



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA**

Civil Case 137 of 2000

NDIEMA SAMBURI SOTIPLAINTIFF/APPLICANT

VERSUS

ELVIS KIMTAI CHEPKESSES.....RESPONDENT/DEFENDANT

J U D G M E N T

The dispute before this court is contained in an originating summons dated 20th September 2000 in which Ndiema Samburi Soti prays to be declared to have acquired by adverse possession a parcel of land measuring 9 acres to be excised from L.R. NO. ELGON/NAMORIO/504 whose title is in the names of Chepkeses Chebasis Kiboroywo (deceased). The originating summons is premised on the provisions of Order XXXVI rule 3 D of the Civil Procedure Rules, Sections 37 and 38 of the Limitation of Actions Act and Sections 28 and 30 (8) of the Registered Land Act. The summons is supported by the affidavit of Ndiema Samburi Soti sworn on 14th August 2000.

Elvis Kimtai Chepkeses was named as the Respondent. The Respondent entered appearance and at the same time filed a replying affidavit he swore on 17th October 2000 to resist the summons.

Directions were taken in this matter on 9th February 2004 in which the matter was treated as though it was commenced by way of a plaint. The parties were invited to tender oral evidence.

The applicant (plaintiff), Ndiema Samburi Soti, testified and called 5 other witnesses to support his case. He told this court that he bought land measuring 125 yards by 144 yards from one Chepkeses Chebasis Kiboroywo now deceased. He produced an agreement dated 4th May 1964 as an exhibit in evidence. The agreement was written in Kiswahili language. An English translation was also produced in evidence. The original agreement contained alteration on the L.R. number of the land and the amount of consideration.

The plaintiff claimed he paid the late Chepkeses Chebasis Kiboroywo sum of Kshs. 2,050 being the full purchase price of the land. He also claimed that he bought another piece of land measuring 8 yards by 101 ½ yards on 28.7.1968 from one Eko Chepkeses which parcel of land is part of the vendor's share to be excised from L.R. NO. ELGON/NAMORIO/504. The agreement shows he paid a sum of Ksh.1,750 to Eko Chepkeses who is alleged to be the son of Chepkeses Chebasis Kiboroywo (deceased). The plaintiff further averred that he took occupation of the portions he bought in 1964 and has been in continuous and uninterrupted occupation since then. He produced a copy of the register and the title deed in respect of the aforementioned parcel of land as exhibits

in evidence to show that the land is registered in the name of Chepkeses Chebasis Kiboroywo. He claimed that he was wrongly registered as the proprietor of L.R.No.ELGON/NAMORIO/839 when the land officials visited each Land after the Registration Exercise was completed. He averred that he only realised much later that the land he bought had not been registered in his name. He claimed he even buried his two children on the land. He also produced an application for consent form he filed at the Kimilili Divisional Land Control Board as an exhibit in evidence to show that he and the deceased visited the lands office for. A consent was produced by this witness claiming he was given on the 2nd day of April 1981 although the same was not effected because it became apparent that the registered owner had passed away.

William Odikoro Ewol testified as the plaintiff's witness. He gave evidence to the effect that he witnessed the plaintiff purchasing land from one Eko Chepkeses a son to Chepkeses Chebasis Kiboroywo (deceased) in 1968 measuring 72 by 101 ½ yards. He averred that the plaintiff still resides on the suit premises. He told this court that he had to sue the plaintiff to get his title which was wrongly registered in the plaintiff's name. He told this court that he managed to get L.R. NO. ELGON/NAMORIO/839 restored back to him by the Senior Principal Magistrate's court sitting at Bungoma in Civil case No. 319 of 1988. He said that the Respondent destroyed the applicant's house when the applicant was admitted in hospital.

P.W 3, Richard Chebuywo Simati, a retired assistant Chief of Kamuneru location also testified in support of the plaintiff's case. He said he was present when the surveyors visited the disputed land to carry out survey work to parcel out 9 acres from L.R. NO. ELGON/NAMORIO/504. He admitted he did not witness the sale agreement between Ndiema Samburi Soti and the late Chepkeses Chebasis Kiboroywo.

Isaac Chemwoti Chesiro also gave evidence in support of the plaintiff's case as P.W 4. He said he witnessed the agreement signed between the applicant and Chepkeses Chebasis Kiboroywo dated 4th May 1964 in which the applicant bought land measuring 144 by 125 yards at a sum of Ksh.2,050/-. He confirmed that by that time reference numbers had not been allocated to the land. He said the applicant moved to occupy the land until recently when his occupation was interrupted.

