



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 371 OF 2015**

**(CONSOLIDATED WITH ELDORET ENVIRONMENT AND LAND COURT CIVIL SUIT**

**CASE NO. 427 OF 2015 (O.S)**

**SIMION KIMAGUT BIWOTT.....1<sup>ST</sup> PLAINTIFF**

**JOHNSTONE KIPCHUMBA LEL.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**ZAKARIA KEMELI KOIMA.....DEFENDANT**

**JUDGMENT**

The plaintiff filed a plaint dated 29<sup>th</sup> September 2015 seeking, in a nutshell, a declaration that the suit parcel of land known as L.R No. 9930/14 belongs to the plaintiffs herein, mesne profits and an eviction order against the defendant from the suit parcel to give the plaintiff vacant possession. An order that the deposit paid by the defendant be refunded to him less mesne profits.

This matter was consolidated with Eldoret Environment and Land Court Civil suit no 427 of 2015 (O.S) wherein the plaintiff sought orders that the applicant Zacharia Kimeli Koima has obtained title by way of adverse possession over the whole of land reference 9930/14 having been on uninterrupted possession of the same since 1996 and that the respondents title over land reference number 9930/14 has been extinguished by dint of adverse possession and all the Limitation of Actions Act. Therefore, Land reference number 9930/14 be transferred by the respondents to the applicant. A vesting order do issue vesting land reference number 9930/14 to the applicant Zacharia Kimeli Koima. The respondents be ordered to transfer land reference number 9930/14 to the applicant failing which the Deputy Registrar of the honourable court do execute the documents necessary to effect a transfer into the applicant name and the Registrar of Titles do issue a fresh title deed in the name of the applicant Zacharia Kimeli Koima. The respondents do pay the costs of the originating summons to the applicant.

The 1<sup>st</sup> plaintiff claims to have entered into a sale agreement with the late Kipkenei Kiptarus Kogo and the late James Mungai Thindiu in the year 2007 or thereabouts in consideration of kshs. 2,810,000/-. The plaintiffs claimed they had misplaced the sale agreement but that the vendor's beneficiaries were privy to the same hence their inclusion as beneficiaries by virtue of the purchase in the succession cause in Eldoret High Court Probate and Administration cause no. 224 of 2010.

The plaintiffs submitted that they carried out a search and visited the suit land and there was nobody in occupation. They then paid the deposit price. After the first deposit, the 2<sup>nd</sup> plaintiff who represents the estate of the deceased went to fence the suit land and it is then that the defendant appeared and claimed an interest in the suit land.

When the plaintiffs approached the seller, the late James Mungai Thindiu, he produced an eviction order against the defendant vide Eldoret Misc. Civil Application no. 71 of 2006. He informed them that there had been an agreement between himself and the defendant which the defendant breached and he moved to court to obtain an order to evict him. The breach was caused by the seller's failure to complete the payment of the agreed purchase price. Having failed to honour the times for payment thrice, the seller rescinded the agreement and obtained a court order.

The plaintiffs proceeded with the understanding that they would be given vacant possession once the eviction order was enforced. The defendant did not vacate and erected temporary structures. They were occupied by Kibet Koima, the defendant's son and not himself. He was in occupation at the time of institution of the suit.

The beneficiaries moved the High Court vide Probate and Administration case No. 224 of 2010 and obtained the grant of letters of administration wherein the plaintiffs were acknowledged as beneficiaries. The administrator executed the assent to facilitate the transfer into their names.

The plaintiff in his witness statement which was adopted by the court as his evidence in chief claimed he bought eleven acres from the deceased as per the sale agreement. He produced his provisional certificate of title and stated that it was issued on 20<sup>th</sup> February 2015.

The 2<sup>nd</sup> plaintiff, the son of the late Kipkemei Kiptarus Kogo adopted his witness statement and submitted that he was not involved in the purchase of the suit land. Neither him or his family used the land and he became known to the defendant through his children who resided on the land. He does not know when the defendant moved on the suit parcel of land.

PW3 was the late James Mungai Thiundu's son and one of the administrators of the estate. He produced the grant of letters of administration dated 26.5.2011 as P-Exh 3(a) and the certificate of confirmation marked as P-Exh 3(b). He testified that the defendant had failed to complete the terms of the agreement with his father and as a result he was evicted. He confirmed executing the transfer with his co-administrators in favour of the plaintiffs.

