



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 391 OF 2015 (OS)

[FORMERLY ELDORET HCCC NO. 42 OF 2007 (OS)]

WILFRED SEREM.....1ST PLAINTIFF

EVERLYNE CHEBITOK CHELUGUI.....2ND PLAINTIFF

VERSUS

ELIMINA ALISONYA FRANCIS

(SUED AS THE ADMINISTRATOR OF THE

ESTATE OF THE LATE PAULO MULINYA MUDUNYA).....DEFENDANT

JUDGMENT

1. **Wilfred Serem** and **Everlyne Chebitok Chelugui**, the Plaintiffs filed the originating summons dated 13th March, 2007 against **Elimina Alisonya Francis**, who is sued as the administrator of the Estate of the late **Paulo Mulinya Mudunya**, the Defendant, seeking for orders that the Defendant's title to **Uasin Gishu/Mile Thirteen Scheme/257**, the suit land, has been extinguished by lapse of time; that the Plaintiffs have obtained title to the suit and by virtue of adverse possession; the Land Registrar, Uasin Gishu be ordered to delete the Defendant's name from the said land's title and to enter the Plaintiffs' names as proprietors thereof, that the Land Registrar, Uasin Gishu to issue the Plaintiffs with title deed to the suit land and costs. The originating summons is supported by the affidavits sworn by **Wilfred Serem** and **Everlyne Chebitok Chelugui**, the Plaintiffs, on the 13th March, 2007. That it is the Plaintiffs' deposition that Wilfred Serem and the late Noah Kipngeny Chelugui, who is his father in law, and father to Everlyne Chebitok, bought land parcel No. 45 that later became on subdivision Uasin Gishu/Mile Thirteen Scheme/257, the suit land, from Paulo Mulinya Mudunya, deceased, on the 9th February, 1993. That the late Noah Kipngeny Chelugui orally gifted and surrendered his share in the suit land in his lifetime to his daughter, Everlyne Chebitok who is also wife to Wilfred Serem. That no consent of the Land Control Board in respect of the sale agreement was obtained but the Plaintiffs took possession of the suit land on 9th February, 1993. That the Plaintiffs have been in continuous, uninterrupted and peaceful use of the said land since then, and the title of Paulo Mulinya Mudunya to the suit land has therefore was extinguished by operations of the late by 8th February, 2005 and they have obtained title to it. That Paulo Mulinya Mudunya is now deceased and Elimina Alisonya Francis, the Defendant, has been sued as the administrator of his estate. That annexed to the affidavits are several documents including certificate of official Search dated the 28th August, 2005 showing land parcel Uasin Gishu/Mile Thirteen Scheme/257 was registered in the name of Mudunya Mulinya Paulo on the 9th March, 1995, copy of the said land's green card bearing the same information, and Grant of letters of Administration Intestate issued to the Defendant on 26th February, 2006 by Eldoret High Court in Succession Cause No. 201 of 2005 in respect of the Estate of Paulo Mudunya Mulinya.

2. The originating summons is opposed by the Defendant through her replying affidavit sworn on the 18th May, 2007. It is the Defendant's deposition that the Plaintiffs have no legal claim over the suit land, and their claim over her late father's estate is "**void and an absurdity ab initio**". That she is the administrator of her late father's estate for the benefit of her old and ailing mother, among other beneficiaries. That her late father was forced out of the suit land in 1992 by tribal clashes. That the Plaintiffs have not been in continuous and uninterrupted occupation of the sit land as only a small portion of the land was cultivated after the filing of the attached affidavit of protest sworn on 11th December, 2008 against confirmation.

3. The 1st and 2nd Plaintiffs testified as **PW2** and **PW3** respectively. They called **Susan Chelugui** who is mother to PW3, **Ernest Kipkering**, who was the village elder, **Betty Torotich** a Surveyor, and **Sadrack K. Sawe** then chief who testified as **PW1**, **PW4** to **PW6** respectively. It is the Plaintiffs' case that they occupied the suit land pursuant to the sale agreement of 9th February, 1993 between their father, the late Noah Kipngeny Chelugui, and the late Paulo Mulinya Mudunya, whose estate is administered by the Defendant. That they have continued in occupation without any interruptions and all the payments were made by 1994. That the vendor and purchaser however passed on without applying for, and obtaining Land Control Board consent for transfer. That in 2006, they learnt that the Defendant were claiming the land through the Succession Cause of the late Paulo Mulinya Mudunya and the administrator of the estate of the late Noah

Kipngeny Chelugui, who included PW1 filed a protest. That the Plaintiffs then filed this suit claiming the said land under adverse possession.

