



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE 2 OF 1996

PETER GICHUKIPLAINTIFF

VERSUS

FRANCIS MBEGADEFENDANT

JUDGEMENT

The plaintiff in his amended plaint avered that during divers and unknown dates between 1983 and 1984 the defendant trespassed and occupied the plaintiffs plot in Mwiwenderi being plot number Eldoret municipality block 15/2/141 later registered as Eldoret municipality block 15/421 without reason or colour of right whatsoever, that the defendants entry and occupation thereof of the plaintiffs plot was forcible and he intends unless restrained to continue with the trespass, forcible entry and occupation and has settled his servants agents there at for this purpose. In consequence thereof the plaintiff claims an order restraining the defendant his agents servants or employees from in any way trespassing forcible entry and or occupation of the plaintiffs plot no. Eldoret Municipality block 15/421 an order for restitution.

The defendant in his further amended written statement of defence averred that he denies paragraph 3 of the plaint and more specifically that on unknown dates between 1980 and 1982 he trespassed and occupied the plaintiffs plot at Mwiwenderi being plot number Eldoret Municipality block 15/421 or any other plot of land or at any other time or at all without any reasonable right or cause or colour of right or at all and puts the plaintiff to a strict proof thereof, denied the contents of paragraph 4, 5, 6 and 7 of the plaint in their entirety and puts the plaintiff to a strict proof thereof, that he was a share holder of Mwiwenderi farmers company ltd and bought a share in the said company prior to 1970 and upon allocation of the plots of land to the respective share holder the defendant was allocated plot number 77 which is now designated as Eldoret Municipality block 15/421 and took possession of the said plot of land in 1970, that upon taking possession of the said plot in 1970 he has been in physical possession of the same and carried out substantial developments thereto todate, that in Eldoret Senior Resident Magistrate criminal case number 4060 of 1983 the plaintiff had him charged for an offence of malicious damage of property and the defendant was acquitted on the basis that the said plot belonged to him, that the dispute between him and the plaintiff was referred to the elders and on 7th June, 1984 an award was made in his favour declaring that the said plot of land belonged to him, that in Eldoret Senior Resident Magistrate land suit no. 51 of 1984, the plaintiff filed a suit against him which suit by a decision of the high court civil appeal no. 5 of 1987 was decided in favour of the defendant, avers that the present suit is therefore misconceived vexatious and an abuse of the process of this court and will crave ;leave of this court to have this suit dismissed on a preliminary point of law.

The defendant put in a counter claim averring that he reiterates the contents of paragraph 2-7 and pleads

them for purposes of his counter claim that on 19th day of February, 1991 the plaintiff knowingly and fraudulently had himself registered as the lessee of the suit parcel of land title no. Eldoret Municipality block 15/421. the particulars of fraud are given as the plaintiff knowingly and fraudulently registered as a lessee of the suit parcel of land when this case was still pending hearing and determination before this honourable court, conspired with land registrar Eldoret to register the parcel of land in question in his name in consequence there of he seeks an order for rectification of the register and cancellation of the plaintiffs certificate of lease and substitution of the name with that of the defendants, declaration that the defendant owns the suit property by operation of the doctrine of adverse possession.

There were averments directed against the land registrar Eldoret but since he was not enjoined to the proceedings there is no need to mention them. The counter claim was introduced by the chamber summons dated 14.7.97 which was allowed on 18.7.97 item 3 of the said consent talked of a reply to a defence and defence to counter claim which had been earlier filed on 29.9.93 as being the one to remain. The key averments in the same are that the plaintiff joins issue with the defendants amended written statement of defence and repeats paragraph 1-9 of the plaint denies the defendants averments in paragraph 2-8 of the amended written statement of defence and reiterates that the issue of plot allocation was purely a preserve of Mwiwendari farmers company ltd which company duly allocated the plaintiff the plot in issue and if the defendant had any cause of action the same ought to have been against the said company, avers that he acquired title to the suit plot on first registration and after following all the requisite procedures laid down by the company and became the sole registered proprietor as from 19th February, 1991, that right from the beginning the defendant has been a trespasser on the suit land and his purported acquittal in Eldoret SRMCR case no. 4060 of 1983 is not at all any evidence of entitlement to him of ownership thereof the defendant has not occupied the suit land since 1970 as the farm was demarcated in a recent time.

