



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERICHO**

**Civil Case 21 of 2001(OS)**

**KIPKETER ARAP MARISIN ..... PLAINTIFF**

**VERSUS**

**PAUL KIPKURUI KURGAT ..... DEFENDANT**

**JUDGMENT**

The Plaintiff, Kipketer Arap Marisin, filed suit against the defendant Paul Kipkurui Kurgat by way of an originating motion under **Order XXXVI rules 3, 3D and 12** of the **Civil Procedure Rules**. The Plaintiff sought an order of this court to declare that he had acquired by adverse possession three acres being part of a parcel number *KERICHO/KIPSONOI/165* after being in possession of the said parcel of land for a period of over twenty two years. He further prayed this court to order that he be registered as the owner of the said three acres in the place of the present registered owner Kipsoi Arap Tiony deceased. The Plaintiff prayed to be awarded costs of the suit. The motion is supported by the annexed affidavit of Kipketer Arap Marisin, the plaintiff. In the said affidavit the plaintiff depones that he purchased the said three acres from the late Kipsoi Arap Tiony in 1971 for a total consideration of Kshs.3,600/-. He further depones that after purchasing the said parcel of land, he took possession of the same and has been in quiet and actual possession of the said parcel of land until in the year 2001 when he was threatened with eviction by the defendant hence his decision to file the suit for adverse possession.

The defendant filed a replying affidavit in defence of the plaintiff's claim. The defendant denied that the plaintiff had acquired the said parcel of land by adverse possession. He denied that the plaintiff had purchased the suit land in the year 1971 from the deceased – Kipsoi Arap Tiony who is his late father. He deponed that the defendant was a mere lessee of the suit land and not a purchaser. He further stated that the defendant had not been in exclusive possession of the suit land without any resistance from late Kipsoi Arap Tiony hence the plaintiff's decision to file a suit against the said deceased at the Kericho Senior Resident Magistrate's Court. The defendant deponed that the plaintiff was unsuccessful in the said suit. He urged the court to disallow the plaintiff's suit.

Directions were taken. The plaintiff and the defendant agreed to have the issues in dispute determined by the litigants herein together with their witnesses adducing viva voce evidence. The plaintiff called three witnesses to prove his case. The plaintiff himself testified that he had sued the defendant as the administrator of the Estate of the late Kipsoi Tiony (*hereinafter referred to as the deceased*). He testified that he purchased three acres comprised of the suit land in 1971 for an agreed sum of Kshs.3,600/-. After purchasing the said parcel of land, the plaintiff took possession and cultivated for twenty years without let or hindrance from the deceased. The plaintiff stated that he planted trees on the said parcel of land. He however testified that when he tried to build a house on the said parcel of land he was stopped by the defendant. It was his further testimony that it was only after the deceased had died that the defendant

started denying his ownership of the suit land. He denied the allegations made by the defendant that he had leased the suit land instead of purchasing it. He further testified that the dispute between himself and the defendant was referred to the Land Disputes Tribunal, Kapkatet who made an award in his favour. The plaintiff conceded that the deceased had not transferred the said parcel of land to him during his lifetime.

He urged the court to find that he had acquired the title of the said parcel of land by virtue of being in adverse possession of the same. He conceded that he was married to the sister of the defendant. He further testified that the trouble with the defendant started when the plaintiff attempted to build a house on the suit land during the lifetime of the deceased. The plaintiff admitted that he was chased away from the suit land once his attempt to build a house on the suit land failed. He reiterated that the Land Disputes Tribunal chaired by the District Officer Kapkatet heard the dispute as regard the suit land and ruled in his favour. He conceded that since he was removed from the said parcel of land, the family of the deceased comprised of his sons had subdivided the suit land among themselves. He further conceded that when the defendant chased him away from the suit land, he did not resist because he was threatened by the defendant. He further testified that since he did not have title to the parcel of land, he had resorted to court to have his ownership of the suit land asserted. The plaintiff produced the agreement entered between himself and the deceased when he purchased the suit land.

PW2 Reuben Busuben testified that he wrote the agreement for the purchase of land the suit land. The agreement was between the plaintiff and the deceased. He testified that he had witnessed the plaintiff pay the deceased the sum of Kshs.2000/-. This payment was made on the 7<sup>th</sup> of November, 1971. The second installment of Kshs.1,600/- was paid on the 20<sup>th</sup> day of August, 1973. He testified that after the agreement had been executed, he witnessed the suit land surveyed and the plaintiff taking possession of it. He further testified that the plaintiff was chased away from the suit land by the defendant in 1992. He testified that a house which the plaintiff had built on the suit land was demolished between the year 1992 and 1993 during the lifetime of deceased. PW2 reiterated that the suit land was purchased by the plaintiff from the deceased and therefore the plaintiff was entitled to it. PW3 Joseph Kibor Ngetich testified that he witnessed the deceased hand over possession of the suit land to the plaintiff. He further testified that the plaintiff occupied the suit land from 1971 to 1992 when the house that he had erected on the suit land was demolished by the defendant. PW3 testified that he had attended several meetings where the land dispute was unsuccessfully adjudicated upon. He conceded that the suit land was now being occupied and cultivated by the sons of the deceased.

