



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAROK

ELC CASE NO. 65. OF 2017

LANGAT KIPKEMOI ANTHONY.....1ST PLAINTIFF

PETER KIPKIRUI ROTICH.....2ND PLAINTIFF

VERSUS

MASEIYA OLE OLOLMAITAI.....1ST DEFENDANT

OLDAKANY OLE OLOLOIGERO.....2ND DEFENDANT

JUDGEMENT

1. What is before this court for determination is Originating Summons dated 11th June, 2013 brought under **Order 37 Rule 7 of the Civil Procedure Rules, Section 38** of the Limitation of Actions Act seeking the following questions: -

- 1. Whether or not the Plaintiffs have been in continuous and an interrupted occupation, possession and use of twenty six acres comprising land parcel number Narok/Cis-Mara/Il Motiok/235;**
- 2. Whether or not the said possession, use and continuous occupation has been peaceful, open and adverse to the Defendants and uninterrupted until 7th June, 2013;**
- 3. Whether the rights of the defendants to the said parcel of land have been extinguished by effluxion of time.**
- 4. Whether the plaintiffs should be declared the owners of twenty six acres out of the said portion of land, ref no. Narok/Cis-Mara/II-M otiok/ 235 and consequently the land title be issued in their respective names.**
- 5. Who should pay costs of this suit?**

2. The summons is supported by the supporting affidavit of the 1st Plaintiff herein, Langat Kipkemboi Anthony, sworn on 11th June, 2013. The 1st plaintiff avers that he has been living on 11 acres out of the whole of the suit land with his family since the year 1982. That on 7th March, 1982 his late father Richard Kibet Chepkwony entered into a sale agreement with the defendants for the sale of undeveloped eleven acres of land being a portion of the suit land and thereupon entered into the land and undertook several developments thereon including building their matrimonial home which they have continuously and peacefully lived on, cultivated and put clear boundaries and fencing without any interruption by the defendants.

3. The 1st Plaintiff further deposed that on 23rd June 2005 his father who lived in Segemian village passed on before the land was transferred to him by the defendants. That since 1982 and preceding the death of his father in 1995, he has been in continuous occupation and possession of the portion of the suit land in full knowledge of the defendants. Also, the defendants have never raised any alarm, reported him to any authority and instituted any suit against him touching on the subject matter for trespass or otherwise for the last over 35 years he has been in continuous occupation and possession thereof and that together with his brothers and sisters they have been living in the portion of the suit land without any interruption from the defendants or any other party whatsoever.

4. The 1st plaintiff further deposed that the defendants have now trespassed onto the said portion of land with intent to subdivide and sell the same to third parties in blatant disregard of their interest in the portion of the suit land. That the defendants neglected or refused to transfer the portion of the suit land to their late father and as such they bring this application to this honorable court to be declared the legal owner entitled by virtue of adverse possession having been on the portion of the suit land for a period of 12 years continuously and without interruption. He is certain that unless this court intervenes, there is likely to be a breach of peace, dispossession of the eleven acres of land as

the respondents have evinced intention to encroach, demarcate and sell his property and it is necessary that the local police station be mandated to observe compliance of law and order. The 1st applicant also deposed that he has made several improvements on the said land costing substantial amount of money and therein lies his matrimonial home.

5. The 2nd plaintiff filed his supporting affidavit sworn on 11th June, 2013 in which he deposed that he has been living on 15 acres of the portion of the suit land since 1982. That on 7th March, 1982 his late father Tapsabei Motimbut Mosonik entered into a sale agreement with the defendants for sale of undeveloped 15 acres being a portion of the suit land and entered into the land and undertook several developments thereon including building their matrimonial home which he has continuously and peacefully lived on, cultivated, put clear boundaries and fenced without interruption from the defendants. That on 12th February, 1992 his mother who lived on the suit land died before the property was transferred to her by the defendants. Further, that since 1982 and preceding the death of his mother in 1992 he has been in continuous occupation and use of the suit without any interruption from the defendants. That the defendants have never raised any alarm, reported him to any authority nor institute any suit against his as regards the portion of the suit land.

6. The 2nd plaintiff also deposed that for over thirty years he has been in continuous occupation of the suit together with his wife and children but the defendants have now encroached onto their portion of the suit land with the intention to subdivide and sell the same to third parties in blatant disregard of their interests. He seeks that this honourable court intervenes and declare him the legal owner entitled to the 15 acres by virtue of adverse possession which he has been for a period of more than 12 years.

7. The 2nd defendant filed grounds of opposition dated 21st February, 2014 in which he opposed the originating summons on the grounds that: -

1. That the plaintiffs' entry into the said land was by agreement and by permission of the defendants.

2. That there have been no unlawful uninterrupted possession of the said land for a period of 12 years or more without the defendants consent.

