REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

ELC NO. 6 OF 2019

RODAH CHEPKOECH KOECH.....PLAINTIFF/APPLICANT

-VERSUS-

BELGUT ENTERPRISES LIMITED.....1ST DEFENDANT/RESPONDENT

ELIZABETH CHEPKIRUI NGENY.....2ND DEFENDANT/RESPONDENT

JUDGEMENT

1. By an originating summons dated 7th February, 2019 and filed on 8th February, 2019 the plaintiff – **RODAH CHEPKOECH KOECH** – is claiming ownership of land parcel **NO KERICHO/KAPSOIT/1855** ("suit land" hereafter) as an adverse possessor. The suit land is registered in the name of 1st defendant – **BELGUT ENTERPRISES LIMITED** – of which the 2nd defendant – **ELIZABETH CHEPKIRUI NGENY** – is a director/shareholder. The plaintiff averred that she had occupied the land from 1995 to date. She said she is a sister to the late Honourable Kipngeno Ngeny who was a director/shareholder of the 1st defendant.

2. In the supporting affidavit that came with the application, the plaintiff deposed, interalia, that she had all along been in physical possession of the suit land and has been using it since 1995. She talked of having fenced, cleared, ploughed and grown maize, beans, and potatoes on the land for all those years. She has also developed, she said, the part fronting Kisumu/Kericho Tarmarc road and has temporary business premises and a car-wash business on that part. She further averred that her possession has been open, visible, and notorious all along and her neighbours are well aware of it. The owner was said not to have challenged that possession or tried to eject her.

3. The registered owner is said to have leased the land to an entrepreneur – **Kipchimchim Enterprises Limited** – who has now occupied the land and even demolished some structures. The plaintiff pleaded that she qualifies to own the land as an adverse possessor.

4. The summons came with various prayers, some of which- like prayers 3 and 5 – should have been for an interlocutory application and are therefore not for consideration at this stage. I single out these two prayers because as formulated, they were to run *"until the hearing and determination of this matter"* (prayer 4) *or "until when this suit is heard and determined"* (prayer 5). They are clearly not meant to last beyond the determination of this suit and I therefore consider them spent and/or misplaced.

5. In total, there are six prayers but the prayers for consideration at this stage are four (4) – prayers 1,2,4, and 6 – which are as follows:

> Prayer 1: The plaintiff/applicant be declared to have become the legal owner entitled by adverse possession of over twenty-four (24) years since 1995 all that parcel of land comprised in title number KERICHO/KAPSOIT/1855 measuring 0.4 hectares situated in Kapsoit Market in the County of KERICHO.
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> Prayer 2: The plaintiff/applicant be registered as the proprietor of the said parcel of land namely KERICHO/KAPSOIT/1855 in place of the above named defendant/respondents in whose favour the land is currently registered.
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> Prayer 4: The defendant/respondents to be restrained from leasing and/or entering into lease or sale agreement with Kipchimchim Enterprises Limited or any other third party in respect of the said parcel of land, KERICHO/KAPSOIT/1855.
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> Prayer 6: Costs of this application be provided for.

6. The defendants responded vide two replying affidavits, one, by 2nd defendant, is dated 21st February, 2019 while the other, by 1st defendant, is dated 19th February, 2019. The substance of their responses is broadly similar. They stated that land is registered in the name of 1st defendant; that the 1st defendant is in actual physical possession; that the plaintiff, even by her own account, is now not in possession;

that the plaintiff has not met the threshold required for proof of adverse possession; and that the suit land has never been transferred to the plaintiff as she alleges in her written statement.

7. The court started hearing the matter on 17th June, 2019. The plaintiff (PW1) said she was gifted the suit land by her late brother, **Kipngeno Ngeny**, in 1995 and she proceeded to fence it. She then started cultivating the land and has been doing so until January, 2019 when the 2nd defendant came interfering. In her written statement the plaintiff said that when her late brother took her to the land, his manager then, Joseph Kimutai and one Joel Ngeno were there. Her own sister and five brothers were also aware of the arrangement. Then sometimes in January, 2019, Kipchimchim Enterprises Limited forcefully entered the suit land, fenced it off, destroyed some business structures, and dumped quarry stones on the site. The plaintiff later on got to learn that the land had already been leased to Kipchimchim Enterprises Limited. The cross-examination done by the defendants' counsel shows the plaintiff saying, interalia, that she has been evicted from the suit land.