The defendant called three witnesses in support of his case. The defendant himself testified that he was the administrator of the estate of the deceased. It was his further testimony that the plaintiff had been given land by the deceased to cultivate due to the fact that the plaintiff had married the daughter of the deceased. He stated that the plaintiff was only given land to cultivate and not to reside or build any house thereon. When the plaintiff attempted to build a house on the land in 1988, he was prevented by the deceased. The plaintiff cultivated the land for a period of thirteen years before he was stopped by the deceased.

The defendant conceded that the plaintiff used to cultivate approximately three acres of land at the particular period. It was his further testimony that the family of the deceased took over possession of the suit land in 1988. The said parcel of land was later sub-divided by the deceased and distributed to his sons in 1991. The defendant testified that the plaintiff have referred his claim for arbitration to various fora, including the provincial administration and the Land Disputes Tribunal. No decision was however made in favour of the plaintiff. He further testified that the plaintiff filed a suit before the Principal Magistrate, Kericho against the deceased which case had not been determined to date (i.e. **Kericho PMCC No. 224 of 1992**).

The defendant denied that the plaintiff purchased the said three acres from the deceased. The defendant reiterated that the plaintiff was only allowed to cultivate the said parcel of land and not occupy or own it. At the moment the defendant confirmed that the suit land was occupied by his brother who had planted tea on it. The defendant denied that the plaintiff planted any trees on the suit land. The defendant denied that he had chased away the defendant from the suit land. He insisted that the said decision was made by

the deceased. DW2 Simon Arap Chepkwony testified that he was not aware that the deceased had sold the land to the plaintiff. He recalled that the deceased called him in 1988 together with other elders to witness as he was distributing his land to his sons. The deceased did not mention that the plaintiff had purchased any parcel of land from him (*the deceased*). DW2 recalled that the plaintiff, at no time resided on the suit land. He denied the allegation that the plaintiff had planted trees on the suit. DW2 remembered that the plaintiff made a claim that he had purchased land from the deceased but the deceased had denied that he entered into any such transaction.

DW3 David Kiptesot Arap Chepkwony, a neighbour of the deceased, re-called seeing the plaintiff cultivate part of the land owned by the deceased. He was however emphatic that at no time did the plaintiff ever reside on the suit land. DW3 testified that the plaintiff was stopped by the deceased in 1988 from cultivating the suit land when the plaintiff made an attempt to erect a house on the suit land. DW3 recalled that the plaintiff made a complaint to the area chief claiming that he had purchased the suit land. When the Elders heard the case, the plaintiff's claim was dismissed because he did not have any documents to prove his claim. DW3 remembered that the deceased had denied the allegations made by the plaintiff that he had sold the land to him (*the plaintiff*). Since 1991, the deceased's son (*including the defendant*) had occupied the suit land. DW3 denied that it was the defendant who had chased away the plaintiff from the suit. DW3 testified that although the plaintiff claimed the said suit land and had presented cases before various forums for resolution, no decision had ever been arrived at in the plaintiff's favour.

Having carefully considered the evidence adduced by the plaintiff and the defendant, the issue for determination by this court is whether the plaintiff has established to the required standard of proof on a balance of probabilities that he has acquired the title to the suit land by adverse possession. The law to be applied by this court when considering whether or not the plaintiff has been in adverse possession of the suit land is well settled. As was held by Lord Denning Mr. In **Wellis' Cayton Bay Holiday Camp Ltd versus Shell Mex & BP LTD [1975] QB 94;**

*“ Possession by itself is not enough to give a title. It must be adverse possession. The true owner must have discontinued possession or have been dispossessed and another must have taken it adversely to him. There must be something in the nature of an ouster of the true owner by the wrongful possessor. When the true owner of land intends to use it for a particular purpose in the future, but meanwhile has no immediate use for it and so leaves it unoccupied, he does not lose his title to it simply because some other person enters it and uses it for some temporary purpose; like stocking materials or for some seasonal purpose, like growing vegetables. The reason is not because the user does not amount to actual possession.....rather his user is to be ascribed to the licence of permission of the true owner. By using the land, knowing that it does not belong to him, he impliedly assumes that the owner will permit it, and the owner by not turning him off impliedly gives permission..... acts done under licence or permitted by the owner do not give a licence or title under the Limitation Act 1939. They do not amount to adverse possession.”*

