



REPUBLIC OF KENYA

High Court at Kitale

Civil Suit 93 of 2011

IN THE MATTER OF ASCERTAINMENT OF OWNERSHIP OF PARTS OF LR. NO. 3036/5.

B E T W E E N

PAUL MWOLOLO MUTEVU.....1ST PLAINTIFF.

ESTHER WANJIRU CHEGE.....2ND PLAINTIFF.

FRANCIS M. NDAMBUKI.....3RD PLAINTIFF.

FRANCIS KIHUMBA GITAHI.....4TH PLAINTIFF.

ANTHONY MUKARU KAMAU.....5TH PLAINTIFF.

DAVID NAMASAKA.....6TH PLAINTIFF.

DINA NAFULA NAMASIKA.....7TH PLAINTIFF.

DANIEL MUTISTYA NDOLO.....8TH PLAINTIFF.

JAPHETH WEKESA MANALI.....9TH PLAINTIFF.

R U L I N G.

The nine (9) plaintiffs/applicants vide the Originating summons dated 1st August, 2011 seek

against the defendant/respondents the following orders:-

[i] A declaration that the defendants right over eight (8) acres part of L.R. No. 3036/5 was extinguished by adverse possession upon expiry of twelve (12) years when the plaintiffs remained in exclusive and uninterrupted possession of their respective portions.

[ii] A declaration that upon expiry of the 12 years, the defendant held the land in trust for the plaintiffs.

[iii] an order under section 38 of the Limitation of Actions Act (Cap 22 LOK) that the plaintiffs be registered as the owners of the respective portions exclusively held/possessed by them.

[iv] an order that the defendants do execute all such documents, as would facilitate the registration of the transfers in favour of the plaintiffs and in default the Deputy Registrar of this court to execute all such documents.

[v] An order that the defendant do pay the costs of this suit.

By consent of the parties, it was ordered that the application be heard by way of written submissions. In that regard, written submissions were filed by the plaintiffs on the 24th September, 2012 and by the defendants on the 26th September, 2012. the affidavits in support of the plaintiff's case were deponed by each of the plaintiff on the 1st August, 2011 and 30th September, 2011. A reply thereto is contained in the defendants' affidavit deponed by the first defendant, **Keziah Siella Pyman**, on the **17th November, 2011**. From all the affidavits, it is the plaintiffs' case that between the years 1990 and 1997 each of the plaintiffs entered into separate agreements with one **John Pyman** and one **Robert Pyman** for the sale of part of a portion of land described as **L.R. No. 3036/5** situated near Kwa-Muthoni trading center, Saboti Division, Trans Nzoia county registered in the name of Josephine Williams also known as **Josephine V.N. Pyman**, late mother of the vendors cum administrators of her estate.

Each of the plaintiffs took possession of their respective portions at different times between the years 1990 and 1997 and continued occupation thereof exclusively and without any interruption for a period exceeding twelve (12) years.

It is therefore, the plaintiffs' contention that they have since acquired right over their respective portions of land by way of adverse possession thereby entitling them to the orders sought herein.

Most of the allegations made by the plaintiffs in their respective supporting affidavits are denied by the defendants who contend that they are the rightful administrators of the estate of the late Josephine William, Alias Josephine V.N. Pyman.

It is the defendants' case that the agreements entered between the plaintiffs and the vendors John and Robert Pyman were null and void for reasons that the agreements were made prior to the grant of letters of administration and that the agreements were made contrary to the provisions of the Land Control Act, (Cap 302 LOK) and the Law of Succession Act (Cap 160 LOK).

The defendants contend that the plaintiffs are intermeddlers in the material estate and that orders have already been made against them in Eldoret Succession case No. 26 of 1995 in a ruling delivered on 15th December, 2010.

the defendants also contend that the plaintiffs are guilty for non disclosure of material facts by failing to disclose that the ruling made on 28th November, 1996 which they rely on was overtaken by events.

It is further contended by the defendants that it is not true that the plaintiffs have been in uninterrupted occupation of the suit land and that they entered into the disputed and illegal agreements from 1990 knowing too well that the owner of the suit land was deceased and that the vendors had no legal authority to deal with the estate of the deceased. Further, the plaintiffs were removed from the land by the

Provincial Administration but went ahead to illegally erect structures thereon. Their occupation thereof is illegal, interrupted and already faulted by the court.

