



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 91 of 2012

FRANCIS KANGOGO CHEBOI.....PLAINTIFF

V

VINCENT KIPRONO KAINO & 4 OTHERS.....DEFENDANTS

(Suit filed by plaintiff seeking adverse possession against a County Council; Preliminary Objection that one cannot claim adverse possession against land vested in the County Council and that the registration being a first registration is protected; whether one can claim adverse possession on land vested in the County Council; Whether a first registration can defeat a claim based on adverse possession; Preliminary Objection partly upheld; suit dismissed)

RULING

A.THE ISSUE FOR DETERMINATION

1. This ruling is in respect of a Preliminary Objection dated 16 may 2011 raised by counsel for the 6th Defendant. The preliminary objection as drawn objects to the hearing of this suit on the grounds :-

1. *THAT this suit is not maintainable by dint of Section 41 of the Limitation of Actions Act CAP 22 Laws of Kenya.*

2. *THAT the concept of adverse possession does not apply against the Government of Kenya or any local authority.*

3. *THAT the title herein is a first registration which is indefeasible by virtue of the provisions of the Registered Land Act, CAP 300 Laws of Kenya.*

2. Probably a little background to this suit will reveal the basis of the preliminary objection raised.

B. BACKGROUND TO THE SUIT.

3. This suit was commenced on 19 December 2001 by way of Originating Summons which did not stipulate the provisions of law under which it was brought.

4. The Originating Summons as originally filed (for it was later amended), was against five respondents namely Vincent Kiprono Kaino, Joseph Ruto, The Board of Governors and Committee of Nerkwo Nursery School, County Council of Marakwet and Commissioner of Lands (hereinafter referred to as the defendants).

5. In the Originating Summons, the applicant (hereinafter referred to as the plaintiff) has averred that he has filed this suit on behalf of the Estate of Petero Cheptoo Suter (deceased). His claim is that the parcel of land registered as Moiben/Chebara/18 (the suit land) measuring approximately 1.3 acres should be registered in the name of the plaintiff in place of Nerkwo Nursery School, the 3rd defendant. His claim is founded on the allegation that the plaintiff is entitled to the suit land by way of adverse possession.

6. In the supporting affidavit to the Originating Summons, the plaintiff has averred that the deceased owns the land parcel Moiben/Chebara/18 and that originally, the suit land, and the land parcel Moiben/Chebara/18, were one, registered in the name of the deceased. He has deponed that the suit land was erroneously hived off and registered separately and reserved for Nerkwo Nursery School without the knowledge, permission or consent of the deceased. He has further deponed that the deceased did not donate the suit land to any public use.

7. He has stated that the suit land has been in their possession since 3rd February 1972 and has contended that the estate of the deceased and his family are therefore entitled to the suit land by way of adverse possession. He has stated that the deceased and his family have been on the suit land continuously without interruption. It is deponed that the 4th defendant in collusion with the 1st, 2nd and 3rd defendants illegally acquired the suit land and registered it separately.

8. To the supporting affidavit, the plaintiff annexed copies of the Green Cards to the suit land and the land parcel Moiben/Chebara/18. The registers show that the suit land is registered in the name of Elgeyo Marakwet County Council whereas the land parcel Moiben/Chebara/18 is registered in the name of the deceased.

9. I have not seen any appearance having been entered by any of the original defendants.

10. On 8 April 2005, counsel for the plaintiff applied in open court to withdraw the suit against the 3rd defendant and the court ordered the suit against the 3rd defendant withdrawn.

11. By a Chamber Summons application dated 9 June 2006, the plaintiff applied to amend the Originating Summons to add the Elgeyo Marakwet County Council as the 6th defendant. By a consent filed on 7 August 2009, signed by M/s Joseph C.K. Cheptarus & Co Advocates for the plaintiff and M/s Chebii & Co Advocates for the Elgeyo Marakwet County Council, the application was allowed and the Elgeyo Marakwet County Council were enjoined to the proceedings as the 6th defendant. Thereafter on 16 May 2011, this preliminary objection was filed.

12. The parties on 4 July 2012 (before Azangalala J. as he then was) agreed to file written submissions to support their respective positions on the preliminary objection. The parties did file their written submissions and the matter came before me on 13 May 2013. None of the counsels wished to supplement their written submissions with any oral submissions.

C. SUBMISSIONS OF COUNSEL

13. In his submissions, Mr. Chebii pointed out that the suit land is registered in the name of the Elgeyo Marakwet County Council. He argued that vide the provisions of Section 41 of the Limitation of Actions Act, CAP 22, adverse possession cannot operate against a County Council. He also argued that the title being a first registration is therefore indefeasible. He contended that the suit as filed does not disclose any cause of action against the defendants and that the same ought to be dismissed with costs. To support his position, he relied upon the case of *Gitu v Ndungu (2001) EA 379*.

14. Mr. Cheptarus in his reply, inter alia argued that the the case of *Gitu v Ndungu* has no application in this matter as in the said case, the property was under the Settlement Fund Trustees. He contended that the suit land is freehold land that the plaintiff has been in actual occupation since the year 1972, unaware of the 4th and/or 6th defendant's acquisition of the same, or that the same had been alienated from the land of the original owner. He has questioned how the local authority acquired the land. He has averred that the suit land is land registered under the Registered Land Act to which the Limitation of Actions Act applies by virtue of Section 37. He has stated that the suit land is neither Government Land nor land vested in the County Council, nor Trust land. He asked for the preliminary objection to be dismissed.