In his defence to the counter claim he denied each and every singular allegation of fact or facts stated in the defendants counter claim as if the same were specifically set forth and transversed seriatim, denies that he knowingly and fraudulently had himself registered as the proprietor of the suit parcel of land and avers that the head title for the main farm was properly surrendered by the company and individual title deeds, issued as per the requisite area list to the various proprietors which were well known to and processed by Mwiwendari farmers co. ltd., that his proprietorship of the suit parcel is now indefeasible for all intents and purposes as per the relevant provisions of the R.L.A. cap 300 Laws of Kenya and the issue of cancellation of the register and or joining of the land registrar ought not arise at all, denies that the defendant has occupied the suit parcel since 1970 and avers that there has been no occupation at all by the defendant of the suit parcel in the manner and style such as to entitle him ownership of the same by way of adverse possession as by law recognized, that the counter claim is incompetent defective and bad in law and a preliminary point of law shall be raised on that regard before or during the hearing of the suit on that basis prayed for the counter claim to be dismissed and judgment entered in his favour as prayed for him the plaint.

A total of 3 witnesses gave evidence for the plaintiff being PW 1 Peter Gichuki the plaintiff, PW 2 David Kiarie who was a chairman of Mwiwendari company ltd., PW 3 John Kariuki Ngure who was the company secretary. Two witnesses gave evidence for the defence and these are DW 1 the defendant Francis Mbega and DW 2 Joseph Nganga a former Chairman of the company. The facts of the case are clear and straight forward. They are to the effect that a group of 37-38 people came together and formed Mwiwendari Company ltd. Whose sole purpose as shown by the memorandum and articles of association exhibit D10 was to purchase land and share it out to its members. The land was purchased from one Ishmael Lalhji. It was about 22-25 acres which could not go round the members and they decided to subdivide it into plots. The land was subdivided into 3 portions being A, B and C. The first Chairman who was called Bedan Murichu shared out portion A in this portion as per the entries in exhibit D3 the plaintiff was allocated plot 36 while the defendant was allocated plot 21. It is on record from the evidence of the dependant himself that his plot was acquired by the Eldoret Municipal Council to put up houses for sewage workers and he was compensated.

DW 2 Joseph Nganga who was the Chairman from 1974-1979 shared out portions B and C. In portion B the plaintiff was given plot 12 and in C plot 26 while the defendant was given plot 13 in B and plot 11 in

C. The dispute relates to the plot in portion B. It is agreed that both parties were fully paid up shares of Mwiyaenderi company Ltd. Shown by production of exhibits 29, share certificates and 2(b), (c) and (d) being payment receipts on the part of the plaintiff. The certificate is for 50 shares. On the part of the defendant he produced exhibit D8 for one share to show his membership. He says he had a certificate for 50 shares which he had used as a security but he had not retrieved the same. No receipts were also produced by him but it is agreed in principle that he defendant was a fully paid up member and he was entitled to 3 plots one from each portion.

It reached a point when members wanted to get title deeds to their plots and they approached the physical planner to undertake the documentation. It was when they were told that their plots are too small and they had to be expanded. It is on record the members were informed that because of this requirement some plots would be swallowed up and those whose plots would be swallowed up would be paid 5,000/= to get plots else where.