8. The court started taking defence evidence on 4th November, 2020. DW1, **JOHN CHERUIYOT KOECH**, a trustee of the estate of late Kipngeno Ngeny, said the land was never gifted to the plaintiff and that the 1st defendant is in full possession or occupation of the land. During cross-examination, he said that the plaintiff had used the suit land sometimes in the past and even occupied it but such use and/or occupation was intermittent, not continuous.

9. Each side called only one witness, the plaintiff (PW1) on the plaintiff's side and **John Cheruiyot Koech** (DW1) on the defence side. After that each side filed written submissions. The plaintiff's submissions were filed on 29th November, 2020. Her submissions give a snapshot of the case as presented by both sides, pointed out the law the plaintiff was relying on, and then submitted, interalia, that the plaintiff has proved adverse possession, having "*actually occupied and had the physical possession and has acted in a manner of a property owner for the last twenty-four years."* She was said to have "*used the parcel of land openly and notoriously by engaging in maize and cabbage planting since 1995*".

10. The occupation and/or possession was said to have been exclusive and the true owner has never shared the land with her. The possession was hostile too, with the plaintiff "fending off approaches against her possession and truly showing her intent in protecting the parcel's fencing and boundary line". In sum, the plaintiff's possession was said to have been "***nec vim, nec clam, nec precario***", said in the submissions to mean "*peaceful, open and continuous and not through force, or secrecy and without the authority of the owner*".

11. Several statutes and/or decided cases were referred to and/or cited, with the Land Act, 2012 and Limitation of Actions Act (Cap 22) being some of the statutes, while **KAHINDI NGAL MWANGANDI VS. MTANA LEWA (2014)eKLR**, **CELINA MUTHONI KITHINJI VS SAFIYA BINTI SWALEY & 8 OTHERS (2018)eKLR** and **KARANTIMU RAIJI VS M. MAKINYA (2013)eKLR** were some of the cited cases. Ultimately, the court was asked to find in favour of the plaintiff.

12. The defendants submissions were filed on 22nd January, 2020. The plaintiff was faulted for closing her case without calling a witness "*to corroborate her testimony*" This created a situation where it was "*her word against that of the respondents*". The defendants pointed out that the plaintiff had alleged that she was in "*open, un-interrupted and quiet possession*". They posed the question whether anybody had seen her in such open, un-interrupted or quiet possession.

13. Further, the defendants viewed any alleged possession as that of a licensee. They said that it is a wide practice in Customary African settings to allow relatives to use land. Such a scenario can never give rise to adverse possession. The plaintiff is said to have alleged to have been allowed by her late brother to use the suit land. She was also said to have been ousted in her possession of the suit land. It was submitted that a claim for adverse possession cannot stand due to that ouster of the plaintiff. The defendants cited the case of **JOHN NGUNYU KIPSOI VS SAMWEL CHEPKULUL: ELC NO 502/2017, NYAHURURU**, for the proposition, interalia, that adverse possession does not apply where possession is by consent. This court was urged to dismiss the plaintiff's suit with costs to the defendants.

14. I have considered the pleadings, evidence, and rival submissions. It seems to me well shown that the plaintiff is no longer on the suit land. Her entry to the land was through gifting, meaning it was permissive entry. She needed to show when her possession of the land became adverse. It was important to do so because it is crucial to draw the line between permitted possession and adverse possession. If you are on the land through permitted possession, you can never become an adverse possessor even if you occupy, use, or possess it for hundred (100) years.

15. Adverse possession in general terms has been understood to mean possession of land of which another person has title intending to make the land one's own. It therefore refers to possession and/or occupation inconsistent with and in denial of the title of the true owner. In law, it is usually based on the principle of limitation of actions which bars recovery of land by its registered owner after expiry of a certain period of time. **In MTANA LEWA VS KAHINDI NGALA MWANGANDI (2005)eKLR**, the court of appeal defined adverse possession thus:

> "Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12 years"

16. In this matter the defendants faulted the plaintiff for calling only one witness, in fact only the plaintiff himself, and ignoring the need to call witnesses to corroborate the evidence. The defendants pointed out that in terms of evidence, it was the plaintiff's word against theirs. I am in agreement with the submissions. And here is why: In law, when one person alleges a fact and the other responds by denying it, that fact is not proved. To prove it, the person alleging the fact needs to do more than the person denying it. And that more entails bringing more credible evidence.

