



**Bundotich v Toroitich & another (Environment & Land Case
98 of 2020) [2024] KEELC 6408 (KLR) (3 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6408 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 98 OF 2020
EO OBAGA, J
OCTOBER 3, 2024**

BETWEEN

SILAH KIPROTICH BUNDOTICH PLAINTIFF

AND

JANE TOROITICH 1ST DEFENDANT

SARAH JEROTICH 2ND DEFENDANT

JUDGMENT

Introduction

1. The Plaintiff filed a suit against the Defendants in which he claimed the following reliefs:-
 - a. An order holding that the suit land parcel Pioneer/Ngeria block 1 (EATEC)/14323 belongs to the Plaintiff and hat the Defendants' occupation and use of the suit land is unlawful.
 - b. An order compelling the defendants to render vacant possession of the suit land parcel Pioneer/Ngeria block 1 (EATEC)/14323.
 - c. An order of eviction of the Defendants from the suit land parcel Pioneer/Ngeria block 1 (EATEC)/14323.
 - d. An order of permanent injunction restraining the Defendants and or their agents from interfering with the Plaintiff's peaceful occupation and use of land parcel Pioneer/Ngeria block 1 (EATEC)/14323.
 - e. Costs.
2. The Defendants filed a defence and raised a counter-claim in which they sought the following reliefs: -
 - a. The Plaintiff's case be dismissed.



- b. The Plaintiff's claim is statute barred by *Limitation of Actions Act*.
- c. A declaration that the 2nd defendant has acquired possession of land parcel Pioneer/Ngeria block 1 (EATEC)/14323 by way of adverse possession.
- d. An order of cancellation of title in land parcel Pioneer/Ngeria block 1 (EATEC)/14323 and one to be issued in the name of the 2nd defendant.
- e. Any other orders the court deems fit to grant.

Plaintiff's case;

3. The Plaintiff is the registered owner of LR No. Pioneer/Ngeria block 1 (EATEC)/14323 (suit property). He purchased the suit property from John Kiptoo Kibor who had also purchased the same from Kapkenda Wamen Group. The Plaintiff obtained title to the suit property on 25.9.2019.
4. In 2019, the Defendants planted maize on the suit property. In 2020, they put up a structure of old corrugated iron sheets. The Defendants attempted to reside on the suit property in the structure which they had put up but they abandoned the plan when the plaintiff strongly opposed it.

Defendants case;

5. The 2nd Defendant is a sister to the 1st Defendant. The 2nd Defendant testified that she purchased the suit property through Mosop Investment Limited where she was a member. Mosop Investment Limited had purchased 5 acres from Lourho Agribusiness (EA) Limited. The process of subdivision started in 2007 and she took up possession of the suit property in 2003. She placed a caution on LR. No. Pioneer/Ngeria block 1 (EATEC)/1218 but the caution was removed without her consent.
6. The 2nd Defendant denied that John Kiptoo Kibor owned land which he could sell to the plaintiff and that in any case, the Plaintiff's suit is statute barred.
7. The 1st Defendant testified that she was put in possession of the suit property in 2003 to take care of it on behalf of the 2nd Defendant who is her sister. She initially used to graze cows on the land but she later started cultivating it. She stated that she did not know how the suit property changed from Pioneer/ Pioneer/Ngeria block 1 (EATEC)/1218. She stated that she has been on the suit property uninterrupted for 16 years.

Plaintiff's submissions;

8. The plaintiff filed his submissions dated 20.5.2024. He submitted that he had proved that he purchased the suit property from John Kiptoo Kibor and that he was an innocent purchaser. He Relied on the Case of *Katende –Vs- Haridar & Company Limited* (2008) 2EA 173 which was quoted by the Court of Appeal in Nakuru coa app. No. 291 OF 2013; *Weston Gitonga & 10 others –vs- Peter Rugu Gukanga & another* (2017) eKLR where it was held as follows:-

“For the purpose of this appeal; it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that: -

