



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT KAPSABET
ELC CASE NO. 142 OF 2021
(FORMERLY ELDORET E & L NO. 49 OF 2019)

KIPTUM KOSGEL.....PLAINTIFF

VERSUS

SAMSON KIPLAGAT MURSOY.....DEFENDANT/1ST PLAINTIFF/COUNTERCLAIM

AND

JANE CHEMUTAI MURSOY.....2ND PLAINTIFF/COUNTERCLAIM

JUDGMENT

1. The Plaintiff has vide his plaint dated 8th July 2019, initially filed before the Senior Principal Magistrates Court at Kapsabet, but later on transferred to this Court, sued the Defendant seeking orders that the Defendant be evicted from Nandi/Baraton/1158.

2. The Defendant filed a defence dated 13th September 2019, and a counterclaim on the said day, denying the Plaintiff's claim in totality, and praying in the counterclaim that the Plaintiffs title to Nandi/Baraton/1158 be extinguished and be registered in the name of the Defendant who is the Plaintiff in the counterclaim together with his Co-Plaintiff in the counter claim. The Defendant further pleads that the suit is time barred and has also pleaded constructive trust in the counter claim.

BACKGROUND

3. The suit was initially filed before the Senior Principal Magistrates Court at Kapsabet but upon establishment of this Court, it was transferred for hearing and determination.

PLAINTIFF'S CASE: -

4. In his plaint, the Plaintiff pleads that on 8th April 2005, the Defendant laid a false claim and occupied the Plaintiff's land and has refused to vacate thereon.

5. The Plaintiff avers that he had never sold or allowed the Defendant to occupy or use the land and that any documents held by the Defendants claiming ownership are forgeries.

6. For the above reason, the Plaintiff prayed for vacant possession and an eviction order.

DEFENDANT'S CASE: -

7. In his defence, the Defendant pleads that he purchased the suit property from the Plaintiff on 10/6/1993 and paid the full price and has settled thereon taking possession and has remained in occupation, continuously uninterrupted from 1993 to date together with his wife the complainant in the counter claim and their children.

8. The Defendant has pleaded adverse possession in his counterclaim stating that the Plaintiff's title in relation to Nandi Baraton/1158 ought to be extinguished in his favour by operation of law.

PLAINTIFF'S EVIDENCE: -

9. The Plaintiff testified and called one other witness. It was PW1 testimony that he was in Court because he disputes having sold to the Defendant Nandi/Baraton/1158. He stated that the property was in his name, thus it was his.
10. He adopted his witness statement dated 8th July 2019. In the statement, he reiterates his pleadings that the Defendant is occupying his property illegally and that any documents held by the Defendants are forgeries.
11. He produced in support of his case his list of documents and the documents produced were a copy of green card as pexhibit 1, copy of title deed as pexhibit 2, official search pexhibit 3, and a copy of demand letter pexhibit 4.
12. He disputed an agreement for sale dated 10/6/1993 and he had demanded for a balance of kshs 150,000/= through his Advocates letter dated 3/4/2018.
13. He confirmed occupation of the property by the Defendant for the past 26 years. In further cross – examination, he indicated that the signed CCB consent dated 27/10/1997 was to transfer the property to the Defendant.
14. He further confirmed in cross – examination that the Defendant has constructed a house and they cultivation the property. There has been no case against the Defendant.
15. He confirmed that the initial property was Nandi/Baraton/949 and that he had subdivided it to 8 subdivisions which were Nandi/Baraton/1155-1161.
16. He had filed an application for Land Control Board consent to transfer, in respect of Nandi/Baraton/1158 but did not transfer the same.
17. PW2 testified on the matter that he was the Plaintiffs elder brother, and that he knew the Defendant as the Plaintiffs neighbor, he adopted his witness statement. His testimony is that the Defendant did not pay the Plaintiff anything.
18. in cross – examination the witness confirmed that the Plaintiff had subdivided the property and sold the property to other people, that in 2019, the Plaintiff had school fees issued and went to the Defendant to ask for money, and that before 2019, he was in employment and never bothered about the Defendant.
19. He confirmed that his brother did not tell him everything, as to whether he was paid or not, and further that his brother does not live on the property, and the Defendant lives on the property.
20. After hearing the testimony of the two witnesses, the Plaintiff's case was closed.

