



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

ELC. NO.896 OF 2012

(FORMERLY HCC NO. 141 OF 2012)

RITA JEPTOO KURUI.....1ST PLAINTIFF

TAPTUEI KIGEN2ND PLAINTIFF

VERSUS

PHILIP CHERUIYOT KIGEN.....DEFENDANT

JUDGMENT

1. The Plaintiffs commenced this claim vide the originating summons dated 28th June, 2012 seeking for the following orders:

i. THAT the Defendant/Respondent be compelled to surrender the original title deed to this Honourable Court for cancellation on account of fraud wherein the Defendant/ Respondent improperly obtained the same in his name as against the Plaintiffs who have been in adverse possession of the same for over 30 years.

ii. THAT a declaration be issued that the Plaintiffs are the rightful owners of the suit parcel of land by adverse possession as against the Defendant and a vesting order be issued transferring the said land parcel L.R No. ELGEYO MARAKWET/KESSUP "B"/479 measuring 1.4 Ha in favour of the Plaintiffs in equal shares.

iii. THAT the Deputy Registrar of this Honourable Court or such authorized officer be mandated to execute all relevant documents of conveyance to enforce prayer No. (ii) above.

iv. THAT the Defendant/Respondent be restrained permanently from taking over/reprocessing (sic), entering, alienating, disposing and/or in any other manner interfering with the Plaintiffs' use, possession and ownership of all that parcel of land L.R No. ELGEYO/MARAKWET KESSUP "B"/479 measuring about 1.4 ha or thereabouts.

v. Costs of this summons be provided for.

The summons is supported by the affidavit of Rita Jeptoo Kurui, the 1st plaintiff, sworn on the 28th June, 2012 to which she annexed a copy of certificate of search and green card confirming that the said land is registered in the name Philip Cheruiyot Kigen, the defendant, from 9th September 1995. She also attached a bundle of photographs. The plaintiffs deponed among others that they are related and have resided on the suit land that is registered in the name of the defendant who is their uncle for over 30 years peacefully. That in March, 2012 the defendant entered onto the land, ploughed a portion of it, cut down trees growing there and burnt charcoal without their consent. That when they conducted a search on the title, they found out that the defendant has fraudulently and illegally got registered as the owner of the land, which was held in trust of the family of the initial registered owner.

2. The Defendant opposed the Plaintiffs' claim through the replying affidavit sworn on the 12th September, 2012 in which he among others deponed that the suit land was transferred to him by his father, Kigen Rugaruk Chepkwony pursuant to a letter of consent dated the 7th December, 2011. That before being served with the suit papers in this case, one Charles Kigen, who is his distant relative, had lodged a complaint against him and he was summoned to appear before the chief on the 7th may 2012. That his aunt who is childless used to stay with the said Charles on some other land but used the suit land on lease basis. That the dispute over the suit land started when Charles defaulted in paying for use of the land and started demanding that it be shared with his family equally. That the dispute was heard during a family meeting and resolved in his favour. He denied that any of the plaintiffs are dwelling or cultivating on the suit land for over 30 years, as he is the one who had been in possession up to and after 2012. That Charles is the Assistant Chief and enlisted the support of the Forest

Department in 2012 to stop him from accessing his tress and developing the land in dispute. He denied having obtained registration with the land through fraud or holding the title in trust for other beneficiaries.

3. The plaintiffs testified as PW1 and PW2 and called Hellen Kharemwa, County Land Registrar, who testified as PW3. The defendant testified as DW1 and called William Ayatsi Chemitei who testified as DW2. That upon the parties closing their cases, the learned counsel for the defendant and plaintiffs filed their submissions dated the 21st May, 2021 and 8th June, 2021 respectively.

4. The following are the issues for the court's determinations;

a. Whether the Plaintiffs' claim meets the threshold for a claim in adverse possession;

b. Whether the Defendant's title ought to be cancelled; and

c. Who pays the costs.

5. The court has considered the pleadings, evidence tendered, submissions filed, superior courts decisions cited thereon and come to the following determinations;

a. THAT the law on adverse possession is anchored on *Section 7,13,17,37 & 38 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya, and Section 28 (h) of the Land Registration Act No. 3 of 2012*. That a party claiming to have acquired adverse possession rights bear the burden of proving all the ingredients required under the aforementioned provisions of the Law as obligated by the provisions of *Section 107, 108 and 109 of the Evidence Act, Chapter 80 of the Laws of Kenya*. That for a party to advance a successful claim for adverse possession, they must show that they first and foremost have had continuous and uninterrupted possession of the subject land for a period of at least twelve (12) years. In the case of **CELINA MUTHONI KITHINJI V SAFIYA BINTI SWALEH & 8 OTHERS [2018] eKLR**, the court made the following observation:

“This being a claim for adverse possession, the plaintiffs must show that they have been in continuous possession of the land for 12 years or more; that such possession has been open and notorious to the knowledge of the owner and that they have asserted a hostile title to the owner of the property.”

b. THAT during the hearing of this case, PW1 testified that she lives with her husband and children in Kapteren, but in the same breath she also stated that she stays at her grandmother Soti's place, which place is not the suit land herein. PW2 testified that she lives in Kamarin. On the other hand, DW1 testified that he does not reside on the suit land but he has planted trees on it and that his neighbour looks after the trees on his behalf. Although both PW1 and PW2 stated that their parents were buried on the suit land, that on it's own is not sufficient evidence to amount to a finding that the Plaintiffs have been in possession of the suit land for a period of thirty (30) years as they claimed. The Court of Appeal in the case of **MTANA LEWA V KAHINDI NGALA MWAGANDI [2015] eKLR** held as follows:

“... Adverse possession is essentially a situation where a person takes possession of land and asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force nor stealth or under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner.”

c. The court recognizes the fact that continuous possession for a period of at least twelve (12) years constitutes the primary element that must be satisfied in proving adverse possession. From the evidence on record, the court is not convinced that the Plaintiffs are in actual and / or constructive possession of the suit land and their claim for adverse possession must fail. In the **MTANA LEWA CASE (SUPRA)**, the court made the following observation:

“It is also a well settled principle that a party claiming adverse possession ought to prove that this possession was “nec vi, nec clam, nec precario,” that is, peaceful, open and continuous. The possession should not have been through force, no in secrecy and without the authority or permission of the owner.”

The court is inclined to believe the fact that the Defendant is most probably the one in constructive possession of the suit land, as he testified that he had planted trees on the suit land, that are looked after by a neighbour since he lives away from the suit land. That as the Plaintiffs have failed to prove possession for the period required or at all, the court finds it is not necessary to attempt to analyse the other elements of adverse possession. The Plaintiffs' claim for adverse possession has no merit and the same is hereby dismissed.

d. The Plaintiffs have contended that the Defendant unlawfully and irregularly caused the suit land to be registered in his favour. The Defendant on the other hand produced copies of the green card, an application for a Land Control Board consent, consent letter and a copy of a title deed issued in his favour as evidence that he is the rightful owner of the suit land. That entry No. 3 on the green card is to the effect that a transfer was registered in the Defendant's favour on 9th September, 1995. The application for an LCB consent relied upon to authenticate the aforementioned transfer is dated 6th December, 2011, the letter of consent is dated 7th December, 2011 while the title deed issued in favour of the Defendant is dated 7th December, 2011. That when a party's title is challenged to have been irregularly obtained, it is not sufficient for the party to produce a copy of the title deed, but must go further and address the discrepancies. That in the case of **MUNYU MAINA V HIRAM GATHIHA MAINA [2013] eKLR** the Court of Appeal held as follows:

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

Further in the case of **ARTHI HIGHWAY DEVELOPERS LIMITED V WEST END BUTCHERY LIMITED & 6 OTHERS (2015) eKLR**, the court held that a party cannot invoke indefeasibility of title where the process of acquisition of the title is irregular. That in view of the findings in the aforementioned cases, the court is obligated to examine the process leading up to the issuance of the impugned title deed to the defendant.

e. The suit land herein is agricultural land, and therefore section 6(1) of the Land Control Act chapter 301 of Laws of Kenya is instructive. It provides that any transactions affecting agricultural land is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act. That Section 8 (1) of the Land Control Act provides as follows:

“An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board **within six months** of the making of the agreement for the controlled transaction by any party thereto:

Provided that the High Court may, notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit”.
(emphasis mine)

In the case of **HIRANI NGAITHE GITHIRE V WANJIKU MUNGE [1979] eKLR**, the court held as follows:

“Section 6 of the Land Control Act is an express provisions of a statute. It is a mandatory provision, and no principle of equity can soften or change it. The court cannot do that; for it is not for us to legislate but to interpret what parliament has registered. So in this case that agreement between the parties having being entered in June 1969 became void for all purposes (including the purpose of specific performance) at the expiration of three months from the date of making it; and since no consent had been obtained within that time, nothing can revise or resurrect such an agreement. Failure to obtain the necessary Land Control Board consent automatically vitiates an agreement to be a party to a controlled transaction. Section 6 prohibits any dealing with agricultural land in a land control area unless the consent of the Land Control Board for the area is first obtained and any such dealing is not only illegal but absolutely void for all purposes.”

Although the aforementioned authority makes reference to a period of Three (3) months, the current position of the law requires the consent to be sought within Six (6) months of the transaction involving agricultural land. The Defendant has not given an explanation why the LCB consent was only sought approximately 16years after the transfer of 1995 that it seeks to authenticate took place. In the circumstances the court finds that relying on an LCB consent that contravenes the express provisions of *section 8(1) of the Land Control Board Act* is highly irregular and any proprietary interests accrued while placing reliance on such a defective LCB consent is unconscionable.

6. The court therefore finds and orders as follows;

a. THAT the title held by the Defendant was irregularly and or unprocedurally obtained, and the court orders that the title deed over ELGEYO MARAKWET KESSUP “B”/479 issued and or re-issued on 7th December, 2011 to the defendant be cancelled and the proprietary rights over ELGEYO MARAKWET KESSUP “B”/479 be reverted to Kigen Eugaruk Changwony, as per entry No. 2 of the green card.

b. THAT as the Plaintiffs did not succeed in their claim for adverse possession, and the Defendant has been found to have irregularly and/or unlawfully obtained registration with the suit land, the court orders each party to bear its own costs.

c. THAT the Deputy Registrar of this court do forward a certified copy of this judgement to the County Land Registrar, Elgeyo Marakwet, for information and action in respect of (a) above.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 16TH DAY OF FEBRUARY, 2022

S. M. KIBUNJA, J.

ELC ELDORET

IN THE VIRTUAL PRESENCE OF;

PLAINTIFFS: absent

DEFENDANT: absent

COUNSEL: Mr. Komen for the Plaintiffs

Mr. Cheptarus for Defendant

ONIALA: COURT ASSISTANT

S.M.KIBUNJA,J.

ELC ELDORET.