



KIPKETER TOGOM.....PLAINTIFF

VERSUS

ISAAC CIPRIANO SHINGORE.....DEFENDANT

RULING:

The Plaintiff/Applicant filed an Originating Summons under Section 38 of the Limitation of Actions Act Chapter 22 Laws of Kenya and Order 37 Rules 3D and 7 of the Old Civil Procedure Rules. The Originating Summons is dated the 30th November, 2006 and the same was filed in court on the 4th December, 2006 together with a Supporting Affidavit made by **KIPKETER TOGOM** the Plaintiff/Applicant herein.

The parties herein, opted to argue the application by way of Written Submissions.

FACTS:

The registered proprietor of the property in dispute was **MANYINYA IRONDANGA** (Deceased) and the widow is **ERICA MANYINYA**.

The Plaintiff bought the land in dispute that is **NANDI KAPTICH/357** on the 27th June 1982 from the widow of the registered proprietor, one **ERICA MANYINYA**.

The Plaintiff took possession on the same date of purchase which was 27th June, 1982 and remained in possession and claims to have had uninterrupted occupation from that date.

In 1992 the Respondent together with his mother **ERICA MANYINYA** filed succession proceedings in the Senior Resident Magistrates Court at Kapsabet vide Succession Cause No. 48 of 1992.

The Plaintiff herein filed objection proceedings to the said Succession Cause which objection was dismissed due to non-attendance by the Objector, the Plaintiff herein.

Thereafter the Plaintiff herein instituted proceedings in at the Land Disputes Tribunal Kipkaren Division. The Plaintiff also instituted an application for the Annulment and Revocation of the Grant in the High Court vide HCC Succession Cause 240 of 2005 which suit is still pending in court.

The Plaintiff's prayers in the Originating Summons are as set down hereunder;

- a) The 2nd Defendants/Respondent's Title to the Land Title Number Nandi/Kaptich/357 stands extinguished by lapse of time.
- b) The Plaintiff/Applicant obtained title and ownership to the Land Parcel Number Nandi/Kaptich/357 by virtue of the Doctrine of Adverse possession.
- c) Pursuant to (a) and (b) above, the Land Registrar Nandi North/South Districts or the Land Registrar

for the time being having the lawful custody of the Land Register in respect of the Land Title Number Nandi/Kaptich/357 be ordered to delete the names of the Defendants/Respondents from the said Register and in lieu thereof, the names of the Plaintiff/Applicant be entered in the said Register as the proprietor of the Land.

d) Pursuant to (a), (b) and (c) above, the Land Registrar Nandi North/South Districts or the Land Registrar for the time being having the lawful custody of the Land Register in respect of the Land Title Number Nandi/Kaptich/357 be ordered to issue a fresh title deed to the Plaintiff/Applicant in his name as the proprietor of the said Land.

e) The Plaintiff/Applicant be awarded costs of these proceedings.

It is the Plaintiffs contention that he became a trespasser on the 27th June, 1982 as the alleged sale became void by operation of law. The Plaintiff also claims that he entered upon the land vide a sale which was void ab-initio. That he then had continuous uninterrupted possession from the 27th June 1982 and the original title became extinguished twelve (12) years thereafter, that is on the 27th June, 1994 and that on the date aforementioned the Defendant/Respondent and others lost the claim to the said parcel of land.

That despite the Defendant having obtained Title and was now registered as the proprietor thereof, the same was subject to prescription rights and regardless to this fact his new title stood extinguished as of the 1st September, 2006.

Pursuant to the above circumstances the Plaintiff claims to have obtained Title by way of adverse possession and prayed that the name of the Defendant/Respondent be deleted from the Register at the Lands Office and that a fresh title do issue made out in favour of the Plaintiff/Applicant.

The Respondent opposed the application and relied on his Written Submissions and his Replying Affidavit dated the 16th March, 2007.

The Respondent submits that the Plaintiff entered into a Sale Agreement with one **ERICA MANYINYA** the widow of the then registered proprietor and at that time she had not taken out a Grant Letters of Administration and therefore she had no locus to sell the suit property.

The said Sale Agreement also became void as no consent from the Land Control Board was obtained.

The Respondent further submitted that Plaintiff did not have continuous and uninterrupted occupation of the suit property as there was interruption by the filing of Succession Cause No. 48 of 1992 in Kapsabet. That the Plaintiff enjoined himself in the proceedings as an Objector. The Plaintiff had also filed proceedings at the Land Disputes Tribunal Kipkaren Division and later filed High Court Succession Cause NO. 240 of 2005 which case is still pending hearing and determination.

The Respondent further avers that the current suit is Resjudicata as set out in Section 7 of the Civil Procedure Act.

