



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL SUIT NO 36 OF 2010 (0.S)
IN THE MATTER OF THE LIMITATION OF ACTIONS ACT
CAP 22 LAWS OF KENYA AND IN THE MATTER OF THE
REGISTERED LANDS ACT, CAP 300 LAWS OF KENYA
BETWEEN
AUGUSTINE KIPKOECH CHERUIYOT..... 1ST APPLICANT
PAUL KIPKEMEI ARAP TUE.....2ND APPLICANT
VERSUS
HARON OCHANDA KABORI..... RESPONDENT
JUDGEMENT

Introduction

1. **Augustine Kipkoech Cheruiyot** and **Paul Kipkemoi Tue** (hereinafter jointly referred to as "the applicants") took up the originating summons dated **10th February, 2010** (against **Haron Ochanda Kabori**, the respondent) for determination of the following questions:-

(i) Whether the applicants have acquired rights by adverse possession over the 10 acres portion and 5 acre portion respectively of the parcel of land known as **Nakuru/Kapsita/ 1068** registered in the name of the respondent?.

(ii) Whether the applicants should be registered as the proprietors of the respective portions of **Nakuru/ Kapsita / 1068**?

(iii) Whether the respondent should be ordered to execute the necessary and relevant conveyance documents to effect registration in favour of the applicants as the proprietors of the portions of **Nakuru/ Kapsita/ 1068** within seven days of service?

(iv) Whether the Deputy Registrar of this court should be ordered to execute the necessary and relevant conveyance documents to effect registration in favour of the applicants if the respondents fail to do so within the time specified in prayer 3 above?

(iv) Who should pay the costs of the application (suit)?

Background and pleadings

2.The application is brought under **Order XXXIV Rule 3(d)** of the repealed Civil Procedure Rules and **Section 38** of the Limitation of Actions Act (Cap 22) Laws of Kenya.

3. The application is premised on the affidavits of the applicants on the grounds that the respondent is the registered proprietor of the parcel of land known as **Nakuru/Kapsita/ 1068** (hereinafter referred to as "the suit property"). The respondent was registered as the proprietor of the suit property on **17th June , 2005**.

4. It is the applicants case that before the respondent was registered as proprietor of the suit property, they were in open, peaceful and quiet possession and had exclusive use of 10 and 5 acre portions of the suit property which they respectively claim against the respondent. The applicants claim that they occupied the suit property after they were issued with allotment letters in respect thereof in 1997.

5. The applicants claim that the said open, peaceful and quiet possession and exclusive use of the said portions of the suit property has been for more than the period of 12 years stipulated in our laws for a claim of adverse possession to accrue against the registered proprietor thereof.

6. To prove their claims against the respondent, the applicants swore and filed their respective affidavits. In the affidavit sworn by the 1st applicant, **Augustine Kipkoech Cheruiyot**, he has deposed that on or about **15th August, 1997** he purchased a parcel of land Known as **plot no. 06688** at **Mariashiani** comprising 5 acres or thereabouts from **Joel Kibet Sigilai**; that the said Joel Kibet Sigilai had been allocated the said parcel of land by the government of Kenya through the office of the District Commissioner, Nakuru; that after he purchased plot no. 06688 at Mariashiani, he immediately took possession (that is on or about **15th August,1997** and began making use thereof (cultivating crops and grazing livestock thereon).

7. Contending that plot no. 06688 at Mariashianl is currently the suit property, the 1st applicant claims that the respondent never raised any claim to the same (even though aware of his occupation) until **7th January, 2010** when accompanied by police officers and brandishing a title deed, he (the respondent) trespassed on to the suit property and carried out a survey of the same without his knowledge and authority.

8. The 1st applicant claims that since the respondent carried out the alleged illegal survey of the suit parcel, the respondent has been threatening him with eviction from the suit property. The 1st applicant also claims that he has settled his family on the suit property and he entirely depends on it.