Although the order did not bear the particulars of the suit land, the parties to the suit were his father and the defendant thus creating a nexus with the suit land. The defendant never filed any objection during succession proceedings claiming a portion of the estate thus clearly showing he was not a beneficiary of the estate.

The plaintiffs submitted that as they are the registered owners of the suit property they are legally absolute and indefeasible owners of the property. They relied on section 25 of the Land Registration Act and further stated that there had been no proof of fraud or misrepresentation levelled against them. They further submitted that a certificate of registration is conclusive evidence of proprietorship. They were bonafide purchasers for value and cited the case of *Charles Karathe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (deceased)* on the application of the Torrens system, of land registration. They also relied on the case of *David Peterson Kiengo & 2 others v Kariuki Thuo (2012)*, eKLR. They also cited the case of *Katende v Haridas & Company Limited (2008) 2 EA* on the threshold for one to be a bonafide purchaser.

They submitted that the computation of time for adverse possession began to run at the registration of their title which was 20<sup>th</sup> February 2015. That given the change in title the time began to run afresh in 2015. Further, that if time was considered to run after the alleged payment of the last instalment on 4<sup>th</sup> December, 1997 to 5<sup>th</sup> September, 2006 which is the date when the deceased James Thiundu initiated proceedings against the defendant then the same would have been 8 years thus making the filing of the originating summons premature in both instances.

They cited the case of *Njuguna Ndatho v Masai Itumo (2002) eKLR* and submitted that there needs to be an active step by the land owner to evict the possessor. As per the eviction order of Misc. Application No. 71 of 2006, it is evident that James Thiundu took active steps to remove the defendant from the suit land. Therefore, the defendant has failed to establish his claim for adverse possession.

The plaintiffs submitted that the defendant confirmed he was served with the court order and it was never appealed or set aside. If he was aggrieved by the order, he should appeal or seek its review. They maintained that it was valid until appealed, reviewed or set aside. They cited the cases of *Econet Wireless Kenya Ltd. V Minister for Information & Communication of Kenya & Another (2005) 1 KLR 828* and the case of *Wildlife Lodges Ltd. V County Council of Narok and Another (2005) 2 EA 344 (HCK)* to buttress their point that the court order ought to be obeyed and it was not invalid.

The defendant's case is that he entered into the land in 1996 and immediately the sale agreement was executed. He took possession with the permission of James Thiundu Mungai. The sale became null and void on 26.9.1996 for want of consent of the Land Control Board. Despite the sale becoming void, the defendant made two payments to the deceased in February 1997 and 4<sup>th</sup> December, 1997 thus the 12-year period in adverse possession ended on 26/9/2008 or 2/12/2008 and the defendant acquired title by dint of adverse possession on these dates. He continued to be in continuous and exclusive possession of the land for more than 12 years. The deceased's title had been caught up by laches. The evidence he availed remained unchallenged and he has therefore proven his claim on a balance of probabilities. He relied on the case of *Cherlon (K) Ltd formerly known as Caltex Oil Kenya Ltd vs Harrison Charo Wa Shatu*.

He submitted that the transfer of land does not stop time from running and cited the case of *Githu v Ndete (1984) KLR 776*, *Kairu v Gacheru (1988) KLR 297* and *Kauve v Mwaani Investments Ltd. & 4 Others (2004) KLR 184*, where it was stated that the transfer of land the subject of adverse possession does not defeat the claim of an adverse possessor.

The defendant submitted that the order that was issued in Eldoret Misc. Civil Application No. 71 of 2006 is of no legal consequence for the reasons that an eviction could not be sought in a miscellaneous application and the order does not relate to any particular parcel of land. It was therefore incapable of enforcement and does not relate to the suit parcel. He relied on the case of *Adala v Anjere KLR (1998)*. The claim is time barred and ought to be dismissed.

