was to deny that the plaintiff had been in possession of the land. They do not live near the suit land at all.

Further while this suit was pending the defendant proceeded and confirmed the grant and had herself registered as the owner of the land. It is therefore safe to deduce that the deceased, her estate and /or the defendant as the administrator/ beneficiary had lost all proprietary right over the suit land by the operation of the doctrine of adverse possession and therefore the subsequent transfer by transmission was not valid. It is also not true as counsel had submitted that the objection proceedings had been determined. I notice that

there was a consent order signed by both Counsel for the petitioner and objector withdrawing the objection with no orders as to costs. What or why would counsel enter into a consent for withdrawal of an objection without protecting the interest of an objector? The plaintiff stated that she withdrew the objection because the defendant had agreed to transfer the suit land to her but later changed her mind. This would be a plausible position.

From the evidence of both parties it is not in dispute that the deceased Jamaiyo Tabletgoi Kerich was the registered owner of the suit land, that she died in 2000 and that the defendant is the administrator of the estate of the deceased. What is in dispute is as to whether the plaintiff bought the suit land from the deceased and whether it was in order for the defendant to register herself as the owner of the suit land.

The defendant and her witnesses gave contradictory evidence as to the real position of the suit land and the possession. The defendant admitted that she resides in Kabyet which is 30 Kms away from the suit land and was not able to establish what is actually happening on the ground. The witnesses were also colliding in their evidence as to what is happening on the suit land and who built the house on the land and when. From the demeanor of the witnesses and the defendant it was clear that there was some truth that they were hiding from the court. They did not strike me as telling the truth and the defendant wanted to seize the opportunity to take the land which had been sold during the lifetime of the deceased who did not have any children to inherit her land.

The plaintiff has been in continuous, open and uninterrupted possession of the suit land as established from the evidence. The Court of Appeal in the case of **Ndatho vs. Itumo & 2 others (2002) 2 KLR 637**, stated that in order to succeed in a summons for adverse possession:-

*"The possessor(s) must show that the possession was adequate, continuous and exclusive. In other words, such possession, to be adverse, must be adequate in continuity, in publicity and in extent to show that the possession was adverse to the proprietor."*

I find that the plaintiff has satisfied the ingredients of adverse possession and grant the orders as prayed in the summons.

**Dated and delivered at Eldoret this 28<sup>th</sup> day of June, 2018.**

**M.A ODENY**

**JUDGE**

Judgment read in open court in the presence of Mr. Songok holding brief for Mr. Nyolei for Plaintiff and Mr. Kiboi for the defendant.

Mr. Koech: Court Assistant.