4. The Defendant testified as DW1 and called **Reverend Francis Adams Wajumbe** and **John Keya**, who testified as **DW2** and **DW3** respectively. DW2 is the husband to DW1 and DW3 her neighbor. It is the Defendant's case that Paulo Mulinya Mudunya who is her late father, and his family lived on the suit land until 1992, when he was forced to leave during the post-election violence that resulted to his church and house being burnt, and him sustaining arrow injuries. That when the late Paulo died in 2002, the Defendant filed a Succession Cause for his estate in 2005, and a protest was filed by the late Chelugui's family claiming to have bought the land. That the late Paulo had not told them of any sale of the land to the late Chelugui. That DW1 agreed that the Plaintiffs have been grazing cattle on the land without permission. DW2 conceded to having given his identity card number to be written in the sale agreement dated 9th February, 1993 that was produced as **exhibit P3**.

5. The learned Counsel for the Plaintiffs and Defendant filed their written submissions dated 19th November, 2020 and 25th February, 2021 respectively. The following are the issues for the court's determinations;

(a) Whether the Plaintiffs have been in continuous and uninterrupted possession or occupation of the suit land and if so, whether their occupation was with permission or adverse to the title of the registered proprietor.

(b) Whether the Plaintiffs' occupation of the suit land, if initially with permission, later became adverse to the title of the registered proprietor, and if so, since when?

(c) Whether the registered proprietor's title to the suit land has been extinguished by the Plaintiffs' adverse possession.

(d) Whether the Plaintiffs are entitled to the prayers sought in the originating summons.

(e) Who pays the costs of the suit?

6. The Court has carefully considered the pleadings by the parties, evidence tendered by **PW1 to PW6, DW1 to DW3**, written submissions by both learned Counsel, the superior Court's decisions cited thereon and come to the following conclusions;

(a) That though the Defendant appears to have disputed the existence of the sale agreement between the late Paulo Mulinya Mudunya as Vendor, and the late Noah Kipngeny Chelugui as the purchaser, DW2 acknowledged receipt of Kshs.4000 from PW2 on behalf of the late Paulo's family on the 14th February, 2003. That the acknowledgment of that payment was produced as **Exhibit P9** and indicates it was **"in respect of the purchase of the Plot 45 Mile 13"**. That the defendant's learned Counsel's submissions, at paragraph 16 and 17 has referred to the said payment stating that if it was the final payment, the time for limitation started to run from that date. That the twelve years lapsed on the 14th February, 2015. That from the evidence tendered by the Plaintiffs, the Court finds ample proof has been availed, including the sale agreement dated 9th February, 1993, acknowledgements dated 23rd March, 1999 and 14th February, 2003 produced as **exhibits P3, 4 and 9** respectively, plus the letters from the administration to show that the late Paul Mulinya Mudunya entered into agreement for sale of Plot 45 situated at Mile 13 Scheme, that after subdivision was registered on 9th March, 1995 as Uasin Gishu/Mile Thirteen Scheme/257 as confirmed by the green card produced as **exhibit P6**. That **section 3(3) of the Law of Contract Act Chapter 23 of Laws of Kenya** provides that no suit shall be brought upon a contract for the disposition of an interest in land unless –

“(a) the contract upon which the suit is founded –

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.”

That whereas the late Paulo Mulinya Mudunya, the Vendor, appear not to have signed the sale agreement dated the 9th February, 1993, the identity card number inserted next to his name has not been disputed. That further among his witnesses are Mrs. Maria Lukhaya, Stephen Mulinya Mudunya and DW2 who were his wife, son and son-in-law respectively. That further, there is no evidence tendered of the said Vendor or the witnesses listed having lodged any complaints with the police, the chief or any other relevant office that their names and identity card numbers had been inserted in the sale agreement without their consent. That more importantly, the Defendant did not avail Stephen Mulinya Mudunya who is her brother to come and tell the court what he knew of the said sale agreement.

(b) That in the sale agreement dated the 9th February, 1993 (**exhibit P3**), the late Paulo Mulinya Mudunya acknowledged receipt of Kshs.170,000. The agreement further stated that the **"balance to be paid after measuring the whole plot being sold to me and to go to the District Lands and Settlement Office – Eldoret for transfer documents and transactions presented to the Moiben Land Board for transfer and subdivisions of Mr. Khafafa and N. K. Chelugui."** That evidently, the land was subsequently subdivided into parcels Uasin Gishu/Mile Thirteen Scheme/257 and 258. That parcel 258 is said to have been given to Mr. Khafafa, while the Plaintiffs claim parcel 257 was to be transferred to their late father, but the Vendor passed on the 1st January, 2003 without doing so. That though the Defendant's position was that the late Paul Mudunya Mulinya passed on in 2002, the Grant of Letters of Administration issued to the Defendant in **Eldoret Succession Cause No. 201 of 2005**, and which she produced as exhibit indicates

the said deceased died on the 1st January, 2003. That further, the acknowledgements dated 23rd March, 1999 and 14th February, 2003 confirms that there were other payments pursuant to the sale agreement dated 9th February, 1993 that were made on 22nd January 1994, 5th February 1994, 23rd March 1999 and 14th February, 2003 of Shs.15,000, Shs.15,000, Shs.5000 and Shs.4000 respectively. That these subsequent payments total Kshs.39,000 which if added to the Kshs.170,000 paid on 9th February, 1993 brings the total payment to Kshs.209,000. That it would appear that Kshs.1000 still remains to be paid to make the total purchase price of Kshs.210,000 for the (6) six acres at Kshs.35,000 per acre.

