

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

Civil Suit 27 of 2004 (O.S.)

DAVID KIPLANGAT ARAP SITONIK.....PLAINTIFF

VERSUS

CHEPKWONY ARAP BISE.....DEFENDANT

JUDGMENT

The plaintiff commenced his claim by way of Originating Summons seeking a declaration that he was the proprietor of 2 acres of land from **L.R. No. Kericho/Kongotik/Block 1140** by way of adverse possession. The defendant was duly served with the originating summons and the affidavit in support thereof but he did not enter appearance or file any replying affidavit. The hearing therefore proceeded ex parte. The plaintiff testified and told the court that the defendant was his brother in law and that in 1970, he purchased from him 2 acres of the aforesaid parcel of land at a price of Kshs.720/-. The land by then was unregistered. They entered into a sale agreement dated 24/9/1970 which was signed by both parties and witnessed by several other people. The agreement was in Kipsigis language and the original thereof and a certified English translation of the same were produced as exhibits before the court. He said that he was not able to get Land Control Board consent because the defendant refused to co-operate. He had been using the land for grazing and he urged the court to enter judgment in his favour as he had stayed on the land for over 12 years.

The plaintiff called two witnesses, Andrea Kerinyet (PW2) and Simon Kipsang Langat (PW3) who testified and stated that they were witnesses to the aforesaid sale agreement of the suit property.

In his written submissions filed through M/S Manani, Lilan & Company advocates, the plaintiff said that he was entitled to the 2 acres because he had been in actual and uninterrupted possession for a period of 35 years and that the parcel of land which he was claiming was a portion of land whose title deed was in the name of the defendant and the plaintiff's occupation was therefore inconsistent with the defendant's interest in the title. He said that the occupation of the land was adverse to the defendant's interest.

The issue for determination in this matter is whether the plaintiff is entitled to the 2 acres as claimed by way of adverse possession.

The plaintiff's action was brought under the provisions of Section 38 of the Limitations of Actions Act Cap 22 Laws of Kenya. The plaintiff proved that his initial entry into the land was as a purchaser but upon signing of the sale agreement, the defendant refused to co-operate for purposes of obtaining Land Control Board consent as required under Section 6 of the Land Control Act. The plaintiff has however remained in uninterrupted occupation of 2 acres of the defendant's land since 1970. By the time the defendant was being issued with his title deed in 1987 the plaintiff was in occupation of the land.

In **WAMBUGU VS NJUGUNA** [1983] KLR 172 the Court of Appeal held that in order to acquire by statute of limitations title to land which has a known owner, that owner must have lost his right to the land by being dispossessed of it or by having discontinued his possession of it.

In **PUBLIC TRUSTEE VS WANDURU** [1984] KLR 314 the Court of Appeal dealt with an appeal which was based on facts quite similar to those obtaining in this case. In that case, the second appellant's husband, on March 16, 1967, entered into an agreement with the respondent's father for the purchase of the latter's land which was registered under the Registered Land Act. The purchase price was paid on the signing of the agreement by the respondent on his father's behalf and the second appellant's husband and his family took possession of the land. The appellants filed an Originating Summons seeking a declaration that the second appellant had become entitled under Section 38 of the Limitation of Actions Act to be registered as the sole proprietor by adverse possession of the suit land in place of the respondent, the registered owner then. The court allowed the appeal and held that the appellant had acquired an indefeasible title to the land by being in a continuous, uninterrupted and exclusive adverse possession of it

for twelve years.

Likewise, in the present case I find that the plaintiff has established that he has dispossessed the defendant of his two acres of land for a period of 35 years and has therefore acquired indefeasible title by virtue of the continuous exclusive adverse possession of it. In the above quoted case of **PUBLIC TRUSTEE VS WANDURU** (supra) the court held that the provisions of the Land Control Act apply where there is a claim to title to agricultural land based on an agreement being a transaction or dealing in the land and not where the claim is based on operation of the law such as by adverse possession.

I therefore find that the defendant's title in respect of the 2 acres has been extinguished and declare that the plaintiff is entitled to be registered as the proprietor of the 2 acres of which he is in occupation of.

The plaintiff will also be entitled to the costs of this case.

DATED, SIGNED AND DELIVERED at Nakuru this 27th day of September, 2005.

D. MUSINGA

JUDGE

27/9/2005