PW 5, Benson Osuru Echokoi, testified as a neighbour of the plaintiff. He said the plaintiff bought the land from Chepkeses Chebasis Kiboroywo. He said the land is adjacent to his. He claimed he was a witness to the sale transaction of 4th May 1964. He said the applicant moved and occupied the land whereupon he built a house. He claimed the applicant even buried his two children on the land though he buried his wife on his land across the river. He said the applicant occupied the land he bought in 1968. He however confirmed that the deceased's son, Masai Chepkeses still occupies the land in dispute.

The last witness on the part of the plaintiff was one Thomas Oruoch Nyagado, the Mt. Elgon District Land Surveyor. He gave evidence to the effect that surveyors visited the suit premises in 1981 with the purposes of subdividing L.R. NO. ELGON/NAMORIO/504 into 3 portions but pointed out that the exercise was not carried out because it was reported that the registered owner was dead. This witness produced in evidence copies of the mutation forms.

Two witnesses testified in support of the defence. D.W.1, Elvis Kimutai Chepkesis, the respondent/Defendant herein denied that the applicant ever occupied L.R.NO. ELGON/NAMORIO/504. He produced as an exhibit in evidence a copy of the grant of administration he obtained to administer the estate of his deceased father Chepkeses Chebasis Kiboroywo. He also produced a death certificate which indicated that his father passed away on 22nd March 1981. He told this court that the applicant leased his deceased father's land for 3 years between the years 1975 and 1978 after which he stopped cultivating. He also disputed the fact that he had a brother called Eko Chepkeses. He further averred that his father could not have taken the plaintiff to the Land Control Board on 2.4.81 when he was already dead. This witness produced the green card in respect of LR.NO. ELGON/NAMORIO/438 to show that the plaintiff has land which he was registered as the proprietor in 1969. He averred that this is the land he has always

resided on.

The Respondent's mother Joyce Cheptarus testified as the 2nd defence witness. She denied that her husband sold land in dispute to the applicant. She also denied knowledge of the applicant's occupation of the suit premises.

This court summoned the evidence of Victoria Odhiambo the District Registrar of persons, Bungoma to clarify on the disputed death certificates which were produced by the parties. This witness was unable to solve out the discrepancy because her evidence was based on the records of Bungoma district. There were no records produced from Mt. Elgon District. She was of the view that Mt. Elgon District were supposed to make inquiries from Bungoma District before issuing death certificates of late registration of deaths which took place before the two districts were split to avoid double registration.

Mr. Ocharo and Mr. Khakula, learned advocates for the applicant/plaintiff and Respondent/defendant respectively gave oral submissions though the issues were not filed. However after receiving the evidence tendered plus the exhibits produced in evidence for and against the originating summons and after further considering the learned advocates' submissions two issues arose for my consideration. First is whether or not the applicant/plaintiff established his claim based on adverse possession. Secondly whether or not he is entitled to the prayers he sought for in the suit.

The plaintiff claims that he is a claimant in exclusive possession of 9 acres comprised in L.R.NO. ELGON/NAMORIO/504 with leave of the Respondent's father Chepkeses Chebasis Kiboroywo (deceased) who is the registered proprietor of the aforesaid land in pursuance of two valid sale agreements one dated 4th May 1964 and the other dated 28th July 1968. The two agreements were produced as exhibits in evidence by the Plaintiff. The plaintiff claimed in his affidavit he swore on 14th June 2000 in support of the originating summons that on 4th May 1964 he bought 7 acres at a consideration of Kshs. 2,050/=. He also claimed that he bought another piece of land from one Eko Chepkeses a son to Chepkeses Chebasis Kiboroywo on 28th July 1968 at a consideration of Ksh.1,750/=. He claimed that Chepkeses Chebasis Kiboroywo (deceased) died before transferring the land to him. He claimed he took peaceful occupation which occupation is said to have been exclusive and continuous since 1964 in respect of the 1st sale and since 1968 in respect of the second sale. The plaintiff was of the view that his cause of action accrued in 1976 in respect of the first sale and in 1980 in respect of the sale. He was of the view that the Respondent's title to L.R. NO. ELGON/NAMORI/504 were extinguished when his cause of action accrued as aforesaid.

A critical look at the agreement dated 4th May 1964 which was produced by the plaintiff as exhibit 1 will reveal that the same was altered and no explanation was given to justify the alterations. The exhibit shows the amount of the purchases price and the plot number were either inserted or altered after the agreement was made. The exhibit also shows that the applicant paid the first deposit of Ksh.1,750/= on 4th May 1964 and the remaining balance of Ksh.300 on 20th May 1968.