The stand of the plaintiff and his witnesses is that indeed this was the position and when survey work was undertaken the defendant became a victim of the swallowing up of his plot. That 18 feet of plot 13 went to the plot of Gathon Gachanja who had balloted for plot 14 and who is still on the ground while 14 feet of plot 13 went to plot owned by the plaintiff which had been plot 12 later on it became plot 77. That when the plaintiff was involved in an accident and was hospitalized is when the defendant went on to this plot and put up a temporary structure of mud wall and iron sheet roof and that is when the case started. The plaintiff put up a fence which was pulled down by the defendant and his son. They were arrested and prosecuted in Eldoret criminal case no. 4060/83 as shown by the proceedings in exhibit D2 but they were acquitted. The remarks of the learned trial magistrate were that he was not sure to whom the land belonged and referred the matter to arbitration. Arbitration proceedings were heard and as per the proceedings in exhibit D13 the plaintiff was to retain the disputed plot while the defendant was to go and get plot no. 81 or in the alternative sue the company. The proceedings were filed in court exhibit 3 and adopted as an award. An appeal was lodged against that decision in Eldoret SRM land case no. 51 of 1984 vide Eldoret HCCCA 5/1987 which set aside the confirmation and ordered a retrial as shown by exhibit 4.

The plaintiff then filed these proceedings in the lower court as PMCC no. 290/90 on 25.5.1990. It is further on record that persons who had disputes over their plots had cautioned the head title so that individual titles are not issued out. The matter went before the land registrar who heard the parties as per exhibit 1. The decision was made on 19.12.90. The ruling was that the caution was to be removed to pave away for the issuance of titles but the plots with cases were to be restricted pending the finalization of the cases. Despite that the plaintiff herein went to the Chairman who is PW 2 whom it has been conceded that he is a father in law to the plaintiff because his PW 25 daughter was married to late brother of the plaintiff. He plaintiff also went to the secretary PW 3 John Kariuki who is married to his sister and they signed for him the cards exhibit 6(a) (b) showing that he had been allocated plot 77 and on the strength of that he was issued with the title deed exhibit 1.

According to the plaintiff and his witnesses the very land registrar who placed the restrictions is the one who signed for the issuance of the title deed and since there was no court order prohibiting issuance of the same he was entitled to get the same.

Turning to the version of the defence it is their stand that he rightfully balloted for plot no. 13 which translated to plot 77 and then EMC block 15/421 which is the subject of this matter. The plaintiffs state that plot 13 was swallowed up with 18 feet going to Gathoni while 14 feet going to the plaintiff. The defendant says that it is plot 10 belonging to Karanja Maina and plot 11 belonging to Karanja Kamanu which are swallowed up and these people were allocated plots elsewhere. They further contend that the plaintiff was given plot 12 which he sold to Wangombe and used his influence with his in laws PW 2 and 3 to try and take the plot of the defendant. At the close of the whole case only counsel for the plaintiff put in written submissions and the points raised by them are:-

1. That it is his submissions that he was allocated the suit property by the said farmers company and that the issue of plot allocation was purely a preserve of Mwiyaenderi Farmers company and if the defendant had any cause of action at all in respect of that plot then it ought to have been against the

said company.

2. That from the lease document exhibit 1 the holder of the lease or the lessee is Mwiyaenderi company ltd and it is their view that this is the company which was granted the lease by the commissioner of lands which in turn facilitated the issuance of the lease to the plaintiff.
3. That after paying all the requisite dues to the government and after cautions had been removed by the land registrar and there being no court order barring him he acquired title to the suit plot on first registration and became the registered proprietor as from 19th February, 1991. Even the present directors admitted that the plaintiff had followed the correct procedure of the company to acquire the land and he is therefore a beneficial owner of the title.
4. That it is their stand that the proprietorship of the said property is indefeasible for all intents and purposes as per the relevant provisions of the RLA cap 300 of the Laws of Kenya and that the issue of the cancellation of the register does not arise.
5. That the defendant did not occupy the said land from 1970 and that there has been no occupation at all by the defendant in the manner and style such as to entitle him ownership of the same by way of adverse possession as by law recognized. The defendant has not shown the possession was adequate in continuity, in publicity and in extend to show that it is adverse to the owner. It must be actual visible exclusive, hostile, open and notorious which the defendant has not shown by evidence adduced.
7. The plaintiff tendered evidence that he preferred criminal charge against the defendant for the first time the later trespassed on his land and later filed a civil case in 1983 which was presided over by the District Commissioner which actions go to show that the alleged possession was not exclusive and uninterrupted.
8. That the claim for adverse possession was not properly brought in court as it has to be brought by way of originating summons which is not the case herein. Further he defendant has not shown that he used to stay on the said land and he used to pay payments in respect for the same.