The Respondent urged the court to dismiss the Plaintiffs claim for adverse possession as the Plaintiff did not have uninterrupted and continuous occupation of the property in issue, for a period of twelve years as required by law.

ISSUES FOR DETERMINATION

Upon reading the Plaintiff and Defendants Written Submissions and upon perusing their respective affidavits the court finds the following issues for determination;

1. Adverse possession – as provided by Section 38 of the Limitation of Actions Act.

2. What amounts to interruption of possession and occupation.

3. Is the Plaintiff entitled to the orders sought.

4. Costs.

ANALYSIS

The Plaintiff bought the property from one **ERICA IRODANGA MANYINYA** on the 27th June, 1982 and took possession of the same on that date.

The said **ERICA IRODANGA MANYINYA** was not the registered proprietor of the land, but was a widow of the late **MANYINYA IRODANGA** and she had not taken out a Grant for Letters of Administration. This therefore renders the sale void ab-initio as she had no locus to enter into such a transaction. Also the property is agricultural land and the parties did not obtain consent of the Land Control Board as required by law, the sale again was void for this reason.

The Plaintiff then took possession and occupation of the land on the same date the agreement for sale was entered into and the Plaintiff's possession and occupation became adverse to the title from that date, 27th June, 1982.

The doctrine of adverse possession entails continuous, consensual and interrupted occupation and possession for a period of twelve (12) years. The provision of Section 38 of the Limitation of Actions Act entitled the Plaintiff to apply to be registered as the proprietor to the land after a period of not less than twelve (12) years had lapsed.

This then brings me to the second issue, what constitutes interruption. It has been held that it is not enough for the proprietor to merely write a letter to the trespasser.

A Court of Appeal decision was annexed and referred to by the Plaintiff **KISUMU C.A NO. 181 OF 1996 JASON MASAI –VS- MASAI KIPSAMU** – in which it was held that a mere demand letter did not amount to interruption of possession. It therefore means that the letter issued by the Respondents agent dated 17th August, 2005 to pay profits and vacate the land did not interrupt possession nor did it stop the running of time.

Refer also to the case of **ELIJAH IKOKHA IKANZO –VS JOSEPH NGAIRA ASUTSA (2006) e KLR** where it was held that;

“.....a letter by the proprietor, even if it be through an advocate, or the chief of the area does not amount to assertion of title in-law and cannot therefore interrupt the passage of time for the purpose of computing the period of adverse possession.....”

A Succession Cause was filed by the Defendant and his mother seeking for a Grant of Letters of Administration. The Plaintiff enjoined the proceedings as an Objector, but the objection as dismissed for non-attendance by the Plaintiff herein.

The Plaintiff also instituted proceedings in the Lands Disputes Tribunal and also filed an application in the High Court for Annulment and Revocation of Grant, which case is still pending for hearing and determination.

With reference to the authority of **GITHU –VS- NDEETE (1984) KLR** all these proceedings do not amount to interruption nor do they put a stoppage to the running of time.

The Respondent must assert his right to title by physically entering onto the property and evicting and ejecting the trespasser from the suit property. Alternatively the Respondent should have proceeded to institute legal proceedings in a court of law against the trespasser asserting his rights against the

trespasser with prayers for his eviction and ejection from the property. Then only is there interruption to occupation and possession and then only does time stop running.

The proceedings, initiated or instituted by the Plaintiff do not amount to interruption. The onus to file suit is upon the Respondent asserting his right to Title as against the Plaintiff herein.

From the evidence on record the Respondent it appears never took such steps.

FINDINGS:

The Plaintiff bought the land in issue from the mother of the Defendant/Respondent and the Plaintiff has had consensual, open, continuous occupation and possession of the land adverse to the interests of the Defendant/Respondent for a period of over twelve (12) years starting from the 27th June, 1982. The Plaintiff has proved that he is entitled to the property by way of adverse possession.

CONCLUSION.

The following orders be and are hereby issued;

- 1) The Plaintiff has acquired Title over NANDI/KAPTICH/357 by way of adverse possession.
- 2) The Plaintiff is entitled under Section 38 of the Limitation of Actions Act to be registered as proprietor of NANDI/KAPTICH/357
- 3) The Defendant/Respondent's title to NANDI/KAPTICH/357 is hereby extinguished.
- 4) The Defendants name be deleted from and the name of the Plaintiff be entered in the Land Register.
- 5) Costs – each party shall bear their own costs.

Dated and delivered at Eldoret this 8th day of June 2012.

A.MSHILA

JUDGE

Coram: Before .A Mshila J

CC: Andrew

Counsel for the Plaintiff Karuga holding brief for Njuguna

Counsel for the Defendant: No appearance.

A.MSHILA

JUDGE