(c) That the evidence presented by the Plaintiffs clearly shows that they entered onto the suit land pursuant to the sale agreement between their father and the late Paulo Mulinya Mudunya. That it follows that they took possession, and occupied the land with permission of the late Paulo Mulinya Mudunya and their occupation was not therefore adverse to his title at that point. That their occupation could only turn to be adverse upon the sale agreement becoming void, or upon the registered proprietor's permission being withdrawn. That it is settled law that a claim for adverse possession cannot co-exist with a claim for a purchaser's interest as was held in the case of *Muchanga Investments Ltd Vs Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR*. That in the case of *Public Trustee Vs Wanduru [1984] KLR 314*, the Court of Appeal stated that time for "adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchasers takes possession of the property because from this date, the true owner is dispossessed off possession. A purchaser in possession of the land purchased, after having paid the purchase price, is a person in whose favour the period of limitation can run."

(d) That though the Plaintiffs claim that the whole purchase price had been paid, but that the Defendant was asking for more money on the pretext that the suit land was larger than the six acres agreed upon, then from the acknowledgments availed to the court the last payment was made on the 14th February, 2003. That for the period of 9th February, 1993 to 14th February, 2003, the Plaintiff's possession of the suit land was with permission of the registered proprietor while their late father continued to pay the purchase price in instalments and cannot be included in calculating the period of limitation. That the Plaintiff's possession of the suit land became adverse to the title of the registered proprietor, herein represented by the Defendant, as administratrix of the estate, after the last payment was made. The last payment was made on 14th February, 2003 but there is no way of establishing whether the remaining Kshs.1000 was ever paid and if so, when? That it follows that by the time this suit was filed on the 13th March, 2007 only a period of about four (4) years had lapsed since 14th February, 2003 when their possession became adverse. That period of possession is insufficient to extinguish the title of the registered proprietor.

(e) The Court of Appeal in the case of *Benjamin Kamau Murma & Others Vs Gladys Njeri C.A. No. 213 of 1996* held as follows;

"The combined effect of the relevant provision of Sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possessor of the same at the expiry of 12 years of adverse possession of that land."

That of course, the Claimant must also prove that possession was hostile to the title of the registered proprietor, and that it was actual, open and exclusive.

(f) That parties are bound by their pleading and in this matter, the Plaintiffs' claim is based only on adverse possession. That had the Plaintiffs pursued a claim based on the doctrines of constructive trust and proprietary estoppel, the Court of Appeal's decisions in the case of *Willy Kimutai Kitillit Vs Michael Kibet [2018] eKLR*, *Macharia Mwangi Maina & 87 Others Vs Davidson Mwangi Kagiri [2014] eKLR*, among others would have come in handy. That however, the Plaintiffs as the persons to whom the late Noah Kipngeny Chelugui had gifted the land bought pursuant to the sale agreement dated 9th February, 1993, and considering the vendor, the late Paulo Mudunya Mulinya passed on without transferring it to them, and that the Defendant, as administratrix of the estate has not shown any interest to see the completion of the said sale agreement, it is only fair the purchase price totaling Kshs.209,000 be refunded to them by the estate as it is a recoverable debt under **Section 7 of the Land Control Act Chapter 301 of Laws of Kenya**. That the Plaintiffs should also be paid interest at court's rate from the date of filing this suit until payment in full. That the Court is aware refund of the money paid is not one of the prayers sought but the provision of **Article 159(2)(d) of the Constitution** and **Section 1A, 1B and 3A of the Civil Procedure Act Chapter 21 of Laws of Kenya** allows this Court to grant it so as to attain a just, and cost effective resolution of the matter expeditiously. That way, there will be no need for the Plaintiffs to commence another suit for recovery of the money.

(g) That pursuant to **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya**, the Plaintiffs are entitled to costs of this suit.

7. That flowing from the foregoing, the Court enters judgment for the Plaintiffs against the Defendant for refund of Kshs.209,000 [**Two hundred and nine thousands**] being the purchase price received under the sale agreement dated the 9th February, 1993, with interest at Court's rate from the date of filing the suit until payment in full and costs.

It is so ordered.

Delivered virtually and dated at Eldoret this 28th day of April, 2021.

S. M. KIBUNJA

JUDGE

In the presence of:

Plaintiffs: Absent.

Defendant: Absent.

Counsel: M/s Wanjala for Magare for Plaintiff.

Mr. Juma for Defendant.

Court Assistant: Christine

and the Judgment is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.