1. He holds a certificate of title;
2. He purchased the property in good faith;



3. He had no knowledge of the fraud;
 4. He purchased for valuable consideration;
 5. The vendors had apparent valid title.”
9. He also submitted that the Defendants had not proved any fraud against him in respect of acquisition of the suit property. he submitted that fraud is a serious allegation which ought to be pleaded and proved on a degree higher than a balance of probability. He relied on the case of *Emfil Limited –vs- Registrar of Titles Mombasa & 2 others* (2014) eKLR where it was held as follows:-
- “allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities.”
10. The plaintiff further submitted that his title cannot be impeached unless under any grounds set out in section 26(1) (a) and (b) of the *Land Registration Act* which provides as follows: -
- “The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
11. The Plaintiff further submitted that the Defendants had not proved that they had acquired the suit property by way of adverse possession. He relied on the case of *Samuel Kihamba –vs- Mary Mbaisi* (2015) eKLR where it was stated as follows:-
- “strictly, for one to succeed in a claim for adverse possession, one must prove and demonstrate that he has occupied the land openly, that is, without force, without secrecy, and without license or permission of the land owner, with the intention to have the land. there must be an apparent dispossession of the land from the land owner. These elements are contained in the Latin phraseology, nec vi, nec clam, nec precario. The additional requirement is that of animus possidendi, or intention to have the land.”
12. He further submitted that the Defendants had failed to prove that they have been in occupation of the suit property since 2003 as they allege, hence they cannot be granted title on account of adverse possession.

Defendants’ submissions;

13. The Defendants submitted that the Plaintiff’s suit is statute barred. They relied on the case of *Dickson Ngige Ngugi –Vs- Consolidated Bank Ltd (formerly Jimba Credit Corporation Limited and another)* (2020) eKLR which held that under the provisions of section 7 of the *Limitation of Actins Act* Cap 22 Laws of Kenya, an action for recovery of land cannot be brought after the expiry of twelve years.



14. The Defendant further relied on the case of *Mehtha -vs- Shah* (1965) EA 321 where it was held as follows: -

“the object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a Defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”

15. The Defendants submitted that the 2nd Defendant had acquired the suit property by way of adverse possession. They relied on the case of *Samuel Kihamba* (Supra) which was also relied on by the Plaintiff.

16. The Defendants also relied on the case of *Gabrial Mbui – Vs- Mukindia Maranya* (1993) eKLR where it was held as follows:-

“The adverse character of the possession must be established as a fact. It cannot be assumed a matter of law from mere exclusive possession even if the mere possession has been for twelve or more years. In addition, there must be facts showing a clear intention to hold adversely, and under a claim of right. De facto use, and de facto occupation must be shown.”

17. The Defendants submitted that the plaintiff has no good title as the person who sold him land had no good title to pass to him having himself purchased the suit property from an entity which did not have power to do so. They cited the case of *Bishopsgate Motor Finance Corporation Ltd -vs- Transport Brakes Ltd* (1949) IKB 322 at PP. 336 – 337 where it was stated as follows:-

“In the development of our law, two principles have striven for mastery. The first is for protection of property; no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get a good title. The first principle has held away for a long time, but it has been modified by the common law itself and by statute so as to meet the needs of our own times.”

Analysis and determination;

18. I have carefully considered the evidence adduced by the plaintiff as well as that of the Defendants. I have also considered the submissions by the parties. The issues which emerge for determination are as follows:-

1. Whether the Plaintiff's suit is statute barred and whether the 2nd Defendant has acquired the same by way of adverse possession.
2. Whether the plaintiff obtained his title fraudulently or not.
3. Whether the Plaintiff and Defendants are entitled to the reliefs in the suit and counter claim respectively.
4. Which order should be made on costs.



