



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO. 128 OF 2016 (O.S)

IN THE MATTER OF THE LIMITATION OF ACTIONS

ACT, CHAPTER 22 OF THE LAWS OF KENYA

AND IN THE MATTER OF A CLAIM FOR ADVERSE POSSESSION

PURSUANT TO SECTION 38 OF THE LIMITATION OF ACTIONS ACT

BETWEEN

NDEGE MAKORI.....PLAINTIFF

AND

ROSE KEBATI

BERNARD KEBATI

(Sued as the legal representative of

KEBATI NYAGWOKA-(Deceased).....DEFENDANTS

JUDGMENT

INTRODUCTION

1. The Plaintiff instituted this suit by way of Originating Summons dated 22nd April 2016 seeking the following reliefs:

a) A declaration that the Defendants' rights to recover the whole of L.R No. WEST KITUTU/BOGUSERO/2551 is barred under the Limitation of Actions Act, Chapter 22 of the Laws of Kenya and their title thereto extinguished on the grounds that the Plaintiff herein has openly, peacefully and continuously been in occupation and possession of the aforesaid portion of land for a period exceeding 37 years.

b) There be an order that the Plaintiff be registered as the proprietor of the whole of L.R No. WEST KITUTU/BOGUSERO/2551 in place of Kebati Nyagwoka, now deceased albeit represented by the Defendants, on account of being the duly appointed and constituted legal administrators.

c) There be an order restraining the Defendants either by themselves, agents, servants and/or employees from interfering with the Plaintiff's peaceful possession and occupation of the whole of L.R No. WEST KITUTU/BOGUSERO/2551 in any manner whatsoever and howsoever.

d) The Deputy Registrar and/or the Executive Officer of the High Court be directed and/or ordered to execute the transfer instruments and all attendant documents to facilitate the transfer and registration of L.R No. WEST KITUTU/BOGUSERO/2551 in favour of the Plaintiff.

e) The costs of the Originating Summons be borne by the Defendants.

2. The Originating Summons is supported by the Plaintiff's affidavit sworn on the 22nd day of April, 2016. In the said affidavit he deposes

that on 8th January, 1979 he bought a portion of land measuring 1.5 acres comprised in land parcel number WEST KITUTU/BOGUSERO/1904 from one Kebati Nyagwoka, now deceased, as per the annexed sale agreement. He then took possession of the portion that was sold to him. The vendor subsequently sub-divided parcel number 1904 into two parcels namely, parcel number WEST KITUTU/BOGUSERO/2551 and 2552. He depones that after the said sub-division, his portion fell within land parcel number WEST KITUTU/BOGUSERO/2551 which measures 0.7 Hectares.

3. The Plaintiff avers that despite the fact that the deceased did transfer the portion that the Plaintiff had bought or obtained the consent of the Land Control Board, the Plaintiff continued to occupy and cultivate the said parcel and remained in open, peaceful and continuous possession thereof upto 2016 when he filed this suit which is a period of 37 years. It is therefore his deposition that the Defendant's interest in the suit property has been extinguished.

4. In response to the Originating Summons, Bernard Kebati the 2nd Defendant swore a Replying Affidavit on his own behalf and on behalf of the 1st Defendant in which he deponed that he is the son of the late Kebati Nyagwoka- deceased who died on 15th March, 2002. He denied that his late father sold any land to the Plaintiff. He deponed that the sale agreement attached to the Plaintiff's Supporting Affidavit did not describe the parcel of land that was being sold. He further deponed that the Plaintiff never obtained the consent of the Land Control Board within a period of six months after signing the sale agreement as required under section 6 of the Land Control Act, Cap 302 of the Laws of Kenya. He denied that the Plaintiff had been in open, continuous and uninterrupted occupation of any part of the suit property.

5. It is the Defendant's deposition that the parcel being claimed by the Plaintiff was known as WEST KITUTU/BOGUSERO/2552 and the same had been sold to Peter Bosire Nyambane in 1988. He added that his late father had been cultivating the land being claimed by the Plaintiff and the Plaintiff can therefore not claim to have been in exclusive possession thereof.

He deponed the parcel of land that the Plaintiff was claiming was non-existent as they reside on the said parcel of land.

6. The suit was disposed of by way of *viva voce* evidence and both parties testified and called their witnesses.

PLAINTIFF'S CASE

7. The Plaintiff testified as PW1 after which he called two witnesses. He told the court that the late Kebati Nyagowka sold him a portion of land parcel number WEST KITUTU/BOGUSERO/1904 measuring 1.5 acres. He produced the documents in his List and Bundle of documents including the Green card in respect of land parcel number WEST KITUTU/BOGUSERO/1904, a copy of the sale agreement dated 8th January 1979, the mutation form in respect of parcel number 1904, copies of certificates of official search in respect of parcel number WEST KITUTU/BOGUSERO/2551 and 2552, minutes of a meeting held by the Chief to resolve the dispute between the Plaintiff and the Defendants on 18th July 2015, and a bundle of photographs of the developments on the suit property. The same were produced as Plaintiff's exhibit 1-7.

