



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**Civil Suit 41 of 2004 (OS)**

**STEPHEN KIPTONUI SANG ..... PLAINTIFF**

**VERSUS**

**KIPNGENO KORIR ..... DEFENDANT**

**JUDGMENT**

The plaintiff Stephen Kiptonui Sang filed an originating motion under the provisions of **Order XXXVI rules 3D and 12 of the Civil Procedure Rules** and section 36 of the **Limitations of Actions Act (Cap 22, Laws of Kenya)** against the defendant Kipngeno Korir seeking to be declared to have acquired parcel number Kericho/Kiptugumo/838 and Kericho/Kiptugumo/839 both measuring 2.5 hectares by virtue of having been adverse possession. The plaintiff averred that he had occupied the said two parcels of land in an open, quiet and peaceful manner for a period of over 26 years. He also prayed to be awarded costs of the suit. The originating motion was supported by the annexed affidavit of the plaintiff. The defendant was served with the originating motion but he did not enter appearance. Interlocutory judgment was entered against the defendant. This suit was fixed for hearing after directions had been issued by this court.

During the hearing of the case, the plaintiff testified that on the 12<sup>th</sup> of April, 1978 he entered into an agreement with the defendant whereby the defendant agreed to sell him a parcel of land known as Kericho/Kiptugumo/82 measuring five hectares (approximately twelve acres). The purchase consideration was Kshs.11,850/-. On the signing of the agreement the plaintiff paid the sum of Kshs.6,326/-. The balance of Kshs.5,524/- was paid by the plaintiff to the defendant before the two of them appeared before the Belgut Land Control Board for consent to be given to the said land transaction (agreement produced as plaintiff exhibit number 1).

At the land control board, according to the plaintiff the defendant changed his mind. Instead of selling him the entire piece of land he agreed only to sell him part of the said parcel of land (copy of the letter of consent by the Land Control Board was produced as plaintiff's exhibit no. 2). The plaintiff testified that the said parcel of land was thereafter divided into two portions i.e. Kericho/Kiptugumo/820 and Kericho/Kiptugumo/821. Parcel number Kericho/Kiptugumo/821 was transferred to the plaintiff whilst the defendant retained parcel number Kericho/Kiptugumo/820. The plaintiff was dissatisfied with the decision of the Belgut Land Control Board. He appealed to the Rift Valley Provincial Lands Appeal Control Board. He lost the appeal (Proceedings produced as plaintiff's exhibit no. 3).

The plaintiff testified that the Provincial Lands Appeal Control Board ordered the defendant to refund the plaintiff the sum of Kshs.6,326/-. The plaintiff testified that to date the defendant had not refunded him the said purchase consideration as ordered by the Provincial Lands Appeal Control Board. It was his testimony that during all this period, he was occupying the suit land. In 1985 the plaintiff learnt that the defendant had subdivided parcel no. Kericho/Kiptugumo/820 into two parcels of land namely: Kericho/Kiptugumo/838 and Kericho/Kiptugumo/839. It is these two parcels of land that the plaintiff

was claiming to be entitled to having occupied the same for a period of over 26 years.

The plaintiff further testified that although he filed a suit against the defendant in 1999, he withdrew the said suit. The plaintiff prayed for this court to declare that he had acquired title to the said two parcels of land having been in adverse possession of the same for a period of over twelve years. It was his testimony that to date the defendant had not refunded him the purchase consideration which he was ordered to refund by the Provincial Lands Appeal Control Board. The plaintiff produced two certificates of official search issued by the District Lands Registrar Kericho which confirms that the defendant is the registered owner of the two parcels of land (certificates of search produced as plaintiffs exhibit no. 4 and 5).

I have read the originating motion filed by the plaintiff herein. I have also considered the evidence that he has adduced in support of this case. The issue for determination by this court is whether the plaintiff has established that he has acquired title in respect of the two parcels of land registered in the name of the defendant by adverse possession. To establish his case, the plaintiff is required in law to prove that he has occupied the said parcel of land openly and without any resistance to his occupation by the defendant.

The plaintiff is required to prove that he has been in possession of the suit lands *nec per vim, nec clam, nec precario*. He has to establish that he had dispossessed the title holder of the suit land and thus acquired title by adverse possession. In *Wambugu – versus – Njuguna [1983] KLR 172* the Court of Appeal held that the *Limitation of Action Act*, on adverse possession, contemplates two concepts, dispossession and discontinuance of possession. The proper way of assessing proof of adverse possession would then be whether 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.

In this case, the plaintiff has testified that he took possession of the said parcels of land on the 12<sup>th</sup> of April, 1978 when he purchased the same from the defendant. Although they had developed a misunderstanding between the plaintiff and the defendant over the said sale of land, it is apparent from the testimony of the plaintiff that at no time did he part with possession of the said parcel of land. The original parcel of land Kericho/Kiptugumo/82 was subdivided into two parcels of land in 1982. The two parcels of land are: Kericho/Kiptugumo/820 and Kericho/Kiptugumo/821. Kericho/Kiptugumo/820 was further subdivided into two further parcels of land namely: Kericho/Kiptugumo/838 and Kericho/Kiptugumo/839. During these subdivisions, the plaintiff occupation of the land on the ground was not disrupted. The plaintiff testified that he has been in occupation of the said parcels of land that now comprise parcels number Kericho/Kiptugumo/838 and Kericho/Kiptugumo/839 without let or hindrance by the defendant.

Having carefully considered the evidence adduced by the plaintiff, which evidence was not controverted I do hold that the plaintiff has acquired title to the suit land by the operation of the law. He has dispossessed the title holder of the said parcels of land by his continuous occupation for over twelve years. He has been in adverse possession of the two parcels of land openly, quietly and without let or hindrance by the defendant. I will allow his originating motion. I declare the plaintiff to have acquired parcels number Kericho/Kiptugumo/838 and Kericho/Kiptugumo/839 by adverse possession. The plaintiff shall have the costs of this suit.

**DATED AT KERICHO THIS 10<sup>th</sup> DAY OF FEBRUARY, 2006**

**L. KIMARU**

**JUDGE**