Whether the Plaintiff's suit is statute barred and whether the 2nd Defendant has acquired it by way of adverse possession;

19. The Defendants submitted that the 2nd Defendant purchased the suit property in 2001 from Mosop Investments Limited and that she gave it to her sister the 1st Defendant who took possession in 2003 and has remained in it to date. There was no evidence adduced to show that the 2nd Defendant purchased the suit property from Mosop Investment Limited. There was also no evidence given to support the assertion by the Defendants that they have been occupying the suit property since 2003.
20. When the 1st Defendant testified, she stated that she does not reside on the suit property but that she cultivates it. The evidence which was adduced by the plaintiff is that the Defendants started claiming ownership of the suit property in 2019 and in 2020, they put up a corrugated iron sheet house which the 1st Defendant tried to occupy but the plaintiff resisted.
21. The Advocates for the parties agreed by consent that the Defendants' Advocate was to extract copies of the green card which will then be admitted in evidence. The Defendants' counsel proceeded to file a copy of green card which showed that 2nd Defendant had registered a caution against title to LR. No. Pioneer/ Pioneer/Ngeria block 1 (EATEC)/1218 on 21.9.2018 claiming purchaser interest. This is the title from which the suit property arose after sub-division.
22. As at 21.9.2018 when the 2nd Defendant registered a caution, title in respect of LR. No. Pioneer/Ngeria block 1 (EATEC)/1218 had ceased to exist upon subdivision. The suit property was registered in the name of Lonrho Agribusiness (EA) Limited on 19.5.2016. The property was then transferred to John Kiptoo Kibor on 7.5.2019 before finally being transferred to the Plaintiff on 26.9.2019.
23. The plaintiff purchased the suit property on 7th December 2018 and proceeded to obtain title on 26.9.2019. This suit was filed on 12.11.2020. The plaintiff's suit is therefore not statute barred.
24. On whether the 2nd Defendant has acquired the suit property through adverse possession, one has to consider the evidence which was adduced. To begin with, there is no clear evidence to show that the 2nd Defendant through the 1st Defendant took possession of the suit property in 2003. The Plaintiff testified that when he purchased the suit property, it was vacant. The Defendants only came in 2020 and put up an iron sheet structure which they did not occupy.
25. As at 23.1.2003, LR No. Pioneer /Ngeria block 1 (EATEC)/1218 was registered in the name of Lonrho Agribusiness (E.A) Limited. This property was later subdivided and the suit property was registered in the name of Agribusiness (E.A) Limited on 19.5.2016 which then transferred the land to John Kiptoo Kibor who finally transferred it to the plaintiff.
26. The Defendants did not testify on which portion of LR. No. Pioneer/Ngeria block 1 (EATEC)/1218 they were occupying. They have not also given evidence to show that they were on that land from 2003. They have therefore not proved that they are entitled to the suit property by way of adverse possession. The case of Gabriel Mbu (Supra) is clear on what is to be proved. The 2nd Defendant cannot merely claim that she has occupied the suit property from 2003 and expect to get it by way of adverse possession.

Whether the plaintiff obtained his title fraudulently or not;

27. The Defendants in paragraph 15 of the counter-claim alleged that the plaintiff fraudulently acquired title from entities which did not have capacity to sell the land. There were no particulars of fraud listed and none were proved. The alleged entities which had no capacity to sell the land were not named.



The evidence which was given is that the plaintiff purchased the land from John Kiptoo Kibor on 7.12.2018. The said John Kiptoo Kibor had purchased the land from Kapkenda Women Group who were under Mosop Investment Limited. When John Kiptoo Kibor processed title, he transferred it to the Plaintiff. There was no evidence adduced that this process was as a result of fraud or a corrupt scheme. I therefore find that the plaintiff acquired his title in a genuine manner.

Whether the Plaintiff and Defendants are entitled to the reliefs in the suit and counter claim respectively;

28. From the analysis hereinabove, it is clear that the plaintiff has proved his case on a balance of probabilities and is entitled to the reliefs in the plaint. On the other hand, the Defendants have failed to prove their counter-claim to the required standards.

Disposition:

29. The Defendants' counter-claim is dismissed with costs. The Plaintiff's claim is allowed in terms of prayers (a)(b)(c)(d) and (e).

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 3RD DAY OF OCTOBER, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Kipnetich for Mr. Maritim for Defendant.

Court Assistant –Laban

3RD OCTOBER, 2024

