



**REPUBLIC OF KENYA**

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

**CIVIL CASE 225 of 2000**

**ALICE IMINZA MUHAVI:.....PLAINTIFF**

**VERSUS**

**DANIEL KIPTABUT A. SANG.....1<sup>st</sup> DEFENDANT**

**ISAAC KIPROOT KURGAT:.....2<sup>ND</sup> DEFENDANT**

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

By an Originating Summons dated 19<sup>th</sup> July 2000 and filed in court on 4<sup>th</sup> October 2000 Alice Iminza Muhavi claimed against Daniel Kiptabut Arap Sang and Isaac Kiptoo Kurgat that on or about the 24<sup>th</sup> day of April, 1986 she took possession from Daniel Kiptabut Arap Sang of the parcel of land then known as plot No. LR. No. 10492 and now known as Eldoret Municipality/Block 21 (King'ong'o/32 measuring approximately one quarter (  $\frac{1}{4}$  ) of an acre registered in the name of Daniel Kiptabut Arap Sang. She claims that she has occupied the said parcel of land openly peacefully and without any interruption since April 1986 and therefore for more than twelve (12) years and she has substantially developed the said parcel of land. She therefore prays in

her Originating Summons for judgment that the interests of the Defendants jointly and/or severally have been extinguished by lapse of time and so she has acquired title by adverse possession of the said  $\frac{1}{4}$  acre of land known as Eldoret Municipality/Block 21 (King'ong'o/32. She further prays that the register relating to the aforesaid piece of land be rectified to reflect her as the owner of the suit land and any title documents issued be delivered to this court for cancellation. She also prays for the costs of the Originating Summons.

In a Replying Affidavit sworn by the 1<sup>st</sup> Defendant herein on 3<sup>rd</sup> April 2000 he denied that he ever executed any sale agreement over the suit land between himself and the Plaintiff and further denied any knowledge of the Plaintiff occupying the Suitland and added that the orders sought cannot issue as the suit land was already sold and transferred to a third party and stated that the Plaintiff would sufficiently be compensated by way of damages.

On 06/07/2001 a consent was recorded by the court by and between the parties herein that the status quo be maintained and such status quo was defined in the following terms:-

1. (a) The Plaintiff who is in occupation do remain in occupation during the pendency of this cause.
- (b) That the Plaintiff be at liberty to cultivate the plot but not to erect any new structures thereon until the suit is finalized.
- (c) The Defendants and or their agents not to evict the Plaintiff or trespass of (sic) the suit property until the suit is finalized.

2. ....

I will come back to this consent later in this judgment.

The Defendants did not attend court on the date the suit was set down for hearing. Their advocate Mr. Yego attended and cross examined the Plaintiff. The case was then adjourned to a later date for the defence case on which date the Defendants once again did not attend court and the matter was fixed for submissions by counsel on each side.

At the hearing the Plaintiff gave evidence that she entered into a sale agreement for  $\frac{1}{4}$  acre out of the larger land known as Eldoret Municipality Block 21 (King'ong'o/32 and paid the entire purchase price of Kshs.15,000/= and immediately took possession of the said portion. Her further evidence was that she was told that the land was registered but she was not shown any title deed and further the portion was not transferred to her. She stated that she had made developments on the Suitland and has lived on the land since she bought it and now wished to get title to her portion of  $\frac{1}{4}$  acre as the rest of the parcel of land was bought by other people including the 2<sup>nd</sup> Defendant here who was threatening to evict the Plaintiff. She insisted that she was on the suit land since she bought the same from the 1<sup>st</sup> Defendant and has never moved out of it.

It was then submitted for the Plaintiff that she had taken possession of the land she had bought from the 1<sup>st</sup> Defendant and has all along used it developing and constructing on it peacefully without

any interruption and therefore any rights the Defendants may have had on the land were extinguished by lapse of time at the expiry of twelve years from 24.06.1986 and hence the Plaintiff is entitled to the portion of  $\frac{1}{4}$  acre by way of adverse possession since 24.4.1998. It was further submitted that the 1<sup>st</sup> Defendant had indeed admitted liability and offered to compensate the Plaintiff to the tune of the current market value of the  $\frac{1}{4}$  acre. For the position of adverse possession the Plaintiff relied on the authority of **GITHO -VS- NDEETE (1984) KLR 776.**

On the Defendants' part there was submission that the OS must fail as the same was not proved. The 2<sup>nd</sup> Defendant's case was that he bought the entire suit land from the 1<sup>st</sup> Defendant without notice that the Plaintiff had bought the same and was residing in it. It was further submitted that as the Plaintiff got into the suit land courtesy of a sale agreement then her claim under adverse possession cannot succeed.

The Originating Summons claims ownership of a  $\frac{1}{4}$  acre of the Suitland due to possession for a period in excess of twelve years since 24/06/1986, hence adverse possession. At the hearing of the case the Plaintiff gave evidence that she got into the suit land pursuant to a sale agreement entered into between herself and the 1<sup>st</sup> Defendant and in 1987 she constructed a house on her  $\frac{1}{4}$  acre which house still stands on the land. She lived on the land for two years and thereafter left it for her son who lives on the land to date. She said that she resisted an attempt by the 2<sup>nd</sup> Defendant to evict her from the suit land and refund her the purchase price. She did not move out and now prays for the  $\frac{1}{4}$  acre she bought in 1986 on 24<sup>th</sup> of April. The evidence led is to the effect that the Plaintiff got into the suit land due to the sale of the same

to her by the 1<sup>st</sup> Defendant. That was supported by the sale agreement and further by the 1<sup>st</sup> Plaintiff's letter dated 24<sup>th</sup> January 2000 by which he admitted the same and offered to compensate the Plaintiff at the then market rate if the Plaintiff agreed to vacate. That the Plaintiff was indeed in occupation of the suit land is further confirmed by the consent recorded in court between the parties on 6<sup>th</sup> July 2001. The evidence led is on occupation of the Suitland due to sale. The pleadings in Originating Summons are on occupation due to adverse possession. Now, these dual issues cannot be used interchangeably. Proof of sale as evidenced by the sale agreement and admitted by the 1<sup>st</sup> Defendant, as stated above, is inconsistent with adverse possession. In the case of **WAMBO V NJUGUNA (1983) KLR 172** it was held that purchaser's interest and claim for adverse possession are two inconsistent interests and that is a conflict. The occupation can only be either with permission or adverse as the two concepts cannot co-exist.

Further in the case of **SAMUEL MIKI WAWERU -VS- JANE NJERI RICHU C.A. NO.122 OF 2001 (unreported)** it was stated:-

**“It is trite law that a claim for adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement of sale or lease or otherwise”** and again it was held that possession does not become adverse before the end of the period for permission to occupy has been given see **JANDIS -VS- KILIPAL (1975) E.A.225.**

In this case the Plaintiff successfully resisted the eviction attempted by the Defendants and hence she has been in continued occupation since the sale of 24<sup>th</sup> June 1986. The sale agreement was therefore never repudiated at any time and as such, and as stated in the case of **SISTO WAMBUGU V KAMAU NJUGUNA (1982-88) 1 KLR - 217**

**“a purchaser of land under a contract of sale who is in possession of the land cannot claim to be in adverse possession**

**unless the contract of sale has first been repudiated as between the parties and in that case time starts to run from the date of the termination of the contract.”**

As was held in the case of **HYDE V PEARCE (1982) ALL ER 1029** the Plaintiff's reliance of the sale agreement would have aided her as a defence in a claim for possession brought against her. However she cannot assert that she has obtained title by adverse possession.

It appears patently clear to me that due to the agreement for sale, the consent not to evict the Plaintiff from the suit land and the evidence of the Plaintiff as to occupation due to purchase and all the authorities referred to above, this Originating Summons was not properly grounded in law and the same must fail. Accordingly the same is hereby dismissed with costs.

It is so ordered.

**DATED SIGNED AND DELIVERED AT ELDORET THIS 25<sup>TH</sup> DAY OF  
MAY 2010**

**P.M.MWILU  
JUDGE**

**IN THE PRESENCE OF**

**Mr. Alwanga** H/B for Nyairo for Plaintiff - Advocate for the Plaintiff

**Mr. Nyobei** - Advocate for the Defendants

**Andrew Omwenga** - Court clerk

**P.M.MWILU  
JUDGE**