In Kenya, the law that grants a person in a possession of a parcel of land to claim that he has acquired title by virtue of being in adverse possession of the said parcel of land is **Section 37 and 38 of the Limitation of Actions Act**. The plaintiff must establish that he has been in continuous possession of the parcel of land in question for a period of twelve years, openly and without the registered owner thereof making a claim over it. As was held by *Potter J. A* in **Githu versus Ndeete[1984] KLR 774** at page 780:

*“It is stated in volume 24 of the Halbury's Laws of England, 3<sup>rd</sup> Edition, at page 252:*

***“To constitute dispossession, acts must have been done inconsistent with the enjoyment of the soil by the person entitled for the purpose for which he had a right to use it. (a) Fencing off is the best evidence of possession of surface land; but cultivation of the surface without fencing off has been held to be sufficient proof of possession.” And further examples of adverse possession of part of an owners land see the cases in footnotes (a) and (r).”***

In the present case, it is the plaintiff's case that he entered into an agreement with the deceased father of

the defendant in 1971 whereby it is alleged the deceased agreed to sell him a portion of land measuring three acres of the parcel of land known as KERICHO/KIPSONOI/165. The plaintiff produced an agreement which was written by PW2 as an exhibit in this case. The said agreement shows that the plaintiff paid the deceased the sum of Kshs.3,600/- as the purchase consideration. According to the plaintiff's evidence, he immediately took possession of the said parcel of land and started cultivating it. He planted trees on the said parcel of land. He even fenced it. He however did not reside on the suit land. Although the plaintiff was a son in law of the deceased, it was his testimony that this relationship was not a factor in his occupation of the suit land. It was further the plaintiff's case that he was stopped from cultivating the suit land and evicted therefrom by the defendant, a son to the deceased.

According to the evidence of the plaintiff's witnesses, the plaintiff was evicted from the said parcel of land in year 1988 when he (*the plaintiff*) made an attempt to construct a house on the said parcel of land. The plaintiff was removed from the suit land by the deceased. Evidence was adduced how the plaintiff made efforts to have the said parcel of land declared to be his in various fora, all in vain. The plaintiff filed a suit against the deceased in Kericho PMCC No. 204 of 1992. The said suit was apparently dismissed on the 10<sup>th</sup> of April, 2002 when the plaintiff and the defendant failed to attend court. No effort has been made to date to revive the said suit.

The defendant's case on the other hand is that the plaintiff occupied the said parcel of land from the year 1975 to the year 1988 as a lessee. The lease was however terminated by the deceased in the year 1988. The deceased took over the possession of the suit land and in the year 1991 sub-divided the same to his sons. Evidence was placed before this court to the effect that one of the sons of the deceased has been in occupation of the said parcel of land since the year 1991. The said son of the deceased has even planted tea on the suit land.

Having evaluated the said evidence adduced and also considered the applicable law, it is clear that the plaintiff has not proved his case on a balance of probabilities to enable this court declare that he has acquired title to the said parcel of land by virtue of being in adverse possession of the same. One thing however is clear. The plaintiff was removed from possession of the said parcel of land by the deceased (whose Estate is being administered by the defendant) in the year 1988. That is more than seventeen years ago. Whereas the plaintiff established that he was indeed in possession of the said portion of land measuring three acres from at least 1975 to the year 1988, once the deceased asserted his proprietary rights over the suit property and took occupation of the same, it was not open for the plaintiff to file a claim that he has been in adverse possession of the said parcel of land.

In cases of adverse possession, possession of the suit land is critical to the claimant's case. Once the claimant loses possession to the registered owner, he ceases to be in adverse possession of the suit land. The plaintiff having admitted that he is no longer in occupation of the suit land, a claim for adverse possession cannot stand. The plaintiff however proved that he paid the sum of Kshs.3,600/- for the purchase of land from the deceased. Maybe the defendant can seek to have the said sum refunded to him if he can overcome the hurdles place on his path by operation of the **Limitation of Actions Act**. I do find that the deceased having asserted his proprietary rights over the suit land by taking possession of it, the plaintiff right to claim the said parcel of land by adverse possession was extinguished. Evidence was adduced by both the plaintiff's and the defendant's witnesses to the effect that the plaintiff was removed from possession from the suit land and further that the plaintiff had sued the deceased to have the possession of the said parcel of land restored to him. The actions by the deceased was inconsistent with the action of an owner who has impliedly given permission to the person who is in possession so that such a person acquires title by adverse possession.

For the reasons stated, the plaintiff's claim must fail. It is consequently dismissed. The defendant shall have the costs of the suit.

**Dated at Kericho this 1st day of December 2005.**

**L. KIMARU**

JUDGE