There were no submissions from the defence counsel. I have also failed to trace agreed issues or issues filed by either side. In the absence of any agreement to that effect and so the court will have to frame its own issues as it proceeds to assess the evidence.

I have taken an over view picture of the evidence herein and I find that the following factors are not in dispute.

1. Both disputants were share holders of Mwiyaenderi farmers company ltd and they both qualified to be allocated 3 plots from the land owned by the company.
2. Exhibit 3 shows that the parcel of land purchased by the company was subdivided into 3 portions of A, B, C and each member was to get a plot in each portion.
3. It is clear that there is no dispute over portion A and C. The dispute is on a plot in portion B.
4. According to exhibit D3 the plaintiff Peter Gichuki balloted for plot 36 in portion A 12 in portion B and 26 in portion C while the defendant balloted for plot 21 in portion A, 13 in portion B and 11 in portion C. It is portion 13 which is in dispute. It was conceded by both sides that it translated to plot 77 and then block 15/421.

The argument of the plaintiff and his witnesses is that plot 13 which the defendant had balloted for was swallowed up with 18 feet going to the plot of Gathoni who had been given plot 14 and 14 feet going to plot 12 which had been given to the plaintiff. This fact has been denied by defendant since it is the plaintiff who was alleging it. It was incumbent upon him to bring evidence from a surveyor or physical

planner to show that indeed the plot no. 13 which had been balloted for by the defendant had been swallowed up. That assertion is further put in doubt by the fact that if indeed plot 13 had been swallowed up during the survey then how come the same translated to plot 77 and then block 15/421. The plaintiff and his witnesses did not say that it is the plot 12 which the plaintiff had balloted for which turned into plot 77 shown on exhibit 6(a) (b) and which it is agreed translated to block 15/421.

The plaintiff has further submitted and stated in evidence that he has a title deed. It is on record that the dispute started in the early 80's and the matter went before the provincial administration. The plaintiffs won but that decision was set aside and the matter was ordered to proceed in court hence these proceedings. It is further on record that cautions had been placed against the entire title leading to proceedings being held before the land registrar Eldoret whose findings are contained in exhibit D1 and they were to the effect that the caution be removed against the whole title and only plots with court cases in court can be restricted. The subject plot was one of the plots with cases in court. But that notwithstanding the plaintiff was issued with certificate of lease. The respondent alleges that the plaintiffs registration in respect of the said lease was fraudulent. The plaintiff has argued that the same is proper because:-

1. The property belonged to the company and the company properly transferred it to him.
2. The title is indefeasible as in the bonafide owner.
3. The doctrine of adverse possession is not available to the defendant firstly because the evidence does not support it and secondly it has been un procedurally invoked.

On the courts assessment of those arguments the court is agreeable that the doctrine of adverse possession is not procedurally available to the defendant as it has been wrongly invoked. It is only available when commenced by way of originating summons which is not the case here and that being the position there is no need to go into the other merits regarding this doctrine save that if it is to be taken that the defendant took possession of the plot in 1970 then that doctrine started running against the title of the company and not the plaintiff. Exhibit 6(a), (b) show that the plaintiff was given the plot in 1982 and that is when adverse possession began running against him. It is on record that the case started between them in or about 1983 – 1984 and so it means that no adverse period can start running when there are disputes.