The plaintiff and his witness Isaac Chemwoti Chesiro (PW 4) were in agreement that in 1964 the land in dispute had not been allocated the land Reference number. The agreement of 4th May 1964 was not signed although PW4, claimed he appended his signature. I am of the view that he knew he was telling a lie from his demeanor which I constantly checked. P.W 4, admitted that he was briefed and or coached on what to say in court. The evidence of P.W 4, was further discredited by the fact that he contradicted himself when he said twice on examination in chief that he did not know Elvis Kimutai Chepkeses only for him to admit knowing him when he was under intense cross-examination. I also observed that he was evasive and at times refused to answer questions. I am of the view that he is not a credit worthy witness. This obviously renders his evidence useless and of no evidential value.

In the circumstances of cases like this, possession only become adverse once the contract is

repudiated. Time begins to run in favour of an occupier in possession when he completes payment of the consideration. Assuming that the first sale in this matter was valid, time would begin to run against the Respondent as from 20th May 1968 when it is alleged that the plaintiff made the last payment of Ksh.300/=.

The plaintiff also produced in evidence an application for consent to the Land Control Board dated 2nd April 1981 presented to Kimilili Land Control Board. The document was produced as exhibit no. 10. In the form it is claimed that the owner, Chepkases Chebasis Kiboroywo wanted consent to subdivide L.R. NO. ELGON/NAMORIO/504 into 2 portions and thereafter to transfer 2 acres to Ndiema Samburi Soti as a purchaser for Ksh.1,750/=. The plaintiff also produced a consent issued on the same date on the basis of exhibit No. 10. The consent was produced as exhibit No. 11. The Kimilili Land Control Board gave consent for subdivision and transfer. However the applicant visited the Lands office on 13.5.1981 to have the consent effected but the same could not be effected because it was noted that Chepkases Chebasis Kiboroywo was dead. The mutation forms were produced by the plaintiff as exhibit number 13 in evidence. This exhibit shows that the plaintiff and Richard Chebuywo Simati, P.W 3 pretended to sign as the proprietors of L.R. NO. ELGON/NAMORIO/504 whilst the duo knew the legal owner was dead. It is not surprising the plaintiff called him to testify in support of his claim.

The plaintiff also produced in evidence as an exhibit an agreement he entered with one Eko Chepkases in which he claimed he bought land measuring 8 x 101 ½ yards to be excised from L.R. ELGON/NOMORIO/504 for Ksh.1,750. PW2, William Odikoro contradicted the plaintiff in his claim. He said Eko Chepkases sold land measuring 72 x 101 ½ yards. The agreement which is dated 28/7/1968 was produced as exhibit no. 3. The same was not executed by either side. Even if it was duly executed, I do not think Eko Chepkases whose origin was not established had authority to sell land which he was not the registered owner without the approval of the actual owner.

To finalize this matter, I find that the plaintiff has failed to establish that he had a valid sale agreement between himself and the late Chepkases Chebasis Kiboroywo. The later did not append his signature to the two agreements allegedly entered on 4th May 1964 and 28th July 1968.

The plaintiff also failed to explain the origin of the alterations inserted on the agreement of 4th May 1964. The plaintiff further failed to establish that had a peaceful continuous and uninterrupted occupation of

L.R. NO. ELGON/NAMORIO/504. The date of occupation is not certain and no clear evidence established that the plaintiff ever resided on the land in dispute. The evidence adduced do not prove that the plaintiff occupied 9 acres as claimed in the originating summons. The plaintiff appeared before the Land Control Board claiming to be given 2 acres. The question is: why now claim 9 acres after the death of Chepkases Chebasis Kiboroywo? The plaintiff and his witnesses did not impress me as people who would tell the truth. They lied to court.

I am convinced that the defendant Elvis Kintai Chepkases and his mother Joyce Cheptarus told the truth. I believe their evidence to the effect that the plaintiff was a mere licensee give permission by the deceased, Chepkases Chebasis Kiboroywo to plough and cultivate 2 acres of

L.R. NO. ELGON.NAMORIO/504. There is no evidence as to when the plaintiff's licence was terminated. The Plaintiff did not establish his claim on a balance of probabilities.

In the end I think the plaintiff is not entitled to the prayer in the originating summons. He has not established the requirements needed in such actions to enable me award him the orders prayed for. Consequently the originating summons dated 20th September, 2000 is ordered dismissed with costs to the Respondent/defendant.

DATED AND DELIVERED THIS 17th DAY OF March, 2005

J.K. SERGON

JUDGE