REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT KERICHO

ELC NO. 8 OF 2012 (O.S)

PAUL KIBET KOECH.....PLAINTIFF

VERSUS

DAVID KIPRONO KOSKE.....DEFENDANT

JUDGEMENT

1. By an Originating Summons dated 19th December 2012, the Plaintiff herein claims to be entitled to be registered as the sole absolute proprietor of LR No. Kericho/Chemagal/2113 **by adverse possession** and therefore the court should order for cancellation of the title in the name of the Defendant. The Plaintiff further seeks for any other relief as may be deemed fit and just to grant.

2. The Originating Summons is premised on the Verifying *Affidavit* sworn on the 19th of December 2012 by Paul Kibet Koech the Plaintiff herein.

3. Pursuant to the service of the Originating Summons and the annexures upon the Defendant herein, he filed his Replying Affidavit dated the 26th February 2013 on the 28th February 2013 wherein he conceded to being the registered proprietor of the suit land herein. The Defendant however did aver that he had not sold the suit land to the Plaintiff but rather that he had left the said parcel of land in the care of the Plaintiff who contrary to their verbal agreement, had trespassed on the same and had started ploughing and planting maize and beans thereon.

4. On 30th January 2014 parties took directions that the Originating Summons proceed by way of viva voce evidence and subsequently the court directed that they comply with the provisions of Order 11 of the Civil Procedure Rules. On the 28th April 2016, parties again took directions to the effect that the suit be heard by way of viva voce evidence wherein the Originating Summons be deemed a Plaint and the Replying Affidavit a Defence.

5. Via a ruling delivered on 16th November 2017 pursuant to a Notice of Motion dated 5th April 2017, the application seeking interim orders was disallowed and parties ordered to maintain the status quo pending the hearing and determination of the suit herein.

6. The matter proceeded for hearing on the 11th June 2018 with the Plaintiff's case wherein he adopted his recorded statements as his evidence and testified as PW1 to the effect that he lived in Sotik and was a farmer. That he had bought parcels of land known as LR No. Kericho/Chemagal/2113 and 2114 (measuring 0.5 of an acre) from the Defendant.

7. That he had bought parcel No. 2113 which measured two acres in the year 1992 wherein he took occupation from 1992 to 2009 when the Defendant started claiming those same for reasons that he had not bought this particular parcel. That subsequently the Defendant had trespassed onto parcel No. 2113 and had cut down some trees where the matter had been reported to the police and parties had been referred to the Chief for arbitration.

8. That he had paid Kshs. 141,000/= as part payments of parcel No. Kericho/Chemagal/2113 and the only balance that had remained was Kshs. 7,000/= which he was to pay upon transfer and issuance of a title deed. That in exchange for the trees on the land, parties had agreed that he would give the Defendant a bull as the trees were still young.

9. That when they had gone before the Chief, the Defendant admitted before 7 elders that he had sold to him the land wherein the elders had reached the decision that the land belonged to the Plaintiff.

10. That the Defendant had been dissatisfied with the findings and filed suit at Sotik vide PMCC No. 52 of 2009. The case had been dismissed with costs for lack of jurisdiction. He produced the decree of the Sotik case issued on 24th August 2012 as Pf exh 1 and the

proceedings thereto as Pf exh 2. He marked the minutes of the meeting of the elders dated 4th May 2009 as Pf MFI 3. The witness further testified that he had placed a caution on the suit property (No. 2113) in 2011 and produced the certificate of official search registered in the Defendant's name as Pf exh 4. His evidence was that he had stayed on the suit land for more than 22 years. He sought for the Defendant's title be cancelled with costs of this suit.

11. In his cross examination the Plaintiff herein confirmed that his residence was on parcel No. 2114 and that the trees on parcel No. 2113 were planted by the Defendant. That he used parcel No. 2113 for farming and grazing his cattle. He also confirmed that the meeting with the Elders took place in 2009 and had been presided over by 7 village elders. That although the Chief did not attend the meeting yet, its secretary had been one Nicholas Langat. He further confirmed that one of the elders did not sign the minutes.

12. His further evidence was that although he had a balance of Ksh. 7,000/= each acre having cost Ksh 74,000/= yet he was claiming the land because he had bought it and had stayed on it for more than 22 years. That it was not true that he had trespassed onto parcel No. 2113.

13. He also confirmed that they did not enter into a written agreement with the Defendant and neither did they obtain consent of the Land Control Board, due to ill health but that he was still using parcel No. 2113 for farming.