8. It was the Plaintiff's testimony that the deceased sold the suit property before he married the 1st Defendant and that he used the proceeds of the sale to pay dowry for the 1st Defendant. He further testified that after he bought the suit property he took possession of the same and he has been in occupation thereof to date. He stated that the deceased died before he transferred the suit property to him and that he had sued the Defendants so that they could transfer the portion that he had bought to him.

9. Upon cross-examination, he stated that he bought the suit property at a price of Kshs. 1,400 and he paid the purchase price in full. He stated that the deceased died 23 years after he sold him the land but he had not yet transferred the same to him. He said he had planted some coffee and assorted trees on the suit property but he did not stay there. He said he had learnt that the original land parcel had been sub-divided into two but he was not sure when the said sub-division took place.

10. In re-examination, he clarified that another portion of the original parcel (1904) was sold to Peter Bosire but his portion was separate and distinct from the one bought by Peter Bosire. He confirmed that he paid the purchase price in full and that the deceased never had a problem with him.

11. Stanslaus Basweti Ogumbo testified as PW2. He stated that the 1st Defendant was his niece while the Plaintiff was his cousin. He relied on his witness statement dated 13th June 2020, in which he stated that he was aware that the Plaintiff had been in continuous occupation of the suit property since he bought the same on 8th January, 1979.

12. Upon cross-examination he stated he was present when the Plaintiff bought the suit property though he did not sign the sale agreement as a witness. He told the court that the Plaintiff paid the full purchase price of Kshs. 1400 and that the land belongs to the Plaintiff even though it is still registered in the name of Kebati Nyagwoka-deceased. He stated that the deceased was willing to transfer the suit property to the Plaintiff but he died before he effected the said transfer.

13. In re-examination he stated that the Plaintiff was still in occupation of the suit property and that the deceased had never interfered with him.

14. Yuvinalis Onyantha testified as PW3. He relied on his witness statement dated 13th June 2020, in which he stated that the Plaintiff bought the suit property from Kebati Nyagowka.

15. Upon cross-examination, he stated that he was not party to the sale agreement. He confirmed that the Plaintiff was in occupation of the suit property and he had occupied it peacefully since he bought it. He said he was aware that the dispute between the Plaintiff and the Defendants had been referred to the Chief. He clarified that the dispute related to the failure to issue the Plaintiff with a title deed.

DEFENDANT'S CASE

16. Bernard Kebati, the 2nd Defendant testified as the only defence witness. He told the court that his late father Kebati Nyabwoka was the original owner of land parcel number WEST KITUTU/BOGUSERO/1904. In 1988 the said parcel was sub-divided into two parcels namely WEST KITUTU/BOGUSERO/12551 and 2552. Parcel 2552 was transferred to one David Nyaoga Ondieki, while parcel 2551 remained in the name of Kebati Nyabwoka. It was his testimony that he was not aware that his late father had sold land to the Plaintiff as the agreement produced by the Defendant did not indicate whether any money was paid. He also stated that the Plaintiff never produced any consent from the Land Control Board.

17. He testified that his father died on 15.3.2002 and at the time of his death he was still registered as the owner of land parcel No. WEST KITUTU/BOGUSERO/2551 where he had planted trees, Napier grass, bananas and assorted crops. He told the court that the Plaintiff had never taken possession of the suit property nor had he carried out any developments thereon. He stated that after his father's death, he obtained a Grant of Administration after which he sub-divided parcel 2551 into two portions namely parcel no. 9198 and 9199 and therefore parcel No. WEST KITUTU/BOGUSERO/2551 did not exist. He stated that his family was in occupation of parcels No. 9198 and 9199 and they have been cultivating the same.

18. Upon cross examination he stated that he was aged only 3 years in 1979 when his father is alleged to have sold land to the Plaintiff. He said that neither his father nor he had evicted the Plaintiff from the suit property because the Plaintiff had never occupied the suit property. He confirmed that parcel number 2551 was sub-divided into parcels no. 9198 and 9199. He said that he was not aware that an inhibition had been placed on title number WEST KITUTU/BOGUSERO/2551. He confirmed that there were trees and crops on the suit property, but stated that he had not produced any photos to show that he was the one in occupation of the suit property.

19. In re-examination he claimed that the Plaintiff was in occupation of parcel number WEST KITUTU/BOGUSERO/2552.

After the close of the Defendant's case both parties filed their written submissions.