Turning to the argument that the title is indefeasible under the registered land Act. It is clear that, that argument can only apply where the title is one of the first registration. Here in PW 2 and 3 agreed that title came out in the name of the government as the first registered owner then the title was transferred to Mwiya company limited as the lessee before coming to the plaintiff. The plaintiff is the 3rd holder of the title and the same can be faulted if evidence exists to that effect. Turning to the argument that the company procedurally transferred the land to the plaintiff this courts finding is that the business of the company is conducted through resolutions. No company resolution has been exhibited by the plaintiff and his witnesses that it was resolved that he be allocated the plot during the pendency of the court case and in disregard of the directive of the land registrar as exhibited. In the absence of a company resolution to that effect what the court is left with is the evidence that the company officials PW 2 and 3 took a short cut and favoured their in law the plaintiff in order to short circuit the court case. It follows that the plaintiff was not procedurally registered as an owner and he can not be allowed to keep the title. Further more the title has two title holders. The plaintiffs name appears on top of exhibit 1 as the holder of the lease while at page 2 the lessee is Mwiya company.

Two entities cannot own the lease hold title separately and at the same time. The title documents exhibit 1 is therefore invalid and of no value to the plaintiff. This court has already made findings to the effect that the same was not a first registration and so not indefeasible and the same can be faulted.

Before I conclude I would like to mention that the plaintiff referred the court to two authorities namely the case of Michael Githinji Kimotho versus Nicholas Murithi Mugo Nairobi CA 53/95 where it was held at page 4 of the Judgement that the issue whether the allocation of the land to the respondent was erroneous or not can only be an issue between the commissioner of lands and the respondent. The protected rights of

a proprietor under section 28 of the registered land Act cannot be defeated except as provided in that Act and certainly not at the instance of the appellant.

Counsel for the plaintiff used this holding to urge the court that the company received a lease from the government and then passed it on to the plaintiff who is the registered proprietor as he has a title which was regularly allocated to him by the company and it cannot be defeated. In answer to that argument this court refers to the earlier assessment of the evidence relating to the allocation and makes a finding that the allocation from the company to the plaintiff was not accompanied by a resolution of the company and that the relationship between the parties weighed more than any thing else.

2. It has already been found by this court that the title was not a first registration and the same is defeasible in accordance with the Act.
3. Further that the same is duplex and invalid as it contains two names of different lease holders.
4. It did not deal with an allocation of land by the commissioner of lands but entitlement of a plot rightly allotted and balloted for by a share holder.

The court was also referred to the case of James Mwangi and others versus Mukenye Enterprises Ltd. Nairobi HCCC No.3912 of 1986 where it was held inter alia that a party relying on adverse possession must show clear possession, lack of consent of owner for such possession, occupation for more than 12 years before action. Here in I agree that adverse possession plea cannot hold as it was improperly commenced.

2. Dispute started immediately the purported registration was made in the name of the plaintiff and so the ingredients of adverse possession are absent. In concluding it is the finding of this court that the plaintiffs suit cannot succeed and the same is dismissed with costs to the defendant.
3. The defendants claim of adverse possession is dismissed.
4. The defendants counter claim succeeds to the extent that an order be and is hereby made and ordered that the plaintiff Peter Gichuki was not regularly registered as an owner of the suit plot no. EMC Block 15/421.
5. An order be and is hereby made and declared that the said title exhibit 1 exhibited herein is invalid as the same is duplex as it has two different lease holders and it can not stand.
6. That an order be and is hereby made, declared and ordered that the suit plot no. EMC Block 15/421 is the by product of plot no. 13 which the defendant balloted for and was allocated the same which translated to plot 77 and later translated to EMC block 15/421 which should rightfully belong to him.
7. That an order be and is hereby made and ordered that rectification of the register and cancellation of the plaintiffs certificate of lease and substitution of the lease hold name from Mwiendareri company ltd and Peter Gichuki be made and the name of the defendant be substituted as the lessee on page 1 in the place of the plaintiff Peter Gichuki and on page 2 in the place of Mwiendareri company ltd.
8. The defendant will have costs of the counter claim.

Dated, read and delivered at Eldoret this 23rd day of May, 2003.

R. NAMBUYE

JUDGE