14. In re-examination the Plaintiff asserted that he had requested the Defendant on several occasions to transfer parcel No. 2113 to him in vain. He also confirmed that Parcel No. 2113 was derived from Kericho/Chemager/3039 and 3040 and that although he lived on parcel No. 2114, yet he had developed parcel No. 2113 by planting trees and crops. That his stay on the suit parcel was peaceful until 2009 which was a period of 17 years, that the Defendant decided to sue him in Sotik Court. That the reason the Defendant started claiming the land was because he had shown its title to his sons who were adults and who had realized that the title was still in their father's name.

15. The next witness Jonathan Kipyegon Nyole testified as PW2 and informed the court that he comes from Kapkesombe village, Sotik Sub-County, Bomet County. That the Defendant sold two acres of land to the Plaintiff in 1992 wherein the Defendant left and went to live in Nakuru. The Plaintiff then took possession of the land in 1992 and started using it to date. That when the Defendant sold the land, he had demolished his houses and left. He then returned in the year 2009 claiming that he had not sold the trees wherein he started cutting them and the matter was reported to the police who advised the parties to settle the matter with the Elders.

16. He confirmed that the meeting by the Elders had been convened wherein a total of 144 people attended. That Joseph Kipkirui Chelule the village elder was also in attendance. That the Plaintiff's neighbor Augustine Kurgat Koech was also there. He confirmed that the land had been sold for Ksh. 148,000/= with each acre going for Ksh. 74,000/=. That the Plaintiff had paid Ksh. 141.000/= and left a balance of 7000/=. The elders decided that the land belonged to the Plaintiff. He identified the minutes of the meeting and went ahead to state that person who have had recorded the minutes had been one Nicholas Langat. He also confirmed that the Defendant had filed suit at Sotik Law court after he was dissatisfied with the decision by the Elders.

17. On cross examination the witness confirmed that the Plaintiff was his cousin and that she was not there at the time of the sale and neither had he seen the sale agreement. He also confirmed that the Plaintiff had title to half an acre to a land parcel No. Kericho/Chemagel/2014(sic). That the suit land measuring 2 acres was registered to the Defendant. He also reiterated that the Defendant came in the year 2009 wherein he had denied having cut the trees. The Plaintiff closed its case.

Defence case

18. The Defendant David Kiprono Koskei testified as DW1 to the effect that

he lived in Molo and was a farmer. That he knew the Plaintiff Paul Kibet Koech and that he did not agree with the Plaintiff's assertion that he has adverse possession over his land. That in the year 1992, when he left for Molo, he had been living on his land No. Kericho/Chemagel/2113 in Kaplong. He confirmed that in the year 1988, he had sold ½ acres of land to the Plaintiff and that they had gone to the Land Control Board where the Plaintiff had been given a go ahead to take his title to plot No. 2114. There was a subdivision of the land wherein the plaintiff got parcel No. 2114 and the Defendant got parcel No. 2113 measuring 2 acres.

19. His evidence was that since the Plaintiff was his friend and neighbor, in 1992 when he left for Molo he had asked him to take care of his land which at the time had been fenced, he had also planted trees in 1998 and used to cultivate it. That in the year 2009 he wanted to sell his trees wherein he went to the suit land to cut the same that the Plaintiff had reported him at Sotik Police Station wherein he sons had been arrested. That he had been asked to bring the title and he had complied. The Plaintiff did not produce any documents of sale and his sons were released. He proceeded to cut down the trees. That at the time he had found the Plaintiff had planted crops on his land wherein he had filed Civil Case No. 52 of 2009 in Sotik.

20. That subsequently after valuation of his land, the court at Sotik had found that it lacked jurisdiction over the matter. That as he prepared to file another suit, the Plaintiff filed the current suit. His testimony was that indeed from 1992 to 2009 the Plaintiff had been on his land with his permission and that he (Defendant) had continued to cultivate and plant trees some which were still on the suit land. He denied having sold the land to the Plaintiff as there had been no sale agreement, and sought that the suit be dismissed with costs.

21. On being cross-examined the Defendant confirmed that currently he lived in in Kuresoi where he moved after he had sold ½ an acre to the Plaintiff and that he had been living there since 1992. He confirmed that even after he had moved away his still used to cultivate on the suit land and that he had left the Plaintiff therein to look after his land and not to cultivate there on. That in the year 2009 the Plaintiff had planted maize on his land contrary to their agreement, the reason why he had filed suit against him. That the Plaintiff used to take care of his land as a friend and it was not true that the Plaintiff had given him Ksh 141,000/=.

