



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Suit 38 of 2004

PETER MWASHI 1ST APPLICANT

HENRY MWASHI 2ND APPLICANT

VERSUS

JAVAN MWASHI 1ST RESPONDENT

LAWRENCE K. BIRECH 2ND RESPONDENT

BEN KIPLAGAT TUNDUNY 3RD RESPONDENT

EMILY JEPCHIRCHIR BETT 4TH RESPONDENT

RAYMOND KIPRUTO CHIRCHIR 5TH RESPONDENT

RULING

Peter Mwashhi and Henry Mwashhi are the applicants in this suit which was originally instituted under Order XXXVI rule 3D of the Civil Procedure Rules on 31/3/2004.

Their main prayer was that they should be declared the owners of LOTONYOK BLOCK 5 (NGELEL TARIT) 153 (subject property), the same having devolved to them by way of adverse possession.

Although the suit was initially filed against Javan Mwashhi only, several amendments have seen the number of respondents grow from one to the current five. I am made to believe that the increase has been due to several subdivisions resulting in various parcels and the subsequent disposal of the same to the 2nd to 5th respondents.

The two applicants have now moved this court in an application taken out under Order XXXIX of the Civil Procedure Rules in which they seek an order to restrain the respondent from “*disposing, alienating, transferring or in any manner dealing with all those parcels of land known as UASIN GISHU/BLOCK 5/LOTONYOK (NGELELTARIT) 187, KAPTAGAT/LOTONYOK/BLOCK 5 (NGELEL TARIT) KAPTAGAT/LOTONYOK/BLOCK 5 (NGELEL TARIT)188, KAPTAGAT/LOTONYOK/BLOCK 5 (NGELEL TARIT)189, KAPTAGAT/LOTONYOK/BLOCK 5 (NGELEL TARIT)190, KAPTAGAT/LOTONYOK/BLOCK 5 (NGELEL TARIT)191, KAPTAGAT/LOTONYOK/BLOCK 5 (NGELEL TARIT) 192 and KAPTAGAT/LOTONYOK/BLOCK 5 (NGELEL TARIT)194 (hereinafter*

called “the suit parcels”) pending the hearing and determination of this suit.”

The application is based on the grounds that they have a legal claim which overrides all others over the suit parcels; that they have no other land to occupy and till, and as a result of which they stand to suffer irreparably if the orders which they seek are not granted.

Though the others, who were duly served with the application, did not file any pleadings in opposition to the application, it is however opposed by the 2nd and 3rd respondents.

The 2nd respondent depones that he bought the subject land, which was originally owned by Settlement Fund Trustees (SFT), from the 1st respondent on 20/4/2004, who then vacated the land soon thereafter. He admits having subdivided the land, which he later disposed of to the 3rd, 4th and 5th respondents.

The 3rd respondent depones that he acquired *KAPTAGAT/LOTONYOK/BLOCK 5 (NGELEL TARIT) 187* from the 2nd respondent who was the first registered proprietor of the said land. He denies that the two applicants have been in occupation of the subject land as it was vacant when he acquired it.

It was the submission of Mr. Mwetich, learned counsel for the applicants that the two have a claim over the suit parcels by way of adverse possession against all the respondents by virtue of the fact that they have been in occupation thereof for a period of over 12 years. He relied on Section 30 of Registered Land Act whose subsection (f) and (g) stipulates that:

Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may from being subsist and affect the same, without their being noted on the register-

- (a).....
- (b).....
- (c).....
- (d).....
- (e).....

“(f) *rights acquired or in process of being acquired by*

virtue of any written law relating to the limitation of actions or by prescription;

(g) *the rights of a person in possession of actual*

occupation of land to which he is entitled in right only of such possession or occupation, save where inquiry is made of such person and the rights are not disclosed;”

He therefore urged the Court to find that whoever purchased the suit parcel holds it in trust for the applicants who have been in such possession, and in which case the right ought to be preserved by way of an injunction. It was also his submission that time started running before 2004, and also that the doctrine runs against any land whether adjudicated or not, and he thus urged the court to find that the subject parcels are subject to the applicants overriding interests.

However, Mr. Chemitei learned counsel for the two respondents was of a different view and he urged the Court to find that in view of the fact that the registration in favour of the 2nd respondent was a first registration, time could only run from the date of such registration, and narrowed down the issue to one, which is whether, adverse possession could apply against a party who obtained the title on 20/4/2004. It

was his contention that the period of limitation could only run from 20/4/2004, as it could not run against SFT which is a government body, and which body was the proprietor of the subject land prior to the aforementioned date.

Having taken the submissions of both Counsel and the pleadings into account, I am convinced that the two applicants are the sons of the 1st respondent against whom they had instituted the suit as aforementioned. It is also on record that the subject property was until 20/4/2004, under the proprietorship of the SFT and that though SFT's records indicated that it belonged to the 1st respondent, instead of having the land registered in his name, he had it transferred to the 2nd respondent. I find that the first registration against the title was actually made on 20/4/2004 in the 2nd respondent's name. Perhaps this would explain why the applicants did not annex a copy of the certified extract of title of the subject land to their affidavit in support of the Originating Summons which is a mandatory requirement under Order XXXVI rule 3D, under which they initially moved this Court. Though Mr. Mwetich relied on *Kairu v. Gacheru* [1988] KLR 297 to support the contention that the rights of the two applicants ought to be preserved by way of an injunction, I find that the case would not apply in his favour as the issue of a first registration did not feature at all.

Be that as it may, an interesting issue arises in this suit, namely whether the applicants can obtain the orders which they seek against the 2nd and 3rd respondents, whose registration is the 1st and 2nd registrations. I have in mind section 27 of the Registered Land Act which clearly stipulates that "*the rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration*" shall not be liable to be defeated except in cases of fraud, or where it is established that there exists overriding interests.

It is clear from the pleadings that the two applicants are sons of the 1st respondent and in my humble opinion, it would be an uphill task for them to convince this court that they would have a right against him under the Limitations Act, more so over land which belonged to the Government, against who the doctrine of adverse possession cannot apply.

The fact that the 2nd respondent is the first registered proprietor of the subject land and that the 2nd and 3rd respondents acquired their parcels for valuable consideration also weakens the applicants' case even further. The fact that they did not controvert the deposition of the 2nd and 3rd respondents to the effect that they were not in occupation when the respondents took possession of their parcels weakens their case.

Based on the above, I find that the applicants have not met the criteria for the award of restraining orders.

But even if I am wrong in the above finding, the mere fact that they didn't comply with the mandatory requirements of Order XXXVI rule 3D is an indication that their suit is a non starter.

I do in the circumstances find that the application lacks in merit and the same is dismissed with costs to the 2nd and 3rd respondents.

Dated and delivered at Eldoret this 28th day of March 2006.

JEANNE GACHECHE

JUDGE

Delivered in the presence of:

Mr. Mwetich for the applicants, Mrs. Fundi holding brief for Mr. Chemitei for 2nd & 3rd respondents, No appearance for 1st, 4th & 5th respondents.