3. That the plaintiffs have no capacity to institute this suit.

4. That the summons have been overtaken by events.

8. The 2nd defendant opposed the Originating Summons by a replying affidavit sworn on 13th December, 2017 in which he deposed that it is of his personal knowledge that the 1st defendant is now deceased and that he is the registered owner of the suit land together with the 1st defendant in equal shares. That on 17th January, 2007 they obtained the relevant land control board consent for partition of the suit land into two equal shares and each one of them to deal with who was alleged to have sold land to and that by the time of this suit was filed, the 1st defendant had filed a suit against him vide Narok CMCC No. 77 of 2008 seeking partitioning of the land between them and a mutation was prepared and paid for sometimes in the year 2011 and on 18th October 2011 a decree was issued by the court pursuant to the terms of their consent.

9. The 2nd plaintiff also deposed that by an application dated 14th February, 2012 in which the 2nd plaintiff made it clear that the family that were purportedly living on the disputed land had bought land jointly or individually from themselves as joint proprietors of the disputed land and the decree which was issued on 18th October, 2011 reflected the plaintiffs interests as can be seen in clause 2 and 3 of the said decree. He further deposed that the decree was clear that if any interested party had constructed his house on land not sold, he had to relocate rather than have the decree executed and that the plaintiffs went to court to frustrate the execution of the decree by cautioning the entire land on the basis of this suit. That this suit is meant to frustrate the execution of the decree and the plaintiffs cannot be said to be litigants who have come to court with clean hands. It is the 2nd defendant's position that he is very eager to have the decree executed and hand over what the plaintiffs claim from him, if any, but the suit has become an impediment.

10. By the time of writing this judgement, it is only the plaintiffs who had filed their written submissions. They filed undated written submissions on 27th September, 2017 in which they submitted that the doctrine of adverse possession has found clear exposition in many previous decisions of the court of appeal and more particularly in **Muraguri Githitho versus Mathenge Thiongó [2009] eKLR** which the court stated that **'The law on adverse possession is my view well settled. It is anchored on sections 7, 13 and 38 of the Limitations of Actions Act'**. The plaintiffs rely on the cases of **Wanyoike Gathure versus Beverly (1965) EA 514, 519, Omukaisi Abulitsa versus Albert Abulitsa, Kakamega HCC No. 8 of 2005 (UR)** and **Anne Gumbi Kiseli versus James Muriuki Mureithi [2013] eKLR**.

11. The plaintiffs further submitted that a party claiming for the relief of adverse possession must prove that the defendants are registered owners of the suit property as was in the case of **Peter Mbiru Michuri versus Samuel Michuki [2014] eKLR** and **Kahindi Ngala Mwangangi versus Mataha Lewa [2014] eKLR**. It is also the plaintiffs submission that the land claimed by adverse possession need not be all the land comprised in the title provided that the portion claimed is demarcated well enough to be identifiable. The plaintiffs also submit that it is not enough for a proprietor of the land to merely write to the trespasser. That a letter by the proprietor whether through an advocate or through the chief does not amount to assertion of title in law and cannot therefore interrupt the passage of time for the purpose of computing the period of adverse possession. That for there to be interruption, the proprietor must evict or eject the trespasser but because eviction is not always possible without breach of peace, institution of suit against the trespasser does not interrupt and stop the time from running.

12. It is their submission that as per the provisions of **Section 13 of the Limitation of Actions Act**, the plaintiffs were in possession which was adverse to that of the proprietor and a right of action clearly accrued to them and therefore their claim of adverse possession of the 26 acres out of the suit land is legitimate as evidenced by the letter from the chief showing that the suit piece belongs to the plaintiffs since they have been in occupation. The plaintiffs also submit that they have satisfied their claim as per section 38 of the limitations of actions act as

such, they have proved their case on a balance of probability as is required by law.

13. Having carefully analysed the Originating Summons, the grounds of opposition, replying affidavit and the written submissions, the issue for determination is whether the plaintiffs are entitled to the 26 acres out of the land known as Narok/Cis-Mara/II Motiok/235 by virtue of adverse possession.

14. The doctrine of adverse possession is provided for under **Section 7 of the Limitations of Actions Act** which states- **“An action may not be brought by any person to recover land after the end of 12 years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”** The rationale for this method of acquiring land was explained in **Adnam versus Earl of Sanwich (1877)2QB 845** as **‘The legitimate object of all statutes of limitation is in no way to quiet long possession, but they all rest upon the broad and intelligible principles that persons, who have at some anterior time been rightfully entitled to land or other property or money, have by default and neglect on their part to assert their rights, slept upon them for a long time as to render it inequitable that they should be entitled to disturb a lengthened enjoyment or immunity to which they have in some sense been tacit parties.’**

15. **Sections 37 and 38 of the Limitation of Actions Act** specify that if the land is registered under one of the registration **Acts**, then the title is not extinguished, but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him.