22. He confirmed that there had been no the sale agreement between them and proceeded to testify that they had no issues before 2009 when the Plaintiff had had but his sons arrested. He was adamant that he had not sold the land and that the Plaintiff started cultivating on his

land in the year 2009 and even grazes his cattle there on. He produced his title to No. Kericho/Chemagel/2113 as Df Exh 1 wherein the defence closed its case and parties filed their respective submissions.

Plaintiff's submission.

23. The Plaintiff in their submission relied on the prayers sought in the Originating Summons dated 19th December 2012 before framing their issue for determination as to whether the Plaintiff was entitled to the orders sought.

24. The Plaintiff relied on the provisions of Section 7 of the Limitation of Actions act as well as the case of **Wilson Njoroge Kamau vs Nganga Mauceru Kamau[2020] eKLR** to submit that the key test on a claim for adverse possession was that the owner of the land must have been dispossessed or has discontinued possession of the property. That in the present case the Plaintiff upon purchase of the suit land from the Defendant in 1992 had settled on the suit land to date.

25. That in the minutes produced as Pf exh 3, the Defendant had confirmed to having entered into an agreement of the sale of land with the Plaintiff in the year 1992 and he acknowledged to having been paid cash and a bull for consideration of the land. That the plaintiff had been in peaceful open and continuous possession of the suit land since 1992 for a period of more than 12 years. That the possession was not by force or secrecy but was without the authority or permission of the owner. The Defendant has not disputed the fact that the Plaintiff has been in occupation for a period of more than 12 years.

26. That indeed the Defendant in his Replying Affidavit had not provided evidence to the effect of the Plaintiff has not enjoyed peaceful open, continuous possession. On the contrary, what the Defendant had cunningly tried to bring out was that he had been cultivating on the suit land every planting season yet he had been away from 1992 and only resurfaced in the year 2009 which was after the lapse of 17 years.

27. In conclusion the Plaintiff prayed that the court finds merit in their Originating Summons and grants him the orders as prayed.

Defendant's submissions.

28. The Defendant submitted that through his well-articulated Replying Affidavit, he had denied the allegations brought forth by the Plaintiff which gave rise to two theories to wit that the Plaintiff had bought the suit land, and secondly that he had acquired it by adverse possession. That the evidence adduced by the Plaintiff and his witnesses were to the effect that the suit land had been purchased. No evidence was given of adverse possession

29. That his evidence had been cogent and unchallenged to the effect that he heard used the land and tended to his trees without any interruption from the year 1992 up to 2009 when the Plaintiff went against his instructions and/or permission. It was his submissions that the Plaintiff had not satisfied the ingredients required in an Adverse Possession case and the evidence and records did not support this principle. That his case had fallen below the threshold required. He placed reliance on the case of **Kimoi Ruto & Another vs Samuel Kipsogei Keitany & Anotehr [2014] eKLR** and sought that the Plaintiff's case be dismissed with costs

Determination

30. I have considered the evidence herein, the submissions and the authorities cited by learned counsel. What comes out clearly in this matter is that the Plaintiff herein seeks title to land parcel No. Kericho/Chemagel/2113 by adverse possession, land which is registered to the Defendant, having been in occupation of the same for more than 12 years and pursuant to the provisions as stipulated under Section 7 of the Limitation of Actions Act.

31. The basis of the Plaintiffs claim is that he bought the said parcel of land measuring two acres from the Defendant in the year 1992 and paid a sum of ksh 141,000/= out of a total of Ksh. 148,000/- being the purchase price. That he took possession of the same and has been farming on it and grazing his cattle until the year 2009 when the Defendant lay claim to it.

32. The Defendant's case and the other hand is to the effect that both parties being friends he had sold to the Plaintiff ½ acre of land comprising of land parcel No. Kericho/Chemagel/2113, wherein he had gone to Molo and left the Plaintiff to take care of his land parcel No. Kericho/Chemagel/2114 measuring 2 acres which he had fenced and planted trees. That upon his return in the year 2009 to harvest his trees, the Plaintiff lay claim to the same and has now filed suit seeking adverse possession. That the Plaintiffs entry onto the suit land was not adverse but was by his permission.

33. From the summary of the case herein above I find matters arising for determination as follows;

i. Whether *there was a sale agreements between the parties.*

ii. Whether the Plaintiff has acquired title to LR No. Kericho/Chemagal/2113, by adverse possession of.