The defendants contend that the plaintiffs are estopped from claiming the land by virtue of the doctrine of estoppel and that they cannot base their case on adverse possession as their occupation of the land has not been peaceful and uninterrupted.

The foregoing clearly show that the plaintiff's claim to respective portions of the suit property is based on adverse possession. The defendants' position is that the occupation of the land by the plaintiffs has all along been illegal in as much as the applicable agreements of sale were null and void and in as much as the occupation has not been free from resistance interference and/or interruption.

Adverse possession is simply acquisition of land by Limitation of Actions. The mechanism is only used as a shield by a person in adverse possession and never a sword by the adversary. It operates to extinguish interest based on failure to bring 'an action' and the rationale is that it is useless to help a person who has decided to sleep on his own right. The basic idea is that a person who perhaps wrongly takes possession of land, acquires a possession title to the land which after the expiry of a certain periods becomes good against all and sundry. This, if the owner of the land fails within a certain period to secure the eviction of the trespasser or squatter from his land, the owner is statutorily barred from recovering possession thereafter. The intruder or trespasser acquires a right which enables him to remain in possession as an indirect effect of the Limitation of Actions which is basically directed towards extinguishing a title which the owner has failed to protect within the period specified by statute.

In this country, the doctrine of adverse possession is embodied in the Limitation of Action Act (Cap 22 LOK) as well as in case law.

Section 7 of the Act provides that:-

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run which possession is referred to as adverse possession (see, section 13 of the Limitation of Actions Act).

Much of the case law has centered on the concepts of discontinuance and dispossession as well as possession by squatters or wrongful intruders. Accrual of right by adverse possession would thus occur on the date of dispossession or discontinuance which concepts the Limitation of Actions Act contemplated.

In **Wambugu vs. Njuguna (1983) KLR 172**, the Court of Appeal held that the Limitation of Actions Act, on adverse possession contemplates two concepts, dispossession and discontinuance of possession and that the proper way of arising proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession for the requisite number of years. It was also held that 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.

In essence, possession which causes time to run must be open. Not secret, peaceful, not by force of adverse (i.e. “*nee vi neclaim nec precario*”)

In this present case, the plaintiffs contend that the defendants right over eight acres of the suit property was extinguished by adverse possession due to the plaintiffs' exclusive and uninterrupted possession of their respective portions for a period of more than twelve (12) years.

The first plaintiff exhibited a sale agreement dated 8th June, 1992 showing that he purchased his portion

from one John Pyman at a consideration of Ksh. 45,000/= and was given vacant possession on 15th July, 1992. he also exhibited a further sale agreement dated 7th February, 1996 for a second portion at a consideration of Ksh. 25,000/=. Possession of the second portion was handed to him on 7th February, 1996.

Similar agreements at different times and consideration were also exhibited by the rest of the plaintiffs. They all indicated having taken possession of their respective portion immediately after executing the agreements or a few days thereafter.

The second plaintiff averred that vacant possession was given to her on 15th September, 1993 while the third plaintiff averred that he took possession on 20th March, 1997. the third plaintiff indicated that he purchased his portion from one T.K. Wairimu in 1997 after she (Wairimu) had purchased it in 1992 from John Pyman.

The fourth plaintiff averred that possession was given to him on 8th February, 1992 while the fifth plaintiff averred that he purchased two portions on 12th September, 1991 and 24th November, 1992 and was given possession thereof on 30th September, 1991 and 31st January, 1993.

the sixth plaintiff averred that his late son purchased a portion from John Pyman on 28th July, 1993 but he was the person who provided the consideration of Ksh. 60,000/= and took possession upon the execution of the agreement.

The seventh plaintiff averred that she purchased her portion on 14th July, 1993 from one Robert George Pyman and took possession upon execution of the sale agreement.

The eighth plaintiff averred that he purchased his two portion on 4th February, 1992 and 12th February, 1993 and took possession thereof on the 12th February, 1993 while the ninth plaintiff averred that he purchased his two portions on 12th October, 1990 from Robert George Pyman and that possession was given to him upon execution of the sale agreement.

All the plaintiffs contend that their occupation of their respective portions from the time of purchase i.e. between 1990 to 1996 has remained exclusive and uninterrupted. They have exhibited photographs showing that they have respectively developed their own portions by planting crops, erecting fences and/or buildings. They all contend that the vendors John Pyman and Robert Pyman were at the time of the sale agreements the administrators of the estate of the late Josephine William alias Josephine V.N. Pyman who died on 18th June, 1990 per evidential material availed herein.

The first sale agreement dated 13th October, 1990 involved the ninth plaintiff and Robert George Pyman as the vendor.

The defendants do not dispute the existence and/or execution of the aforementioned sale agreements between the respective plaintiffs as the purchasers and John Pyman and Robert Pyman as vendors.

However, the defendants contend that the agreements were null and void as they were made prior to the grant of letters of administration respecting the estate of the late Josephine V.N. Pyman and were in contravention of the Land Control Act and the Law of Succession Act.

The defendants are in essence saying that the alleged vendors John Pyman and Robert Pyman had no legal capacity to sell respective portions of the material land to the plaintiff and inspite of being aware of the fact, the plaintiffs went ahead to enter into illegal sale agreements.

The defendants in reference to a previous succession case No. 26 of 1995 at Eldoret contend that the ruling made therein on 15th December, 2010 rendered the plaintiffs' annexures (exhibits) invalid for having been overtaken by events.

The annexures or exhibits referred to by the defendants are essentially the sale agreements and

most likely the ruling of the court made on 28th November, 1996.

It is the sale agreements which enabled the plaintiffs take possession of their respective portions of land from the estate of the late Josephine Pyman through its administrator at the time, John Pyman and a beneficiary, Robert Pyman. John and Robert Pyman sold part of the estate to the plaintiffs at different times between 1990 and 1997. the plaintiffs took possession of their respective portion upon execution of the sale agreements or immediately thereafter. A certificate of confirmation of grant dated 17th July, 2003 is enough proof that John Pyman was the previous administrator of the estate before he was substituted with the three defendants herein. The ruling of the court dated 15th December, 2010 and other annexures show that John Pyman was appointed administrator on 6th July, 1995. the deceased Josephine Pyman died in the year 1990. She was the mother of John and Robert Pyman. The exact date of her death was the 18th June, 1990. the plaintiffs' occupation of their respective portions of the suit property from the date of purchase remains undisputed. They have remained in occupation todate. Indeed in an affidavit, supporting a chamber summons dated 9th December, 1995, John Pyman, as the administrator of the estate confirmed that part of the estate property had been sold to some people including some of the plaintiffs herein. He also confirmed that Robert Pyman was a beneficiary of the estate entitled to nine (9) acres of the estate property i.e. the suit property.

The agreements exhibited by seventh and ninth plaintiffs show that they purchased their respective portions from Robert Pyman. It is instructive to note that the chamber summons dated 9th December, 1995 presented by John Pyman doubled up as an application for confirmation of grant and for confirmation and/or alteration and/or improvement of the proposed mode of distribution.

The ruling of the court dated 28th November, 1996 in effect sealed the confirmation of grant in favour of the administrator John Pyman and the distribution of the estate in favour of all the beneficiaries and purchasers of part of the estate.

It would therefore appear that the defendants' contention that John Pyman or Robert Pyman had no legal capacity to sell their entitlements of the estate to the plaintiffs was misplaced. The two were beneficiaries of the estate and had every right to sell their part of entitlement to any person including the plaintiffs herein. Apart from being a beneficiary, John Pyman was also the administrator of the estate and was entitled to sell part thereof as part of his management of the estate. At the time the defendants were substituted as administrators in the year 2003, the plaintiffs had long been in adverse possession of their respective portions of land. They had paid full purchase price and taken vacant possession of their respective portions.

On the contention that the sale agreements between the plaintiffs and vendors were null and void by dint of section 6 and section 7 of the Land Control Act, proper guidance is found in the case of **Gatimu Kinguru vs. Muya Gathangi (1976) KLR 253**, where it was held that the consent of the Land Control board was not required under section 6 (1)(a) of the Land Control Act to a change in the ownership of agricultural land situated within a Land Control area which occurs by adverse possession in accordance with section 7 of the Limitation of Actions Act. Further, a title acquired by adverse possession creates a change in ownership of the title which does not require reallocation of the register.

Further, in the case of **Karanja Matheri vs. Kanji (1976-80) 1KLR 172** it was held that although section 6 (1) (a) of the Land Control Act renders certain transactions relating to agricultural land void unless the consent of the local land control board is first obtained, and section 6 (1) (b) similarly renders void the division of such land, a person is entitled to be registered as the proprietor of such land in accordance with sections 7 and 17 of the Limitation of Actions Act by order of the court even if he has not previously obtained the requisite consent.

These two decisions of the High court have settled the matter and rendered untenable the defendants' contention that the sale agreements between the plaintiffs and the vendors of part of the suit property were voided by the provisions of the Land Control Act.

In **Wambugu vs. Njuguna (supra)**, it was held that where a claimant pleads the right to land under an

agreement and in the alternative seeks an order based on subsequent adverse possession, the rule is:- The claimant's possession is deemed to have become adverse to that of the owner after the payment of the last instalment of the purchase price. The claimant will succeed under adverse possession upon occupation for at least twelve years after such payment. Herein, the plaintiffs paid the full purchase price and took possession thereafter. This occurred between 1990 and 1997. To date no legal action has been taken by the previous administrator and the present administrators to have them (plaintiffs) vacate the land. The letters from the provincial administration exhibited herein by the defendants were not directed at the plaintiffs and did not involve the plaintiffs. They were a reflection of a dispute involving family members of the late Josephine Pyman and did not upset the peaceful enjoyment that the plaintiffs had over the suit property since occupying their respective portions in the 1990's.

There was an attempt made by the defendants in the year 2011 to institute an action for trespass against the plaintiffs from the defendants to most of the plaintiffs.

The attempt did not however interfere with the plaintiffs' possession of part of the suit property.

The demand letter referred to a court order made on the 15th December, 2000 but the same is not exhibited herein.

The court order made on 15th December, 2010 was a result of the application made by the plaintiffs against the defendants for a temporary injunction and revocation and/or annulment of the grant made to the defendants. It was indicated in the ruling that the defendants were substituted as administrators after the death of their father Robert Pyman, on 9th December, 2002. It was also indicated that the late Robert Pyman and John Pyman may not have had the necessary authority to deal with the property between October, 1990 and February, 1995. However the plaintiffs purchase and occupation of part of the suit property was not invalidated and was indeed acknowledged by the court. That was the reason why the plaintiffs were told that their remedy lay elsewhere. Indeed, this suit was filed by the plaintiffs so that the remedy due to them may be provided.

Suffice to hold that the plaintiffs had been in exclusive and an uninterrupted possession of part of the suit property up to the month of May, 2011 when a demand letter was forwarded to them by the defendants to vacate the suit property. This translates to a period of more than twelve (12) years. The plaintiffs were thus within their rights to move the court under the provisions of the Limitation of Actions Act (section 37 and 38) seeking the orders sought in the originating summons dated 1st August, 2011.

It has been submitted by the defendants that the sixth plaintiff, David Namasaka, lacks "**locus-standi**" in this matter. However, there was no dispute that he provided the purchase price for the portion occupied by himself. He took possession on the 28th July, 1993 and has been in such possession to date. The contention that he has no "**locus-standi**" is therefore untenable.

The circumstances of this case do not give rise to the operation of the doctrine of estoppel. The ruling of the court made on 15th December, 2010 was not instigated by the defendants but the plaintiffs. Most importantly, the ruling did not invalidate the sale of part of the suit land to the plaintiffs, neither did it invalidate the occupation thereof by the plaintiffs which occupation was adverse to the defendants from the time of execution of the respective sale agreements, a period exceeding twelve (12) years.

In the upshot, the plaintiffs are entitled to all the orders sought in the originating summons dated 1st August, 2011.

Ordered accordingly.

[Read and signed this 18th day of October, 2012.]

[In the presence of Mr. Kiarie for applicants and Mr. Waweru for Chebii for defendant.]

J.R. KARANJA.

JUDGE.