PLAINTIFF'S SUBMISSIONS

20. Learned counsel for the Plaintiff submitted that on 8th January, 1979 the Plaintiff entered into a sale agreement with the late Kebati Nyagwoka for the sale of a portion of land parcel No. WEST KITUTU/BOGUSERO/1904 measuring 1.5 acres. The Defendant then took possession of the parcel he had bought. However, since the deceased did not obtain the consent of the Land Control Board within 6 months from the date of the agreement his continued occupation of the 1.5 acres became adverse to the interests of the owner and he had been in open, continuous, and uninterrupted occupation of the suit property for a period of 37 years. Counsel relied on the case of **Rhoda Mongina Ongoro & 2 Others v Johnstone Nyanyuki Menge (2019) eKLR** where the Court held that the Plaintiff having entered into a sale agreement with the Defendant, the said agreement became null and void after the expiry of six months from the date of the agreement for failure to comply with section 6 of the Land Control Act and the period of adversity started running after six months.

21. Counsel further submitted that the Plaintiff had proved that he has been in open, continuous and uninterrupted use of the suit property where he has planted assorted trees and crops for a period of 37 years without being evicted by either the deceased or the Defendants. Counsel relied on the case of **Celina Muthoni Kithinji v Safiya Binti Swaleh & 8 Others (2018) eKLR** for the proposition that in order to succeed in a case of adverse possession, one must prove that the possession was "*nec vi, nec clam nec precario*" that is peaceful, open and continuous.

22. It was counsel's contention that the subsequent sub-division of the original parcel did not affect the Plaintiff's claim of adverse possession. Reliance was placed on the case of **Kiprono Arap Chepkwony v Bornes Taprandich & Another (2019)** where the Court cited the decision of the Court of Appeal in **Peter Thuo v Kuria Gacheru (1988) 2KAR** for the proposition that the law relating to prescription affects not only the present holders of title but their predecessors in title. The Court also relied on the decision in **Mwangi & Another v Mwangi (1986) KLR 328** where the Court of Appeal held that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and that the land is subject to those rights.

Counsel therefore submitted that the Plaintiff had proved his case to the required standard.

DEFENDANT'S SUBMISSIONS

23. Learned counsel for the Defendants submitted on three main issues; whether there was a valid sale agreement between the Plaintiff and one Kebati Nyagwoka-deceased; whether there was consent of the Land Control Board and whether the Plaintiff has established that he is entitled to the suit property by way of Adverse Possession.

24. On the first issue, counsel faulted the sale agreement that was produced by the Plaintiff as Plaintiff's exhibit 1 for indicating that the Plaintiff had paid "NIL" amount in respect of the purchase price of Kshs. 1400. She also contended that the said sale agreement was defective as it was not executed and attested as required under section 3(3) of the Law of Contract Act Cap 23 of the Laws of Kenya. It was her further contention that in his evidence the Plaintiff did not state when he paid the purchase price so as to be able to justify his claim for adverse possession, as it was not clear when time started running. She relied on the case of **Wambugu v Njuguna (1983) KLR 172**.

25. With regard to the second issue, counsel submitted that the Plaintiff had not demonstrated that he obtained consent of the Land Control Board within a period of six months after signing the sale agreement in accordance with section 6(1) of the Land Control Act. He relied on the case of **Moses Kamande Nyambura v Francis Munyua Ngugi (2018) eKLR** for the proposition that section 6(1) of the Land Control Act is a mandatory provision of the law.

26. On the third issue, counsel submitted that the Plaintiff had not met the threshold for Adverse Possession as he failed to demonstrate that

he has been in exclusive possession of the suit property, since the 1st Defendant's evidence was to the effect that his late father was cultivating the suit property upto the time his death. She relied on the case of **Wanje v Saikwa** for the proposition that in order to prove Adverse Possession the Plaintiff must have dispossessed the true owner of the land and what constitutes dispossession of a proprietor are acts which are inconsistent with the enjoyment of the soil for the purpose for which he intended to use it.

27. Counsel wondered how parcel number WEST KITUTU/BOGUSERO/1904 could have been sub-divided into two parcels giving rise to parcels number 2551 and 2552 in 1988 without the Plaintiff's portion being transferred to him if indeed he was in possession of the same.

28. She relied on the case of **Gabriel Mbui v Mukindia Maranya (1993) eKLR** for the proposition that the plea of Adverse Possession was always based on facts which must be asserted, pleaded and proved. She further argued that since the Defendant testified that they are in occupation of the suit property, and that his father had cultivated the suit property upto the time of his death, the Plaintiff had never dispossessed them and he could therefore not succeed in his claim for Adverse Possession.

29. This being a suit for Adverse Possession, the only issue for determination is whether the Plaintiff has proved that he is entitled to the suit property by way of Adverse possession.