17. Further, in a matter that involves proof of adverse possession, the true nature or character of adverse possession requires to be understood. Many decided cases have explicated that character. In **MBIRA VS SACHUHI(2002)I EALR 137**, for instance, the court observed as follows:

> "… a person who seeks to acquire title to land by method of adverse possession for the applicable statutory period must prove non-permissive or non-consensual actual, open, exclusive and adverse use by him or those under whom he claims for the statutory prescribed period without interruption."

The character also comes out in the maxim: ***nec vi, nec clam, nec precario***, which essentially means that possession must be peaceful, open, and continuous.

18. In the book "**LAW OF LIMITATION AND ADVERSE POSSESSION" VOLUME II, 5th Edition, at pages 1374 and 1375, K.J Rumtomji** observed that whereas possession is a matter of fact, the question whether that possession is adverse is a matter of legal conclusion to be drawn from the findings on fact. In **KWEYU VS OMUTO (1990) KLR 709, Gicheru JA** (as he then was) emphasized the need to bring out the character of adverse possession and quoted the same book with approval at pages 1366 and 1367 as follows:

> "By adverse possession is meant a possession which is hostile, under a claim or colour of title, actual, open, uninterrupted, notorious, exclusive and continuous. When such possession is continued for the requisite period (12 years) it confers an indefeasible title upon the possessor. (colour of title is that which is title in appearance, but not in reality). Adverse possession is made out by the co-existence of two distinct ingredients; the first, such a title as will afford colour; and, second, such possession under it as will be adverse to the rights of the true owner. The adverse character of the possession, must be proved as a fact; it cannot be assumed as a matter of law from mere exclusive possession, however long continued. And there should be proof that the party held under a claim of right and with intent to hold adversely. These terms (claim of right or colour of title) mean nothing more than the intention of the disseissor to appropriate and use the land as his own to the exclusion of all others irrespective of any semblance or shadow of actual title or right. A mere adverse claim to the land for the period required to form the bar is not sufficient. In other words, adverse possession must rest on defacto use and occupation. To make possession adverse, there must be an entry under a colour of right claiming title hostile to the true owner and the world, and the entry must be followed by the possession and appropriation of the premise to the occupants use, done publicly and notoriously."

19. In this matter, I am called upon to determine whether the plaintiff has proved adverse possession and whether she is entitled to the orders she is seeking. I have already given a summation of her evidence. She didn't call any witness. The defendants rebutted her allegations. She should have done more. She failed on this score. But that is not all. Given that adverse possession is possession done publicly and notoriously, how can you rest comfortable by giving only your own evidence as plaintiff while the aspects of publicity and notoriety require at least that people other than you are aware of your possession? How can you prove by your evidence alone that your surrounding world is aware of you as the owner of the land?

20. In her evidence, the plaintiff talked of her sister and five brothers being aware that she was gifted the land. She also talked of her neighbours at the place where the land is being aware that the land is her own. Where were all these people to give evidence? The truth of this matter is that the plaintiff failed to bring out the true character of adverse possession in her evidence. She failed to appreciate too that more than her evidence alone was required to demonstrate the character of adverse possession sufficiently.

21. It is crucial to appreciate also that the plaintiff is no longer on the land. And she evidently was not even at the time of filing the suit. In her submissions, she seems to realize that her ouster from the suit land could well mean that her goose is cooked. She therefore urges the court to make a finding that she has suffered "*loss, pain, anguish and damages*" and therefore order for "*pecuniary compensation calculated and assessed on the developments thereon…*".

22. It is trite that it is pleadings that guide the court. It would be completely wrong to grant orders that are not asked for in the pleadings. The other side has not been given a chance to controvert the prayers or bring evidence to rebut them. By making this request about compensation or damages in the submissions, the plaintiff seems to be ambushing the defendant.

23. The upshot, when all is considered, is that the plaintiff has not proved her case on a balance of probabilities. I hereby dismiss the case. As regards costs, I realise that this is a matter between close family members. The plaintiff seems to be an aunt to the 2nd defendant. The person said to have gifted the land to the plaintiff was the plaintiff's own brother and he was also the 2nd defendant's father. Bearing all this in mind, I order that each side should bear its own costs.

Dated, signed and delivered at Kericho this 6th day of May, 2020.

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A. K. KANIARU

JUDGE