9. On his part, the 2nd applicant (**Paul Kipkemoi Arap Tue**) claims that on or about **16th August,1997** he was allocated **plot no.06702** in Kapsita Sheet 5 measuring 10 acres by the Government of Kenya, through the office of the District Commissioner, Nakuru. The said parcel of land upon registration fell in L.R No. **Nakuru/Kapsita/ 1067** and L.R No.Nakuru/Kapsita/ 1068 (the suit property) both of which are registered in the name of the respondent.

10. Like the 1st applicant, the 2nd applicant contends that he has been in occupation of a portion measuring 5 acres in the suit property for over 12 years. Contending that over the period he has been in occupation and use of the portion of the suit property, the respondent never raised any claim to the same, (even though aware of his occupation) the 2nd respondent claims that it was only on or about **7th January, 2010** when the respondent accompanied by police officers and brandishing a title deed, trespassed on to the suit property and carried out a survey thereon without his knowledge and authority.

11. Like the 1st applicant, the 2nd applicant claims that since the respondent carried out the alleged illegal survey of the suit property, he (the respondent) has kept on threatening him with eviction from the suit property. He also claims that he has settled his family therein and that he entirely depends on the suit property for his livelihood.

12. In reply and opposition to the applicants claim, the respondent filed the replying affidavit sworn on **17th May, 2010**. In that affidavit the respondent has, inter alia, deposed that he bought the suit property from **Sammy Silas Komen**; that before purchasing the suit property he conducted a search which revealed that the seller (Sammy Silas Komen) was the registered proprietor thereof; that after he paid the seller the agreed consideration, the suit property was transferred to him.

13. The respondent contends that because at the time he purchased the suit property he was not living thereon, the 1st defendant invaded a portion of approximately 2 acres of the suit property and tried to cultivate the same. As a result, he complained to the area chief who wrote to the 1st applicant advising him to vacate immediately. In addition to seeking the help of the chief, the respondent also instructed his advocate to demand that the 1st applicant vacates the suit property. The respondent contends that the 1st applicant complied.

14. It is the respondent's case that he had been cultivating the suit property until 2007 when he was chased by unknown people. The respondent explains that he discovered that the 1st applicant had returned to the suit property in 2010 when he sent people to cultivate it.

15. Concerning the 1st applicant's allegation that he has settled his family on the suit property, the respondent denies that contention and instead avers that the 1st applicant has cultivated on a small portion thereof.

16. With regard to the documents annexed to the 1st applicant's supporting affidavit, the respondent contends that the document(s) neither belongs to the 1st applicant nor relates to the suit property. Besides, the 1st applicant has not provided any evidence of how he acquired the suit property, for instance, he has not produced any sale agreement to prove that he indeed bought a portion of the suit property, as alleged. It is the respondent's case that the true account of the dispute is as given by the area chief, through the letter dated **7th April, 2011** (annexture H).

17. As for the 2nd applicant's claim, the respondent explains that the 2nd applicant's plot is No.1067 and not the suit property. Relying on the letter of the area chief, (annexture H), the respondent contends that the applicant removed beacons demarcating their respective portions and started cultivating his land.

18. Concerning the 2nd applicant's allegation that he was allocated 10 acres, the respondent contends that, that claim is not supported by the letter of allotment annexed to the 2nd applicant's supporting affidavit.

19. In view of the foregoing the respondent contends that the applicants have not made up a case for issuance of the orders sought.

20. In a rejoinder, the 1st applicant filed the further affidavit sworn on **21st July, 2010** where he contends that Sammy Mwaita, from whom the respondent purchased the suit property, was neither a member of the Ogiek Community nor a resident of Kapsita; that Sammy Mwaita may have used his position as the Commissioner of Lands to alter the register and to allocate himself the suit property and that Sammy Mwaita has never set foot on the suit property and probably does not know where it is located.

21. Reiterating the contention that he has been in occupation of the suit property since 1997, he denies the allegation that he invaded approximately 2 acres of the suit property at the time of purchase.