DEFENDANTS EVIDENCE: -

21. The Defendant called 3 witnesses and he testified making it a total of 4 defence witnesses. DW1, was the Defendant who was the 1st Plaintiff in the counterclaim, he adopted his witness statement, and produced the list of documents and the exhibits. It was his testimony that he purchased 0.2 hectares vide an agreement dated 10/6/1993 and that he bought Nandi/Baraton/1158. The agreement was produced as D Exhibits 1. He bought the same for a consideration of kshs 50,000/= and paid in full.
22. That he moved and took possession immediately and has lived thereon since 1993.
23. That at the time of purchase the proposed subdivision had been done on the ground and mutations form were signed on 26/11/1993 and the mutation form register on 15th December 1994. The mutation forms were produced as **D Exhibit 6**; while the proposed subdivision of the original Nandi/Baraton/949 prepared on 11/6/1993, and produced as **D Exhibit Number 7**, clearly shows the transferees as;
 1. Simion Saina,
 2. Samson Kiplagat Mursoy ID No. 5618630168 and the Catholic Diocese of Eldoret.
24. The Defendant further testified and produced an application for a Land Control Board consent dated 27/10/1997; as **D Exhibit 9** Application for the Land Control Board consent reveals the purchaser as Samson Kiplagat Mursoy ID No. 5618630/68, and the land purchased been Nandi/Baraton/1158 measuring 0.2 Ha.
25. It was Defendant's testimony that the witnesses who were present during the purchases were his witnesses in Court and that all was well till in 2019, when the Plaintiff wanted to sell the property to someone else. He further disputed the demand letter from S. K. Kitur Advocates, claiming a balance of kshs 150,000/ as he had paid the full purchase price.
26. DW2, was the 2nd Plaintiff in the counterclaim, and it was her testimony that she got married to the Defendant in 1982 and in 1993 they purchased the suit property and have lived there on since. There had been no dispute since then. She identified the 8 photographs **D Exhibit 15** as the house that they constructed and live thereon.
27. She prayed for an order that the Plaintiffs title over Nandi/Baraton/1158 be extinguished. She identified the witnesses who were present

during the purchases as Mr. William Kipkemboi Bisem and Mr. David Kiprotich Saina known as Malele.

28. DW3 – was Mr. William Kipkemboi Bisem a cook at Mwein SDA Secondary School. It was his testimony that he had known the Defendant since 1993 when they worked together at Baraton University. He equally knew the Plaintiff in 1993, since he had many plots near Baraton University. In cross examination he confirmed that he had executed the agreement for sale and his signature was on it.

29. That the original property was Nandi/Baraton 949, and it was subdivided on 15/12/1993, while the agreement indicates that the property sold was 1158 and it was executed on 10/6/1993.

30. DW4 Mr. David Kiprotich Saina testified before Court, and that he has known the Defendant since 1979 when he was a Mason at Baraton University. That he bought No. Nandi/Baraton 1159, he borders a Mr. Hosea Kili Advocate, a teacher and the Catholic Church. He further testified that he witnessed the agreement.

31. He further testified that the Plaintiff sold to a MR. Samuel Too plot No. 1159 and that he sold the same property to Mr. Hosea Kili. That he thereafter allocated Mr. Too property number 1157 which belonged to the Catholic Church. The church having built thereon.

32. After hearing the two Plaintiffs witnesses and the 4 defence witnesses, parties closed their respective cases, and were directed to file their written submissions.

33. No list of agreed issues was filed by either party. The Plaintiff in its submissions however has framed the following issues:-

- i) Whether there is in existence of a binding sale agreement between the Plaintiff and Defendant.
- ii) Whether the Plaintiff's ownership and/ or title over Nandi/Baraton 1158 has been extinguished by operation of law.
- iii) Whether the Plaintiff has proved his case on a balance of probability and deserves the orders sought in the plaint.