16. It is not disputed that the defendants sold 26 acres being portion of the suit land to the plaintiffs fathers in the year 1982. It is not disputed that the plaintiffs have lived on the portions of the suit land of the suit land since the year 1982 and made improvements thereon by constructing their matrimonial homes, cultivated and erected boundaries by fencing their portions. What is disputed is that there have been no unlawful interrupted possession of the said land for 12 or more years without the defendant’s consent. I understand this to refer that the interruption by the defendants on the suit land have been lawful for 12 years or more. However, no evidence has been adduced to show any interruption by the defendants. The 2nd defendant is of the view that this application has been overtaken by events owing to the amended decree issued on 31st October, 2011 by the Principal’s Magistrates’ Court.

17. It is clear from the pleadings that the Defendants sold the 26 acres portion out of the suit land to the Plaintiffs’ fathers in the year 1982 in which they took possession and have been in continuous use and peaceful enjoyment. Section 7 of the Limitation of Actions Act, provides that an action to recover land may not be brought after the end of twelve years from the date on which the right accrued. This means that the plaintiffs’ deceased fathers’ having bought the suit land in the year 1982 and taken possession of the same, the Plaintiffs herein could only seek to recover it from the Defendants, but only if they did so within twelve years after the sale agreement.

18. There is no doubt that the defendants were registered as the proprietors of the suit land in the year 1980 and 1981 respectively. The portion of the suit land was sold to the Plaintiffs’ deceased fathers’ in the year 1982. If we are to compute the time, such claim would have arisen in the year 1994. Also according to the pleadings, it appears that interruptions began to take place after thirty years of their occupation on the portion of the suit land. This means that since occupation in the year 1982, the defendants interfered with their peaceful and quiet use of the land in the year 2012. However, this does not seem to be the case as the plaintiff’s sought to participate in the Chief Magistrates’ Court civil suit No. 77 of 2008 as interested parties. A further look at the documents relied on by the 2nd defendant indicated that the defendants were parties to CMCC No. 77 of 2008 whose main issue was on partitioning of the suit land between the defendants. In my view, the action was first founded on a contract between the defendants and the plaintiffs’ deceased fathers. **Section 4 (1) (a) of the Limitation of Actions Act** provides that: - **‘No action founded on contract may not be brought after the end of six years from the date on which the cause of action accrued’**. No action was brought by the plaintiffs deceased fathers within the period from 1982-1988. Therefore a claim of adverse possession would begin to accrue after 12 years from 1988. The Plaintiffs also claim uninterrupted use of their respective portions of land. From the pleadings the plaintiffs seemed to have been in possession and occupation of their respective portions of the land until they participated in the civil suit no. 77 of 2008. From the year 1988, twelve years accrued in the year 2000. Thereafter, from the year 2000 a claim of adverse possession would accrue as against the defendants. The 2nd defendant has not disputed the same and I will not delve any further.

19. The other question that this court needs to address is the amended decree issued by the trial court in CMCC 77 of 2008. Item 2 of the amended decree states that **‘The third parties who have purchased portion out of the subject parcel of land from the proprietors jointly or individually and whether they are in occupation or not shall have their interests addressed after partition’**. Item 3 states that **‘The third parties who are in occupation of the subject parcel of land, do relocate in the event that where they occupy at the moment may fall under ownership of the other proprietor who did not sell any portion to them’**. In my view, the orders appear not to take into account the developments made by the Plaintiffs in their respective portions of the land and since no appeal has been preferred, I will not delve any further.

20. Arising from the above, I do find that the 1st and 2nd Plaintiffs have satisfied the requirements to warrant claim of adverse possession and this honourable court makes the following determination: -

- 1. That the Plaintiffs have been in continuous and uninterrupted occupation, possession and use of twenty six acres comprising land parcel No. Narok/Cis-Mara/II Motiok/235;**
- 2. That the said possession, use and continuous occupation have been peaceful, open and adverse to the Plaintiffs’ since the year 2000;**
- 3. That the rights of the Defendants to the 26 acres portion of the suit land have been extinguished by effluxion of time;**
- 4. The Plaintiffs are declared the owners of the 26 acres out of the portion of Land parcel No. Narok/Cis-Mara/II Motiok/ 235 and a certificate of title do issue in their respective names.**

5. The 2nd Defendant is to bear the costs of this suit. It is so ordered.

DATED, SIGNED AND DELIVERED VIA EMAIL ON THIS 24TH DAY FEBRUARY, 2022.

Mbogo C.G

Judge

24/2/2022

In the presence of: -

CA: T.Chuma