22.As concerns the contention by the respondent that he complied with the advice of the chief and the demand by the respondent's advocate to vacate the land sometime in 2009, he denies having received any demand letter from the respondent's advocates and having moved out of the suit property since 1997.

23. Concerning the allegation that he ceased cultivating the suit property during the post-election violence, the 1st applicant maintains that he has never moved out of the suit property since 1997 when he took possession thereof.

24. As concerns the respondent's allegation that there has been tension on the ground, the 1st applicant

denies that contention and avers that apart from his cronies, the respondent has never set his foot on the suit property.

25. As for the documents annexed to their supporting affidavits, he explains that the documents are allotment cards and maintains that they were settled upon subdivision of the land.

26. Relying on the letter from the area chief dated **29th June, 2010** (Annexure AC (i)), the 1st applicant asserts that they settled on the suit property in 1997. As for the letter from the area assistant chief, **Joseph Kipkemoi**, in which it is stated that the suit property belongs to the respondent and that the 1st applicant forcefully settled thereon after the post-election violence in 2007, the 1st applicant contends that the author of that letter is not the assistant chief of their sublocation.

27. As for the claim by the 2nd applicant, he explains that the 2nd applicant was allocated 5 acres vide card No.06702 and his wife (Jane Chepkemoi) allocated a similar acreage vide card No.06703.

28. With regard to the 2nd applicant's claim, he explains that part of the suit property belongs to the 1st applicant.

29. Maintaining the claim that they took possession of the suit property in 1997, he explains that he entered the suit property with the permission of its former allottee, Joel Sigilai, and in 2004 the allottee sold it to him. In this regard he referred to the sale agreement dated **20th July, 2004** (annexure AC3).

30. Terming the respondent's replying affidavit fatally defective, the 1st applicant urges the court to be guided by the letter of the chief dated **29th June, 2010** which is to the effect that the applicants entered the disputed plots in 1997 and that they have constructed structures thereon, the applicants urge the court to allow their claim for adverse possession.

Submissions

31. When the matter came up for hearing on **19th December, 2013** parties took directions to the effect that the suit be disposed of by way of written submissions. Subsequently, the advocates for the respective parties filed submissions which I have read and considered.

Analysis and determination

32. From the pleadings herein, the submissions filed by the advocates for the respective parties, the law applicable to the application and the issues raised in the submissions, the questions for determination are:-

1. Whether the applicants have failed to specifically plead fraud on the part of the respondent or his predecessor in title, can be heard to claim that the respondent's title was fraudulently obtained?

2. Whether the applicants have established a case for issuance of the orders sought?

3. What order(s) should this court make?

The contention that the respondent's title was fraudulently obtained:-

33. In the submissions filed on behalf of the applicants, it is submitted that the respondent obtained the suit property through an underground deal which was fraudulent. In that regard, it is submitted that the person who sold the suit property to the respondent, Silas Komen Mwaita, could not have lawfully obtained the property for the reasons that the suit property had neither been sold nor allocated to him; that the seller (Silas Komen Mwaita) was neither a squatter nor a member of the Ogiek community like the other allottees. It is also contended that unlike the other allottees the seller of the suit property was not a resident of Kapsita.

34. The propriety of the respondent's title is also challenged on the ground that he owns 15 acres acreage, when the other allottees hold only 5 acres.

35. Although the applicants have challenged the propriety of the title issued to the respondent on grounds that it was fraudulently obtained, it is noteworthy that the applicant neither pleaded fraud nor led any evidence to prove fraud on the part of the respondent or his predecessor in title. That fact raises the question, can the applicants be heard to claim that the respondent's title was fraudulently obtained when they did not plead that fact in their pleadings as by law required?

36. In answering that question I adopt the decision of **Lesiit, J.**, in the case of **V.K. Construction Company Limited V Mpata Investments Limited** [2009] eKLR where she stated:-

"In regard to the issue of fraud, it is trite that a party wishing to rely on fraud must not only plead fraud in the pleadings giving particulars, but must also adduce evidence to support it. Order VI rule 4 of the Civil Procedure Rules is very clear on this point. The case of Telkom, supra, is also very clear that evidence to prove fraud must be called at the trial. In this case the issue of fraud was raised for the very first time in the Plaintiff's submissions. Parties are bound by their pleadings. The Plaintiff cannot rely on this ground as it never pleaded it. Section 26 of the Limitation of Actions Act does not apply to this case.