34. On the first issue as to whether there was a valid Sale Agreement between the parties, I have looked at the requirements of a contract for the disposition of interest in land as per the provisions of **Section 3(3)** of the **Contract Act** which provides as follows;

3(3)No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

35. In the present case, I find that apart from the pleadings, no evidence was adduced informing me that the parties herein did indeed enter into an agreement for sale on any date. The above aside, I do not have any document that can term itself as an agreement for sale of land, or indeed any document that can be said to be evidence of a transaction, and the terms thereof between the Plaintiff and the Defendant. Indeed it is trite law that if one wished to enforce an agreement for sale of land, then such transaction ought to be in writing as provided for Section 3 (3) of the Law of Contract Act herein above stated. The existence of such sale agreement was denied and therefore it was incumbent on the Defendant to produce documentary evidence to the contrary.

36. There was also evidence that no consent of the Land Control Board had ever been obtained and therefore it goes without saying that even if there had been the sale of the suit land as the Defendant would want the Court to believe, such sale was null and void and cannot be given effect to without their being a consent of the Land Control Board. This line of argument must therefore fail.

37. On the second issue for determination as to whether the Plaintiff had acquired adverse possession to the suit land, the court is mindful of the legal attribution to the doctrine of Adverse Possession in Kenya which is embodied in Section 7 of the Limitation of Actions Act, (Cap 22) in these terms:

> *"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it is first accrued to some person through whom he claims, to that person".*

38. Section 13 of the Act is in these terms:

> *"(1) A right of action to recover land does not accrue unless the land is in possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession....."*

39. Section 17 of the said Act stipulates that upon the expiry of the period (12 years) prescribed by the Act for a person to bring an action to recover land, the title of that person to the land stands extinguished.

40. The Court of Appeal in the case of Benjamin Kamau Murma & Others vs Gladys Njeri, C A No. 213 of 1996 held as follows:

> ***"The combined effect of the relevant provisions of sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land."***

41. The onus is on the person or persons claiming adverse possession:

> ***".. to prove that they have used this land which they claim as of right: Nec vi, nec clam, nec precario (No force, no secrecy, no evasion). So the Plaintiffs must show that the company had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavors to interrupt it or by any recurrent consideration''***

42. The main the elements of adverse possession that a claimant has to prove include :

i. actual,

ii. open,

iii. exclusive

iv. and hostile possession of the land claimed.

Has the Plaintiff herein demonstrated the said elements?

43. As stated herein above, the critical period for the determination as to whether possession is adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it. See **Littledale vs Liverpool College (1900)1 Ch.19, 21.**

44. It is not disputed that Plaintiff got into possession of the suit land in 1992 after an alleged ''sale transaction'' and therefore this being a matter where the Plaintiff has sought for orders that he be registered as proprietor of parcel LR No. Kericho/Chemagal/2113, the burden was on him to prove, not only the period but also that possession was without the true owner's permission. From the evidence adduced it is not in

dispute that prior to the Defendant leaving for Molo, he had fenced the suit land and had planted trees thereon. It is also not in dispute that the Plaintiff herein took occupation of the said parcel of land from 1992 to 2009, which was a period of 17 years. There is nothing to suggest that that occupation was in secrecy or that it was not known to the Defendant who returned in 2009 to cultivate trees he had planted thereon. By this time, the Plaintiff had disposed him and asserted his right in a manner that was in clear conflict with the Defendant's rights. Indeed during cross examination the Defendant had stated that

"*I left the Plaintiff therein to look after my land and not to cultivate there on''*

45. By his own admission, the Defendant had confirmed that the Plaintiff had been dealing with the suit premises as if it was exclusively his. That the Defendant was, as such dispossessed of the suit premises by those acts which were *nec vi, nec clam,nec precario (*that is, neither by force, nor secretly and without permission).

46. The Court of Appeal in **Chevron (K) Ltd v Harrison Charo Wa Shutu [2016] eKLR** reminded themselves of the rationale of acquiring land by Adverse Possession as explained in the decision in **Adnam v Earl of Sandwich (1877) 2QB 485** that:

> "*The legitimate object of all statutes of limitation is in no doubt to quiet long continued 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"*

47. I find and hold that the Plaintiff has proved on a balance of probabilities that his right of action as against the Defendant had accrued as at the time of filing this suit for the suit property to be said to have fallen into his possession pursuant to the provisions of Section 38 as read together with sections 7, 9 and 13 of the Limitation of Actions Act.

48. In the circumstance herein the Plaintiff's Originating Summons dated the 19th December 2012 succeeds in its entirety as prayed. Since the Plaintiff has obtained land, there shall be no costs awarded.

49. It is so ordered.

DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 24TH DAY OF FEBRUARY 2022.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE