



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 197 of 2004

DOMIC LOSAMULI YIAPAN PLAINTIFF

VERSUS

TUBMEES WAWERU KULUODEFENDANT

JUDGMENT

This suit filed by way of Originating Summons is provided under Order XXXVI Rule 3(1) of Civil Procedure Rules and Section 38 of Limitation of Actions Act (Cap 22).

It seeks declaration that the Defendant's right to recover land known as L.R. Narok/Cismara/Enabelbel/enengetia/217, (hereinafter referred to as the 'suit land'), from the plaintiff is barred under Section 7 of the Limitation of Actions Act and his Title is extinguished under Section 17 of the said Act, on the grounds that the Plaintiff has been openly and peacefully in occupation of the above mentioned piece of land for a period of 12 years preceding the presentation of this suit.

The Plaintiff also seeks order that he be registered as a sole proprietor of the suit land in place of the Defendant and in the event the Defendant fails to transfer the said land, the Deputy Registrar of the High Court to sign all the necessary documents for effecting transfer of the suit land.

He also prays for the costs.

The said summons was supported by the affidavit of the Plaintiff sworn on 6th January, 2004.

The Defendant responded to the aforesaid claims by his replying affidavit sworn on 23rd March, 2004.

On the date of hearing, i.e. 8th May, 2007, after satisfying that the Defendant was properly served and yet was either not present or not represented by his counsel, I proceeded to hear the matter ex-parte.

The Plaintiff adduced evidence. He knew the Defendant who approached him in the year 1980 and offered to sell a portion of land admeasuring 3.5 acres from the parcel of land No. L.R. Narok/Cismara/Enabelebe/Enengetia/217 the suit land. They executed and duly signed a sale agreement on 12th July, 1980 (P.Ex.1). The payment of agreed purchase price of Shs.8,400 was duly made.

The Plaintiff took possession of the portion sold to him. I do note that the sale agreement does make mention of that fact and that the Defendant has also conceded to that fact in paragraph 4 of his replying affidavit.

Thereafter on 9th August, 1981 the Defendant sold him another portion of 4 acres with agreed purchase price of Shs.4000 per acre. A handwritten note stating

“Purchase of 4 acres shamba at Shs.4,000 per acre – Received Shs.5000/-“ was produced in evidence (P.Ex.2). It was signed by both parties.

The Defendant has averred in his replying affidavit that he only leased those 4 acres and did not sell the same. It was in fact leased to the Plaintiff for a period of six years at Shs.200/- per acre per year and has received only Shs.5,000/- for the rent, and nothing more. (paragraphs 8 and 13 of replying affidavit).

It is also true that the Plaintiff has not shown that he paid the balance of the agreed purchase price.

The averment of the Plaintiff that the Plaintiff then sold him one and half acre of an agreed price of Shs.7,500 on 8th October, 1982 has also been accepted by the Defendant. (Paragraph 5 of the replying affidavit).

The Plaintiff’s occupation of the said portion of 9 acres has not been denied. The Defendant has stated that the portion of four acres was fenced by the Plaintiff at his request as cattle of the Plaintiff were straying in his land. (paragraph 10 of the replying affidavit).

In the year 1990 the Defendant tried to interfere by uprooting posts of his fence but after the matter was reported to the chief, the Defendant agreed that he did not have any claim from the Plaintiff. That was on 22nd August, 1990. The plaintiff produced a note signed by the Chief and Assistant Chief dated 22nd August, 1990 which was produced in evidence (P.Ex.4). According to the plaintiff, the Defendant replaced the posts.

In 1992, the Defendant agreed to appear before the Land Control Board and to apply for consent to sub-divide. He produced the application and consent. (P.Ex.5 and 6). Those documents do mention that the portion of land was admeasuring 10.25 acres. The Plaintiff explained the same by stating that a portion of land admeasuring 1.25 acres was purchased by another person (PW.3) and they decided to join their respective portions before the Land Control Board.

I further note that P.Ex.5 mentions sub-divisions into four portions of 6.6. acres, 6.25 acres, 1.25 acres and 10.25 acres. The area of the whole land was 10.00 Hectares. The letter of consent dated 22nd July, 1992 (P.Ex.6) does mention those four sub-divisions.

According to the Plaintiff, after the consent survey was carried out but the surveyor passed away and the Defendant had refused to appear before the Land Control Board for executing transfer of the sub-divisions and hence the suit.

He has since used the portion of 9 acres for grazing and cultivation.

PW.2 Titus Sururu is a retired Assistant Chief. He knew the parties. He was aware that the Defendant from his big parcel of land sold 9 acres of land to the Plaintiff.

He recalled the incident when a complaint was made by the Plaintiff that the Defendant has uprooted posts from his portion of the suit land. The Defendant was called to appear before the Chief and panel of elders and he confirmed that the plaintiff had no dues to pay to him and agreed to replace the uprooted posts.

He was shown P.Ex.4 and confirmed that the chief wrote and signed the same and after that he also placed his signature. The chief is not alive and his name was Rupert Tole Paret.

PW.3 is Peter Njoroge Kariuki who had purchased 1.25 acres of land from the Defendant in the year 1990. He also knew that the Plaintiff had purchased portion of land from the Defendant.

He reaffirmed that his portion of land and that of the Plaintiff was joined together when the consent for sub-division was applied and granted. He also stated that the survey was done. The Defendant thereafter returned to give him the title and then he returned his portion of the land when the Defendant paid him back the purchase price. He agreed to return the land also because he then went to stay at Naivasha.

He confirmed that the Defendant, his wife and his child accompanied him to the Land Control Board and confirmed that the surveyor had the letter of consent (P.Ex.6) when he came to survey the land. He confirmed that the plaintiff has been using his portion of land, for dairy and cattle farming and his workmen are staying on that land.

The Plaintiff had also stated the same. The averments made by the Defendant that he did not appear before the Land Control Board and that the document (P.Ex.5) does not bear his signature (see paragraph 12 of replying affidavit) and the servants not staying on the land have been controverted by the evidence of the Plaintiff confirmed by PW.3.

This was the evidence which remained uncontroverted.

It is evident from the evidence led before me that initially the Plaintiff took over possession under the agreement to sell in respect of three portions of the suit land at different times, and that the Defendant did not transfer the land even after the consent to sub-divide was obtained. I may note that the consent was in fact obtained for 10.25 acres and not for 9 acres which the plaintiff claims to have purchased.

Thus the plaintiff has agreed that the 9 acres acquired and used by him was not transferred to him and thus those agreements which he has produced may not be basis of his cause of action. What he has stated after all the aforesaid narration, was that he has been using those 9 acres peacefully and without interruption since the occupation and thus the prayers which I have already enumerated hereinbefore. He claims the prayers on the basis of adverse possession of the piece of land admeasuring 9 acres.

The Limitation Act as per Section 37 applies to land registered under the Government Lands Act, the Registration of the Titles Act and the Registered Land Act and proviso (a) of Section 37 stipulates:

(a) Where, if the land were not so registered, the title of the person registered as proprietor would be extinguished, such title is not extinguished but is held by the person registered as proprietor for the time being in trust for the person who, by virtue of this Act, has acquired title against any person registered as proprietor, but without prejudice to the estate or interest of any other person interested in the land whose estate or interest is not extinguished by this Act.”

Similarly Section 38 stipulates that any person, claiming the entitlement by adverse possession to the land registered under any of the Act cited in Section 37, or land comprised in a lease registered under any of those Acts, may apply to the High Court for the 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.

Section 7 of the Limitation Act also is very clear and stipulates that an action may not be brought by any person to recover land after the end of twelve years.

The issue, whether the provisions of the Land Control Act (cap 302), specifically section 6(1) thereof, overrides the rights occurred under adverse possession, has been vastly considered and determined by our courts.

I shall start with the case of **Gatimu Kinguru vs. Muya Gathangi (1976) KLR page 253.**

It is held in the holdings by Madan J (as he then was) on page 253, and I quote:

“The consent of the local Land Control Board is not required under Section 6(1)(a) of the Land Control Act to 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 rectification of the register.”

The last sentence of the aforesaid finding makes it clear that section 143 of the Registered Land Act does not apply to the change of ownership acquired by adverse possession.

It was further held: namely,

“The creation of a trust over agricultural land in a land control area does not constitute an ‘other disposal of or dealing’ for the purposes of section 6(1)(a) of the Land Control Act and, therefore, does not require the consent of the local land control board.”

In the case of the **Public Trustee and Mrs. Beatrice Muthoni vs. Kamau Wanduru (C.A. No.73 of 1982)** the Court of Appeal held:

“This brings in the Limitation of Actions Act (cap 22) which applies to registered land in a special way. The title of the registered proprietor is not extinguished but is held by him in trust for the person who, by virtue of the Limitation of Actions Act, has acquired title against the proprietor. Section 37 (a) Limitation of Actions Act)”

While making final finding the three judges stated: viz

“The upshot is that although Kamau is the proprietor of this registered land Mrs. Muthoni is in possession and actual occupation of it and has been in possession of it over twelve years so she has rights acquired under the Limitation of Actions Act which is an overriding interest in it that it does not have to be entered on the register so Kamau is a bare trustee for Mrs. Muthoni who is entitled to the reliefs she claims.”

The Court of Appeal in **C.A. No.57 of 1997 between Peter Njau Kairu and Stephen Ndungu Njenga** and another adopted the following passage from the case of **Perry Vs. Clissold and Others (1907) AC 73 at page 79**: namely.

“It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the provisions of the statute of Limitations applicable to the case, his right is for ever extinguished, and the possessory owner acquires an absolute title”.

The Court of Appeal in **C.A. No.12/1982 between Francis Munene Paul Muthuita and Milka Wanoe and others** applied the decision of Madan J. (as then he was) in Gatimu’s case (*supra*).

With the aforesaid observations, which I reverently agree and follow, I do find that if the plaintiff can prove that he has been openly and without interruption in possession or occupation of the 9 acres of the land in the suit land for twelve years or more, then he has acquired the ownership by adverse possession and section 6(1) (a) of the Land Control Act (cap 302) does not apply and the Plaintiff can claim from the court the transfer of the said portion of the land in his name, and the Defendant can be barred from claiming ownership thereof as the same is extinguished.

In the case of **Peter Njau (supra)**, the Court of Appeal on page 6 thereof observed – namely

“In order that a registered owner of land may be deprived of his title to such land, in favour of a trespasser (who claims by adverse possession) stringent but straightforward proof of possession is necessary. This of course, does not mean that the trespasser must be all the time in possession. He may be for instance be in possession through his wife or an offspring or those who are members of his immediate family or a person appointed by him in that respect”

They also added that:

“We would hasten to add that so long as the land in question is ascertained it does not help the defendant to urge that the exact area of land in dispute is not clear or that the boundaries defined are vague”.

Similar observations are made in the case of Gatimu (*supra*) at page 260 F. & G.

“The portion occupied by the defendant is not a separately surveyed piece of land with a plot number and title number to it. There is no deed plan in respect of it, at least none has been produced to the court. It is, however, a definitely identified and identifiable portion with a clear boundary. That which can be ascertained is certain, that which is definitive is positive. It is so plotted that if not certain it can be made certain. I think the absence of a plot and title number should present no difficulty or be a bar to the defendant in establishing his claim on the ground of adverse possession.”

I have made specific mention to the above referred passages, as in the present case, the plaintiff does not have a surveyed piece of land or deed plan but he has fenced the piece of 9 acres as well as his area is definitive and can be identified with certainty.

After elaborating the position of law relating to acquisition of ownership by adverse possession, I shall now have to find whether the Plaintiff has proved his case as per required standard of proof that he has been in open and interrupted occupation of 9 acres of land for more than twelve (12) years.

The Originating Summons has been filed on 6th February, 2004. From his evidence, which is conceded by the Defendant in his replying affidavit, it is indisputable that the Plaintiff took possession of the three and a half acres on 12th July, 1980 and that of portion of land admeasuring one and half acres on 8th October, 1982. It is testified by the Plaintiff that he used those portions of land for cultivation and grazing.

He also testified that on 9th August, 1981 he acquired possession of four acres on 9th August, 1981.

It is also on record that the Defendant tried to uproot the posts in the year 1990 but on 22nd August, 1990, he relented and agreed and did replace the posts of fencing he had uprooted. His acceptance to do so would tantamount to his withdrawal of any claim over the portion of land by the Defendant and the occupation of the Plaintiff would remain continuous and uninterrupted.

Even if I am wrong to find as above, which I hope I am not, the Plaintiff continued to occupy the land for more than twelve years from August, 1990 upto February, 2004 when the present Originating Summons was filed.

PW. 3 also has confirmed that the Plaintiff was using the portion of 9 acres land for Dairy and cattle farming and his servants had structures thereon and were living there. As I have observed earlier it is not necessary that the Plaintiff himself should occupy the land personally, he can acquire ownership by adverse possession even through persons appointed by him. I would also note that the Defendant himself had agreed that the fence was erected by the plaintiff at his instance as the Plaintiff's cattle were coming to other portions of the land.

The dates of occupation by the Plaintiff of three portions of land are adequately proved by producing three agreements. There is no proof that his occupation as such was ever interrupted by any action by the Defendant or by the Defendant or by any third party. Thus the failure of the Defendant to get consent and transfer of the land in favour of the Plaintiff does not bar the overriding interest acquired by adverse possession of the plaintiff over 9 acres of land in the parcel of land known as L.R. Narok/Cismara/Enabelbel/Enengetai/217.

In short, I am satisfied that the plaintiff has proved even as per the stringent standard, that he has been in peaceful and open possession of the portion of land admeasuring 9 acres in the above land for a period of over 12 years preceding the presentation of this Originating Summons.

I therefore allow the Originating summons and grant prayers Nos.1, 2, 3 and 4 thereof.

Dated and signed at Nairobi this 29th day of May, 2007.

K.H. RAWAL

JUDGE

29.5.07