34. The Defendant has no framed any issued of determination and the Court frames the issued for determination as follows:-

- a) Did the Plaintiff enter into an agreement for sale with the Defendant in 1993?
- b) If the answer to a) above is in the affirmative, did the Defendant acquire purchase's interest in Nandi/Baraton/1158?
- c) If the answer to 1 (a) above is in the negative, is the Plaintiff entitled to the prayers sought for in the plaint.
- d) If the answer to (b) above is in the affirmative, does the Defendant deserve the prayers in the counterclaim.?
- e) Who bears the costs of the suit?

PLAINTIFF'S SUBMISSIONS:-

35. It is Plaintiff's submissions that he did not sale the suit property Nandi/Kamobo.1158 to the Defendant and he is a stranger to the agreement of sale, and that there is pending before Kapsabet Chief Magistrate's Court, a charge against the Defendant for attempting to obtain land registration by false pretense contrary to Section 389 of the Penal Code.

He submitted that the agreement was prepared on 10/6/1993 while the mutation was prepared on 17/9/1993.

The Plaintiff further submits that the evidence of P.W2 should be taken into consideration since he had no reason to live.

36. The Plaintiff placed reliance on Section 25 and 26 of the Land Registration Act and submits that his title be protected.

37. The Plaintiff further submits placing reliance on the decision in Lois Holdings Limited vs. Ndiwa Tamboi & 2 others.; that the agreement for sale was void as there was no consent obtained within 6 months from date of contract, and that the agreement could not be enforced after 6 years.

38. For the above submission, the Plaintiff prays that his suit be allowed.

DEFENDANT SUBMISSIONS: -

39. The Defendant submits that the Plaintiff has not proved his case that the Plaintiff's testimony was at variance with the pleadings.

40. The Defendant further submits that, the Plaintiff confirmed having seen the Land Control Board application dated 27/10/1997 and the same was signed by both.

41. The Defendant submits that **D Exhibit 7** the proposes subdivision of Nandi/Baraton/947, was prepared on 11/6/1993 and it had the number Nandi/Baraton/158 on it.

42. In support to his submission that the suit was time barred, as pleaded in paragraph 6 of the Defence the Defendant cites Section 7, 13,17,18, 26 – 31, 38 and 39 of the Limitation of Action Act and cites the cases **of Chevron K. Limited Vs. Hamson Charo wa Shatu (2016) eKLR.**

43. The Defendant further submits that the Plaintiff pleaded 18/4/2015 as the day of entry of the Defendant. On the suite land and that he refused to vacate on 4/4/2019 that the period was 14 years and the suit thus offends Section 7 of the Limitation of Action Act.

44. In support of this position, the Defendant cites the case of **Edward Moonge Lengusunrunge vs. James Lenaiyara & Another (2019) e KLR** as well as the case of **Mehta Vs. Shah 1965 E. A. 321 and Gathoni Vs. Kenya Cooperative Creameries Limited 1982 KLR (104)**

45. The Defendant further submits that a claim of adverse possession can be claimed by way of a counterclaim and cited the decision of the Court of Appeal in **Chevron (K) Ltd. Vs. Harrison Charo was Shutu (2016) eKLR.**

46. On constructive trust, pleaded in the counterclaim, the Defendant submits that a constructive Trust exist in his favour of the Defendant and has cited the Court of Appeal Decision in **Francis Gicharu Kariri Vs. Peter Njoroge Mairu** where the elements of constructive trust were discussed.