30. The law pertaining to Adverse Possession is now settled. Section 7 and 38(1) of the Limitation of Actions Act provide as follows:

"7. 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 first accrued to some person through whom he claims, to that person.

38(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land."

31. The courts have put the above provisions of the law and the doctrine of Adverse Possession into context. In the case of **Celina Muthoni Kithinji** (supra) the court held as follows:

"The requirements of adverse possession in Kenya have also been set out in the case of Mbira v Gachuhi (2002)1EALR 137 in which the court held that:

".....a person who seeks to acquire title to land by the method of Adverse Possession for the applicable statutory period must prove non-permissive ,or non-consensual actual, open notorious, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption.

Likewise, in **Jandu v Kirpial &Another (1975) EA 225** it was held:

".....to prove title by Adverse Possession it is not sufficient that some acts of Adverse Possession must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner, it must be actual, visible exclusive, open and notorious.

The ingredients were recently discussed by the Court of Appeal in the Case of Mtana Lewa v Kahindi Ngala Mwangandi (2005) eKLR where it was held that Adverse Possession is essentially a situation where a person takes possession of the land, asserts rights over it and the person having title to it omits or neglects to take action against such a person in assertion of his title for a certain period, in Kenya, 12 years.

It is also a well-established principle that a party claiming Adverse Possession ought to prove that the possession was "nec vi, nec clam, nec precario" that is peaceful, open and continuous. The possession should not have been through force, nor secrecy and without the authority or permission of the owner"

32. In the instant case, it was the Plaintiff's evidence that on 8th January 1979 he purchased a portion of land parcel no. WEST KITUTU/BOGUSERO/1904 measuring 1.5 acres from Kebati Nyakworo- deceased. A look at the sale agreement produced by the Plaintiff as PEX 1 shows that he paid NIL amount. He did not produce any other document to show when payment was made. This would have given an indication as to when time started running for purposes as it is presumed that the initial entry into the land was with the consent of the registered owner. Although he testified that he took possession of the portion that he bought almost immediately, there is no evidence that he fenced it in order to make it identifiable. I say so because the Plaintiff testified that he only bought 1.5 acres while according to the Green card produced as an exhibit parcel no. 1904 measures 1.1 hectares.

33. The 1st Defendant's evidence was that parcel number WEST KITUTU/BOGUSERO/1904 was sub-divided in 1988 giving rise to parcels number WEST KITUTU/BOGUSERO/2551 and 2552. It is surprising that the Plaintiff was not aware of this sub-division even though it happened during the lifetime of Kebati Nyakwora from whom he bought the land. If the Plaintiff was in actual possession of the suit property, he would have been aware of the said sub-division and followed up with the deceased in order to get his title. The 1st Defendant denied that the Plaintiff was in exclusive possession of the suit property as he testified that his late father cultivated the land until he died and that him and his family are still carrying out farming activities on the land todate. Infact when the 1st Defendant was asked why he had not evicted the Plaintiff, he answered that he could not have evicted him because he has never occupied the suit property. This casts doubts on the Plaintiff's allegation that he has been in exclusive, open, peaceful, continuous and uninterrupted possession of the suit property.

34. What compounds the Plaintiff's case is that the 1st Defendant stated that he has sub-divided parcel number WEST KITUTU/BOGUSERO/2551 into parcels number WEST KITUTU/BOGUSERO/9198 and 9199 and transferred one of the parcels to a purchaser. This is what prompted the Plaintiff to apply for an order of inhibition and leave to amend the Originating Summons to include one Thomas Maisiba Ondoro as a Defendant. Although the order for inhibition and leave to amend the Originating Summons was granted on 10th May 2018, it was not served upon the Land Registrar until the 30th day of August 2021 which was long after the said sub-division. Worse still, the Originating Summons was never amended to bring on board the purchaser, one Thomas Maisiba as a Defendant. This means that even if the court were to find that the Plaintiff had proved his case, it would not be possible to issue orders in respect of a non-existent parcel of land and against a person who is not party to the proceedings.

35. In light of the foregoing, I am of the considered view that the Plaintiff has not proved his case on a balance of probabilities as he failed to prove that he has been in exclusive, open, peaceful and continuous occupation of the whole of Parcel No. WEST KITUTU/BOGUSERO/2551 which was formerly part of land parcel number WEST KITUTU/BOGUSERO/1904. Additionally, the portion being claimed by the Plaintiff is currently registered in the name of a person who was not made a party to these proceedings.

Consequently, the Plaintiff's case is dismissed with costs to the Defendants.

DATED, SIGNED AND DELIVERED AT KISII THIS 22ND DAY OF MARCH 2022.

J.M ONYANGO

JUDGE