In conclusion on the issue of fraud, I find and hold that fraud was not pleaded by the Plaintiff in its plaint, and neither was any evidence adduced to support fraud, and therefore the Plaintiff did not bring its case within the legal requirements contemplated in the law in order to rely on fraud."

Have the applicants established a case for issuance of the orders sought?

37. It was submitted on behalf of the applicants, that the evidence on record shows that the applicants had established their homes long before the respondent acquired his interest in the suit property. The respondent is faulted for failing to conduct a physical search before buying the suit property. The applicants contend that had the respondent conducted a physical search before he entered into a contract with his predecessor in title, he would have got to know about their interest on the suit property.

38. Further, that evidence was led to show that the 2nd applicant is the true owner of the parcel of land known as Nakuru/Kapsita/ 1067 which is allegedly part of the suit property. It was submitted that there is no way the 2nd applicants property (Nakuru/Kapsita/ 1067) can form part of the suit property as the 1st applicant never sold it to the respondent or any other person.

39. As concerns the time the applicants took possession of the suit property, it was submitted that the letter by the chief dated **29th June, 2010** confirmed that the applicants had been in occupation of the suit property since 1997.

40. Contending that the applicants have satisfied the condition for acquiring land by adverse possession enunciated in **Wambugu vs. Njuguna** (1983) KLR 173 and in **Virginia Wanjiku Mwangi vs. David Mwangi Jotham Kamau** (2013) eKLR, counsel for the applicants argued that the applicants should be declared the rightful owners of the suit property by adverse possession. Counsel for the applicant also argued that unless the orders sought were granted, the applicants would suffer great prejudice as they had no alternative place of residence.

41. On his part, counsel for respondent submitted that it was not clear whether the 1st applicant settled on the suit property in 1997 or in 2004 after he allegedly bought it from its original allottee, Joel Kibet Sigilai.

42. Wondering whether the 1st applicant's claim is a claim for adverse possession or a claim by a bona fide purchaser and an holder of an indefeasible title to the suit property, counsel for the respondent, argued that the 1st applicant should have enjoined Sigilai in the suit, being the person who sold to him the

suit property.

43. As for the 2nd applicant's claim, it was submitted that whereas his claim is for 10 acres, the evidence on record shows that he is occupying only 5 acres which are comprised in parcel number 1067 as opposed to the suit property.

44. Reiterating the contention that the applicants have not satisfied the conditions for grant of the orders sought, counsel submitted that there is no conclusive evidence on when the 1st applicant took possession of the suit property. In this regard, counsel argued that since the 1st applicant purchased the land in 2004, it was reasonable to assume that he took possession thereof in the same year. In the same vein, he argued that there was evidence that on the advice of the area assistant chief, the 1st respondent moved out of the suit property and only returned after the 2007 post election violence.

45. In the absence of concrete evidence that the applicants took possession of the suit property in 1997, it was submitted that the applicants have failed to prove that they have been in occupation of the suit property for the period stipulated by law. That being the case, and bearing in mind that no oral evidence was tendered in respect of the suit, counsel urged me not to associate myself with the ruling of **W. Ouko J.**, (as he then was) in the applicant application for interlocutory relief. In his ruling the judge, *inter alia*, stated:-

"...There is nothing to show that the 1st applicant indeed entered the suit property in 1997, apart from a letter dated 29th June, 2010 by the chief, Mariashoni location, that letter is written to counsel for the applicant in response of his (applicant's counsel of 21st June, 2010,) a copy of which was not exhibited.