ANALYSIS AND DETERMINATION: -

Did the Plaintiff enter into an Agreement for sale with the Defendant in 1993? 47.The Plaintiff has vehemently denied entering an agreement for sale with the Defendant in 1993. Other than the dispute Agreement, produced by the Defendant; the Plaintiff produced a demand letter dated 30th April 2018. The said letter was titled “*Re Balance of Purchase Price – Kiptum Kosgey – Nandi Baraton 1158.*”

48. It is the Courts view that for a balance of purchase price to have been demanded by the Plaintiff, an Original and/or initial agreement for sale must have existed and a deposit must have been paid. The disputed agreement for sale was authored on 10/6/1993 and was witnessed by Mr. Wilson k. Malel Issau B. Kirgong and William K. Bisem.

49. Two of the witnesses to the agreement for sale also testified in the matter as DW3 and DW4 and it is was their testimony that they were present and witnessed the Agreement in 1993.

50. The proposed subdivision scheme produced as D Exhibit 7 was signed on 11/6/1993, on its foot notes it reveals the owner/lessor/proprietor as the Plaintiff, and it further shows the transferees (as) (1) Simon Saina, 2) Samson Kiplagat Mursoy ID No. 5618630/68 3) Catholic Diocese of Eldoret.

51. **D. Exhibit 7** was prepared a day after the alleged Agreement of sale.

52. An application for Land Control Board consent dated 27/10/1997 signed by the Plaintiff and Defendant was also exhibited, and it shows the consideration paid as kshs 50,000/= which is the sum in the agreement for sale, and was also confirmed by DW2 as the consideration paid for the purchase.

53. On the account of the foregoing the Court is satisfied that there was indeed a valid and binding agreement dated 10/6/1993 between the Plaintiff and the Defendant.

54. Mr. Tallam learned Counsel for the Plaintiff submits that the agreement is void by virtue of Section 6 (1) of the Land Control Act that the Agreement would be void by virtue of non compliance with the said Section and has cited **Lois Holdings Limited Vs. Ndiwa Tanboi and 184 others. Cooperative Society (2021) e KLR** and I agree with him that the Agreement became void after 6 months for non compliance with section 6(1) of Land Control Act and could not be enforced after 6 years by virtue of limitation of Actions.

Did the Defendant acquire a purchaser interest in Nandi/Baraton/1158?

55. Having found that the Agreement for sale dated 10/6/1993 was valid but become void initially for lack of LCB consent after 6 months and become unenforceable after 6 years by virtue of the Limitations of Actions Act, it follows that the Defendant acquired purchasers interest in Nandi/Kamobo/1158; at the time of purchase and he become an adverse possession after the agreement become void. His adverse possession started running in 1999. In arriving at this conclusion, this Court is guided by the decision of the Court of Appeal in **Samwel Miki Waweru Vs. Jane Njeri Richu 2007 eKLR** where the Court held “ *in our view where a purchaser or lessee of land in a controlled transaction is permitted to be in possession of the land by the vendor, or lessor pending completion and the transaction thereafter becomes void under Section 6 (1) of Land Control Act for lack of consent of the Land Control Board such permission is terminated by the operation of law and the continued possession if not illegal, becomes adverse from the time the transaction become void.*”

56. The Court has found that there was a valid agreement for sale between the Plaintiff and the Defendant. The whole of the Plaintiff’s case was that the agreement was a forgery. It follows then that the Plaintiff has not proved its case on balance of probabilities as required in law. Furthermore if the occupation adverse to the Plaintiff is to be taken from 1999 when the agreement become void as found earlier, then the Plaintiff suit for eviction filed in 2019 is clearly time barred by virtue Section 7 of the Limitation of Action Act.

57. The Plaintiff has vided paragraph 4 of his plaint pleaded occupation by the Defendant as from 8/4/2005 and the suit was filed in 2019. Even if the Court was to find this as the date of occupation, which the Court does not, the suit was still clearly statute barred and the Plaintiff’s claim does not succeed and the Plaintiff does not deserve the orders sought in the plaint.

Does the Defendant deserve the orders sought in the counterclaim?