D. CONSIDERATION BY THE COURT

15. I have considered the preliminary objection, the pleadings herein and the submissions of counsel. I can see from the Originating Summons that the plaintiff is claiming adverse possession to the suit land. It is discernable from the annexed extract of the register that the suit land is registered in the name of Elgeyo Marakwet County Council. The Elgeyo Marakwet County Council was all along registered under the Local Governments Act (CAP 265) (now repealed by the County Government's Act, Act No. 17 of 2012). The land is registered under the Registered Land Act, (CAP 300) (now repealed by the Land Registration Act, Act No.3 of 2012).

16. Suits seeking land by way of adverse possession are provided for under Section 38 of the Limitation of Actions Act, (CAP 22) Laws of Kenya. Section 37 provides that the Act applies to land registered under the Government Land Act, the Registration of Titles Act, the Land Titles Act, or the Registered Land Act (all statutes now repealed by the Land Registration Act, Act No.3 of 2012). The suit land is

registered under the Registered Land Act but the repeal of the statute is immaterial for our purposes.

17. Under Section 38(1) of the Limitation of Actions Act, CAP 22, where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37, 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.

18. However, Section 41 of CAP 22 provides as follows :-

This Act does not -

(a) enable a person to acquire any title to, or any easement over -

(i) Government land or land otherwise enjoyed by the Government;

(ii) mines or minerals as defined in the Mining Act;

(iii) mineral oil as defined in the Mineral Oil Act;

(iv) water vested in the Government by the Water Act;

(v) land vested in the county council (other than land vested in it by section 120 (8) of the Registered Land Act); or

(vi) land vested in the trustees of the National Parks of Kenya; or

(b) affect the right of Government to any rent, principal, interest or other money due under any lease, licence or agreement under the Government Lands Act or any Act repealed by that Act.

19. It will be seen from the above, that the Limitation of Actions Act, does not apply inter alia to land vested in the County Council (except for land vested in it by Section 120(8) of the Registered Land Act which was repealed in 1972). It follows therefore that one cannot claim the reliefs provided for in the Limitation of Actions Act, including the relief of adverse possession, for land vested in County Councils. The suit land as we have seen is vested in the Elgeyo Marakwet County Council and there is no question that this entity is a County Council as its name suggests. The plaintiff cannot therefore claim the suit land by way of adverse possession.

20. I have seen the case of ***Gitu v Ndungu*** relied upon by counsel for the plaintiff. The same related to a claim for land that was initially registered under the Settlement Fund Trustees before being registered in the name of the 2nd defendant to the suit, who later transferred it to the 1st defendant who later transferred it to the 2nd and 3rd defendants. The plaintiff's claim, which was filed in the year 1997, was that he had been in occupation of the suit land from the year 1965 and therefore the 2nd defendant's title got extinguished in the year 1977. The property was transferred by the Settlement Fund Trustees in the year 1987 to the second defendant. The court of appeal held that the period before the transfer in 1987 could not be included in the 12 years time required for one to claim adverse possession. This was by dint

of the provisions of Section 41 of the Limitation of Actions Act, which exempts Government land from a claim for adverse possession. The interests of the Settlement Fund Trustees, being an organ of the Government could not therefore be extinguished by limitation of time.

21. I agree with Mr. Cheptarus, that the suit land is not Government Land, as was the case in ***Gitu v Ndungu***. However, the principles are the same with regard to land vested in the County Council. Just as one cannot claim Government Land under adverse possession, so too, one cannot claim County Council Land by dint of adverse possession. I am guided by the principles in this decision and I therefore uphold the first and second limb of the preliminary objection.

22. The third limb of the preliminary objection raises the issue of indefeasibility of title as this was a first registration. It is correct that this was a first registration under the Registered Land Act. Section 143 of the Registered Land Act protected first registrations from cancellation even in the face of fraud or mistake and there is a long chain of authorities on this (See for example ***Obiero v Opiyo (1972) EA 227*** and ***Esiroyo v Esiroyo (1973) EA 388***).

23. However, the claim for adverse possession is not a claim challenging title, but is a claim based on an overriding interest which does not have to be registered. Under Section 28 of the Registered Land Act, the rights of a proprietor were not liable to be defeated but were held subject inter alia to overriding interests set out in Section 30 thereof. Among the overriding interests set out in Section 30 (f) of the Registered Land Act were rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription. Thus a registered owner, including a first registered owner, still held title subject to the overriding interests and such owner could not plead protection by dint of Section 143 of the Registered Land Act.

24. The Land Registration Act, Act No.3 of 2012, which repealed the Registered Land Act, in Sections 26 and 28 has more or less similar provisions to Sections 28 and 30 of the Registered Land Act. It follows therefore that one can claim adverse possession for registered land and the registered owner cannot claim protection by dint of his first (and indeed even subsequent) registration since such registration is subject to the overriding interests, including the overriding interest of a claim for adverse possession.

25. For these reasons I am unable to allow the 3rd limb of the preliminary objection.

26. I have allowed the first and second limbs of the preliminary objection. The registered owner of the suit land is a County Council and the plaintiff cannot claim such land by adverse possession. This suit is a claim for adverse possession against the County Council. I am not sure why the other defendants (not the County Council) were enjoined to these proceedings. They are not described in the Originating Summons and there are no pleadings nor orders sought against them. The plaintiff could not in any event claim adverse possession against them as one cannot file suit for adverse possession against a person who is not the registered owner (See case of ***Wasui v Musumba (2002) KLR 396***) The suit against the other defendants is therefore unmaintainable as there is no cause of action revealed against them.

27. This suit does not disclose a cause of action against the defendants. I therefore dismiss it in its entirety. Costs shall be to the 6th defendant.

28. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 28TH DAY OF MAY 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Mr. J.K.C Cheptarus for the plaintiff.

N/A for M/s Chebii & Co for the defendants.