



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITALE**

**CIVIL SUIT NO. 111 OF 2010 (OS)**

**IN THE MATTER OF THE REGISTERED LAND ACT CAP 300 LAWS OF KENYA**

**AND**

**IN THE MATTER OF ASCERTAINMENT OF OWNERSHIP OF TWO ACRES PART  
OF TITLE NO. WEST POKOT/KERINGET "A"/141**

**BETWEEN**

**GABRIEL NYABANDO MAGUARO ..... PLAINTIFF**

**AND**

**JASON NDIWA EZEKIEL ..... DEFENDANT**

**J U D G E M E N T**

**INTRODUCTION**

1. The Plaintiff herein filed an originating summons dated 26/11/2009 against the defendant seeking the following reliefs;-
  - (a) A declaration that the defendant's right over the two acre plot the same being part of Title No. West Pokot/Keringet "A"/141 got extinguished by adverse possession.
  - (b) A declaration that upon the expiry of twelve (12) years the defendant held or continues to hold the said land in trust for the plaintiff.
  - (c) An order under section 38 of the Limitation of Actions Act Cap 22, that the two acre plot, and the same being part of Title No. West Pokot/ Keringet "A" /141 be subdivided from the whole parcel of land and that the same be transferred to the plaintiff by the defendant and in default, the Deputy Registrar of this court to effect the said subdivision and transfer.
  - (d) An order that the defendant do pay the costs of this suit.
  - (e) Such other order and relief as this court may deem fit to grant.
2. The defendant is the registered owner of LR NO. West Pokot/Keringet "A"/141 measuring 1.9 hectares.

## **PLAINTIFF'S EVIDENCE**

3. On 21/11/1986, the plaintiff entered into a sale agreement with the defendant in which the defendant sold to him two acres forming part of LR NO. West Pokot/Keringet "A"/141. The plaintiff paid a consideration of Kshs.14,000/= for the two acres. It was a term of the agreement that the plaintiff was to take possession of the two acres upon signing the agreement.
4. The plaintiff took possession of the two acres and has since constructed three houses on it. He has been planting crops on it and has planted various types of trees on it. The plaintiff testified that the defendant did not obtain consent of the land control board to transfer the plot to him but that he has been staying on the plot openly, peacefully for a period of over 27 years.
5. The defendant had filed a replying affidavit to the originating summons but during the hearing, he did not attend court despite having been duly served. The hearing therefore proceeded ex-parte the court having been satisfied that there was proper service.

## **ANALYSIS OF EVIDENCE AND THE LAW**

6. The plaintiff produced a green card in respect of the suit land (exhibit 1). He also produced a sale agreement between himself and the defendant (Exhibit 2). According to the sale agreement, consent of the land control board was to be obtained within three months after the signing of the agreement. This was never done. It was a further term of the same agreement was to become null and void if consent of the land control board was not obtained within three months of the signing of the agreement. The agreement between the plaintiff and defendant therefore became null and void after expiry of three months from the signing of the same. This therefore means that the occupation of the plaintiff from that period became adverse to that of the defendant.
7. The defendant in his replying affidavit does not deny that he is the registered owner of the land and that he entered into a sale agreement with the plaintiff. What he contends is that the plaintiff is illegally staying on the land as he had charged the land to the Agricultural Finance Corporation on 13/5/1986 and therefore had no interest to alienate on the said land. It is clear from the defendant's replying affidavit that he has been aware that the plaintiff has been staying on the land since 1986. The plaintiff's stay on the land has been peaceful from the time he ought to have moved out on ground that the sale agreement had become null and void for want of consent of land control board.
8. For a person to succeed in a claim for adverse possession, he is required to prove that he has been openly and continuously in possession of the land without interruption for a period of over 12 years. In the present case the plaintiff has been in continuous, open and uninterrupted possession of the land after 21/2/1987 when the sale between him and the defendant became null and void for want of consent of the land control board as per the sale agreement. The defendant's title to the two acres therefore became extinguished after 21/2/1998. The fact that the defendant had charged the land to AFC could not interrupt time from running. The charge of the land to the AFC had been done prior to the sale and it was expressly indicated in the agreement that the defendant was to have the land discharged in order to give title to the plaintiff. I therefore find that the charging of the property to the AFC could not defeat the interest of the plaintiff in a claim for adverse possession.

## **DECISION**

9. I find that the defendant's right to the two acres has been extinguished and that he is holding the two acres in trust for the plaintiff. Consequently I make the following orders;-
  - (a) That the defendant's right to two acres forming part of LR NO. West Pokot/Keringet "A"/141 has been extinguished and that he is therefore holding the said two acres in trust for the plaintiff.
  - (b) That the said trust is hereby terminated and an order is issued that the two acres be

excised from LR NO. West Pokot/Keringet "A"/141 and the same be transferred to the plaintiff by the defendant failing which the Deputy Registrar of this court do sign all documents necessary to have the two acres transferred to the plaintiff.

c. The costs of this suit shall be borne by the defendant.

Dated, signed and delivered at Kitale on this 25th day of June, 2014.

**E. OBAGA**

**JUDGE**

In the presence of Mr Kiarie for plaintiff.

Court Clerk – Kassachoon.

**E. OBAGA**

**JUDGE**

**25/06/2014**