58. The Defendant in the suit who is the Plaintiff in the counterclaim for the substantive order that: -

a) the honourable Court be pleased to order that the Plaintiff's now Defendant in the counterclaim title to Nandi/Baraton/1158 has been extinguished by the doctrine of adverse possession or prescriptive rights or constructive trust due to open occupation of the Defendant now Plaintiff in the Counterclaim and issue an order to compel the transfer of Nandi/Baraton/1156 the Defendant now Plaintiffs within 30 days from the date of judgement in default thereto, the Executive Officer of Kapsabet Chief Magistrates Court be authorized and ordered to execute the transfer document's.

59. The Court has found that the Plaintiff in the counterclaim acquired purchaser's interest and that time running for purposes of adverse possession started after the Agreement for sale became unenforceable that was after 6 years in 1999.

60. Submissions have been made on the joinder of the 2nd Plaintiff in the counterclaim to this suit, Mr. Tallam learned counsel for the Plaintiff submits that the 2nd Plaintiff in the counterclaim has not shown any interest in the suit property so as to be joined. Mr. Rotich learned Counsel has not submitted on the same.

Joinder of parties to a counterclaim is governed under order 7 Rule 8 of the Civil Procedure Rules. The same makes provisions for joinder of a party who is not in the original suit to be joined in a counterclaim.

Accordingly the joinder of the 2nd Plaintiff in the counterclaim was procedural and proper.

61. Although, Mr. Tallam learned Counsel for the Plaintiff, did not submit on whether a claim of adverse possession can be filed as a counterclaim, Mr. Rotich learned counsel for the Defendant/Plaintiffs in the counterclaim did submit on it, and cited the decision in **Chevron (k) Limited Vs. Harrison Charo Washulu 2016 eKLR** where the Court of Appeal held:

'The Courts have since this decision, held that a claim by adverse possession can be brought by a plaint (see Mariba vs Mariba Civil Appeal No. 188/2082 Counterclaim or defence as was the case here. See wabala vs Okumu 1997 LLR609 (AK) IN Gulam Mariam Noordin vs Julius Charo Karisa Civil Appeal No. 26 of 2015, where the claim was raised in the defence, this Court in rejecting the objection to the procedure, stated as followed;

*“where a party like the Respondent in this appeal is sued for vacant possession, he can raise a defence of statute of Limitation by filing a defence or a defence and counterclaim. It is only when the party applies to be registered as the proprietors of land by adverse possession that order 37 Rule 7 requires such a claim to be brought by Originating Summons. It has also been held that the procedure of Originating Summons is not suitable for resolving complex and contentious of fact and law. Be that as it may, and to answer the questions, whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, we refer to the case of Wabala vs, Okumu (1997 LLR 609 (AK) which like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly in **Bayete Company Limited Vs. Kosgey (1988) LLR 813**, where the Plaint made no specific plea of adverse possession the plea was nonetheless granted.....”*

62. The Plaintiffs in the counterclaim have proven their case, that they have occupied the suit property from 1993 initially pursuant to purchaser's interest and from 1999 as adverse possessors and are therefore entitled to the orders sought.

63. Accordingly the Plaintiff's suit is hereby dismissed and judgement is entered for the Defendant/Plaintiffs in the counterclaim in the following terms:-

a) That the Plaintiff as the proprietor of Title Nandi/Baraton/1158 is holding the same in trust to the Defendants/Plaintiffs in the counterclaim and his right proprietary interest and rights in Nandi/Baraton/1158 are extinguished under Section 17 of the Limitation of Actions Act and the title is the name of the plaintiff Mr. Kiptum Kosgey is hereby cancelled.

b) The Land Registrar Nandi County to rectify the register accordingly and register Samson Kiplagat Mursoy and Jane Chemutai Mursoy as the new proprietors of Nandi/Baraton/1158.

c) The Plaintiff to bear the costs of the original suit and the costs of counterclaim.

Judgment accordingly.

DATED AT KAPSABET THIS 28TH DAY OF FEBRUARY, 2022

HON. MICHAEL N. MWANYALE,

JUDGE

IN THE PRESENCE OF

MR. TALLAM FOR THE DEFENDANT

MR. ROTICH FOR THE PLAINTIFF