



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CIVIL SUIT NO.129 OF 2004 (O.S)

KITUR KERIO - PLAINTIFF

VERSUS

CHRISTOPHER A. CHERUIYOT - 1ST RESPONDENT

KIPLANGAT A. CHERUIYOT - 2ND RESPONDENT

JUDGMENT

Kitur Kerio, the Plaintiff took out the originating summons dated 17th December 2004 in which he sought for inter alia to be declared to have acquired L.R. No.Kericho/Kapsoit/583 by adverse possession. The Plaintiff filed an affidavit he swore in support of the Originating Summons. The aforesaid parcel is registered in the name of Cheruiyot Arap Rogito, who is now deceased. The Plaintiff named Christopher Taita A. Cheruiyot and Kiplangat A. Cheruiyot, the legal representatives of the Estate of Cheruiyot A. Rogito, deceased as the Respondents. The Respondents filed the replying affidavit of Christopher Taita A. Cheruiyot to oppose the Originating Summons. This court directed the Originating Summons to be disposed of by oral evidence.

The Plaintiff tendered the evidence of three witnesses: Kitur Kerio (PW1) produced in evidence a copy of a sale agreement he executed together with the late Cheruiyot Arap Rogito to purchase three (3) acres to be excised from L.R. No.Kericho/Kapsoit/583. PW3 said he paid Ksh.6220/= and thereafter he moved into the land where he begun occupation. Before taking up occupation, Wilson Rono, an agricultural officer is said to have visited the land to survey and curve out 3 acres. PW1 said that he planted Mauritius thorns round the land. The Plaintiff claimed that he has occupied the land for more than thirty (30) years without any disturbance. The Plaintiff alleged that the Defendants destroyed his fence and chased him out of the land, before obtaining title. He said though he is no longer in occupation of the land, his house still stands. In cross-examination PW1 admitted that he entered into a sale agreement with Kiptalaal Arap Cheruiyot and Cheronon Raely w/o Rogito and not Cheruiyot Arap Rogito who was the registered owner. The Plaintiff claimed that the late Cheruiyot Rogito was aware of the sale transaction. It is said the vendors refused to attend the Land Control Board. Jane Soi (PW2), a sister to Christopher Taita said that she and her mother visited the Plaintiff in 1975 with an offer to sell land to him. She stated that PW1 paid Ksh.6,220/= for the land. The purchase price was used to buy another land in Londiani. PW2 said that PW1 took over occupation of the land and begun cultivating the same until 2004 when the Defendants evicted him. PW2 confirmed that the Plaintiff had quiet occupation of the suit land until her father i.e. Cheruiyot Arap Rogito passed away. She said she is aware that PW1 paid

the purchase money in 1974 though she wasn't sure of the exact date. PW2 also stated that she was aware that the Plaintiff did not have a sale agreement with Cheruiyot Arap Rogito. PW2 confirmed that the Plaintiff put up a house in the suit premises in 2004.

Wilson Cheruiyot Rono (PW3) said he was requested by the late Cheruiyot Arap Rogito to carry out a survey on his land and carve out 3 acres which he intended to sell to the Plaintiff in 1972. PW3 said he witnessed PW1 pay the late Cheruiyot Arap Rogito about Ksh.6000/=. PW3 further stated that he was told by the late Cheruiyot Arap Rogito that he wanted to buy land in Londiani for his sons. PW3 further claimed that he was aware the deceased handed over the money to his daughter PW2 to purchase the land in Londiani. PW3 further claimed that he is aware that PW1 has been utilizing the land since 1972. PW3 also said, that in 2004, the sons of the late Cheruiyot arap Rogito moved into the land in question, destroyed PW1's fence and chased away the Plaintiff. In cross-examination PW3 confirmed he was aware the deceased sold the land to PW1.

The defence case was supported by the evidence of Christopher Taita Cheruiyot (DW1) who claimed that the Plaintiff (PW1) has never lived on the land in dispute. He alleged that in 2004 he visited the land in company of PW3 whereof he destroyed his fence and took away fencing posts. DW1 denied having chased away the Plaintiff. He claimed the Plaintiff was a liar. In cross-examination DW1 stated that he was not informed of the sale transaction which took place in 1976 nor the 1983 sale agreement.

At the close of evidence, parties were invited to file written submissions. I have considered the evidence and the rival written submissions. The main issue which was posed to this court to grapple with is whether or not the Plaintiff acquired 3 acres to be excised from L.R.No.Kericho/Kapsoit/583 by adverse possession? In Wambugu –vs- Njuguna [1983] K.L.R 172, the court of Appeal held inter alia that:

1. In order to acquire by the statute of limitation title to land which has known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose for which he intended to use it.
2. The Limitation of Actions Act, on adverse possession, contemplates two concepts: dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has been discontinued of his possession for the statutory period and not whether or not the claimant has proved that he been in possession for the requisite number of years.”

A critical examination of the evidence tendered by the Plaintiff will reveal that the Plaintiff took occupation of the land and utilized the same from 1983 until 2004 when he was evicted by the Defendants. It is also clear from the evidence that the Plaintiff marked his boundaries by planting Mauritius thorns round the portion he was shown by PW3 as instructed by the late Cheruiyot Arap Rogito. I am also satisfied that the Plaintiff put up a house on the suit land and planted Cypress trees. I am further convinced that the Plaintiff had quiet and peaceful occupation and use of the land for a period of over 12 years before he was unlawfully uprooted from the land in 2004. I do not believe the assertion by the 1st Defendant that he was not aware of the Plaintiff's occupation. The Defendants used unlawful means to evict the Plaintiff and purported to reclaim the land. By the time the Defendants purported to recover the land, the Plaintiff had already acquired prescriptive rights against the registered owner and or his successors or assignees. In the end I find that the Plaintiff has proved his case to the required standard i.e. on a balance of probabilities. Consequently judgment is entered in favour of the Plaintiff and against the Defendants in the following terms:

- i. Kitur Kerio is hereby declared to have acquired 3 acres of land to be excised from L. R. Kericho/Kapsoit/583 by adverse possession.
- ii. The Defendants herein being the legal representatives of the Estate of Cheruiyot Arap Rogito, deceased are hereby ordered to execute the necessary documents to have 3 acres excised from L.R. No.Kericho/Kapsoit/583, transferred and registered in the name of Kitur Kerio. In default the

Deputy Registrar of this Court is authorized to do so in their place within a period of 90 days from the date of this Judgment.

iii. The Defendants are hereby ordered to vacate the portion of the land within 60 day from the date hereof, in default they be forcefully evicted without further reference to this court.

iv. The Defendants are ordered to pay costs of the suit.

Dated, signed and delivered in open court at Kericho this 16th day of May 2014

J. K. SERGON

JUDGE

In the presence of:

- Mr. Mutai for Plaintiff

- N/A for Defendant