In view of an earlier letter by the same chief dated 3rd April, 2009, another one dated 7th April, 2010 by an assistant chief, Joseph Cheruiyot, and the fact that the 1st applicant has been charged with forceful detainer, the letter of 29th June, 2010 to counsel for the applicants to the effect that they have occupied the suit land since 1997 cannot be credible or conclusive of that fact.

It is further averred by the 1st applicant in the further affidavit that the 2nd applicant and his wife were allocated plot Nos. 06705 (5 acres) and 06703 while 1st applicant was asked by Joel Sigilai, the allottee of the suit property, to clear the bushes and make it habitable. The 1st applicant then proceeded to occupy the suit property. Seven years later he entered into a written agreement with the said Joel Sigilai whereby the latter sold to him the suit property.

I have already dealt with the claim regarding allocation of the suit property to 2nd applicant and his wife. Regarding the 1st applicant's claim that he purchased the property from Joel Sigilai, it can only be observed once more that no nexus has been drawn between Joel Sigilai's plot No.06688 and the suit property other than a general averment that the former is the original number before registration to the latter."

46. The question to answer is whether there has been a change of circumstances or elucidation of the evidence tendered before the judge to warrant deviation from the foregoing determination.

47. In answering this question, it is important to point out that no further evidence was tendered before this court or further elucidation thereof. Counsel for the respective parties merely wrote submissions in support of the said evidence.

In the case of **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another** [2014] eKLR the Court of appeal held:-

"Proof in claims of a civil nature is by way of evidence. Section 3 of the Evidence Act (Cap 80) defines evidence as denoting:

"--- the means by which an alleged matter of fact, the truth of which is submitted to investigation, is proved or disproved, and without prejudice to the foregoing generally, includes statements by accused persons, admissions and observations by the court in its judicial capacity."

In that regard, to prove or disprove a matter of fact, a claimant bears the burden of proof as stated in sections 107, 108 and 109 of the Evidence Act, as follows;

"107 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either said.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence unless it is provided by any law that the proof of that fact shall be on any particular person."

48. In applying the foregoing legal principles to the case in hand, the question to answer is whether the submissions by counsel for the applicants sufficed to bridge the glaring gaps identified in the applicants' case?

49. My answer to this question is negative. I say this because, the submissions are not evidence so as to be able to answer the questions raised about the nexus of the plot allocated to the 1st applicant and the suit property. The submissions did not and cannot be said to have settled the doubts raised concerning the actual time the applicants' in particular the 1st applicant, took possession of the suit property.

50. Before I conclude this matter I wish to point out that the applicants claim for adverse possession is also pegged on the wrong title. Since the respondent's title was issued in 2005, I hold the view that the applicants cannot be heard to claim that they have had possession of the suit property which was adverse to that of the respondent, when they had been in the suit property, against the interest of the respondent for less than 5 years. Given that the respondent's interest in the suit property was for a period less than the time required for a claim for adverse possession, I hold the view that the applicants claim for adverse possession cannot succeed against the respondent. In this regard see **Charles Matheka vs. Haco Industries Ltd**, Machakos High Court Miscellaneous Application No.1 of 2004 where **Lenaola J.**, observed:-

"If that be so, then the claim must fail because one of the hallmarks of any claim for adverse possession is that the registered owner was aware of the trespassers possession but did not interrupt it for a period exceeding twelve years."

51. In applying the foregoing legal position to the circumstances of this case, it is clear that the respondent having not been the registered owner of the suit property in 1997 when the applicants allegedly took possession of the suit property, cannot reasonably be said to have been aware of the applicants adverse possession of the suit property.

52. It therefore follows that, the applicants claim for adverse possession against the respondent is unmaintainable because, the applicants use of the property against his legal rights thereon has not been for the period stipulated in law.

The upshot of the foregoing is that the claim has no merit and is dismissed with costs to the respondent.

Dated, signed and delivered at Nakuru this 10th Day of December 2014.

L N WAITHAKA

JUDGE

PRESENT

Mr Ogeto for the Defendant

Mr Kipkoech for the plaintiffs

Emmanuel Maelo : court Assistant

L N WAITHAKA

JUDGE