### **ISSUES FOR DETERMINATION**

- a) When the defendant acquired rights to the suit land vide adverse possession.
- b) Whether there was interruption of continuous possession of the suit land
- c) Whether the Plaintiffs are the rightful proprietors of the suit land

### **WHEN THE DEFENDANT ACQUIRED RIGHTS TO THE SUIT LAND VIDE ADVERSE POSSESSION**

The ingredients were discussed by the Court of Appeal in the case of **Mtana Lewa –v- Kahindi Ngala Mwangandi (2005) eKLR**, where it was held that:

**“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 an action against such person in assertion of his title for a certain period, in Kenya 12 years.”**

One of the issues that has arisen is that of when the time began to run. In the case of **James Maina Kinya v Gerald Kwendaka [2018] eKLR** the court stated;

**In the case of Public Trustee vs. Wanduru, Madan J A stated as follows; -**

**“... that adverse possession should be calculated from the date of payment of the purchase price to the full span of twelve years if the purchaser 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”.**

**In the instant case the Plaintiff was put in possession in 1983 when he completed payment of purchase price. It therefore follows that time started running for purpose of limitation from 1983 when he was granted possession on payment of the purchase price.**

There was acknowledgment of the purchase price having been paid to the deceased evidenced by D-exh 1b which was an acknowledgment of payments received. The defendant then took possession of the land and as such time began to run from 4<sup>th</sup> December 1997. This therefore means that the defendant acquired rights to the suit land by December 2009.

#### **WHETHER THERE WAS INTERRUPTION OF CONTINUOUS POSSESSION OF THE SUIT LAND**

The Plaintiffs submitted that there was a court order in Eldoret Misc. Civil Application No. 71 of 2006 obtained by the seller to evict the defendant.

In the case of **Lazaro Kabebe v Ndege Makau & another [2017] eKLR**, the court held;

**“We agree with the learned trial Judge that the appellant did not establish a right by way of adverse possession in respect of 3 acres registered in favour of the 2<sup>nd</sup> respondent’s name. This was because time stopped running in the first instance in 1977 when there was demand of the entire suit land by the 1<sup>st</sup> respondent which interrupted the quiet and continuous possession. Possession was further interrupted in 1988, by way of another law suit in Embu filed by the 2<sup>nd</sup> respondent who was claiming 3 acres as registered owner. The present suit was filed in June, 1999 which was after about 10 years of un-interrupted possession since 1988. In the case of Githu v Ndete [1984] KLR page 776 Madan, Law & Potter JJA had the following to say about change of ownership in a claim of adverse possession; -**

**“...Time ceases to run under the Limitation of Actions Act either when the owner takes or asserts his right or when his right is admitted by adverse possession. Assertion occurs when the owner takes legal proceedings or makes an effective entry into land. Giving notice to quit cannot be effective assertion of right for the purpose of stopping the running of time under the Limitation of Actions Act.**

It therefore follows that if there was a case of which the suit land was the subject the same would be considered interruption. The eviction order however does not contain the specifics of the parcel from which the respondent is being evicted. For that reason, it is defective as it is not possible to determine the subject of the order. One wonders how such an order would be enforceable. The only way to establish a nexus between the parties and the suit land and the order would be to produce the proceedings. In the absence of the same, the order is defective and the same does not amount to interruption.

#### **WHETHER THE PLAINTIFFS ARE THE RIGHTFUL PROPRIETORS OF THE SUIT LAND**

The plaintiffs do have registered title to the suit land but that does not override the rights of the defendant to claim the land by way of adverse possession. In **Lazaro Kabebe v Ndege Makau & another [supra]**, the court held;

**“A title by adverse possession can be acquired under the Limitation of Actions Act to a part of the parcel of land to which the owner holds title.”**

Despite having registered title to the suit land, the defendants’ rights had accrued upon the expiry of the 12-year period and as a result the vendor did not have proprietary rights in the suit land which he could pass on.

The Uganda case of **Katende Vs Haridas & Company Limited (2008) 2 EA 174** defined a bonafide purchaser as thus;

**“a Bonafide purchaser is 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 Bonafide doctrine he must prove the following; he holds a certificate of title; he purchased the property in good faith; he had no knowledge of the fraud; he purchased for valuable consideration; the vendors had apparent good title and he purchased without notice of any fraud”.**

The plaintiffs were aware that there was a dispute concerning the alleged eviction and that the ownership was in dispute therefore the vendor did not have apparent good title. The plaintiffs have not demonstrated that they were bonafide purchasers for value.

In conclusion, I do find that the defendant met the threshold for the suit property to be deemed rightfully his by operation of law by dint of adverse possession due to his uninterrupted occupation of the suit land for a period well over 12 years.

Ultimately, the plaintiffs' claim fails and the defendant's Originating Summons succeeds and therefore, it is hereby declared that Zacharia Kimeli Koima, the defendant, has obtained title by way of adverse possession over the whole of land reference 9930/14 having been in uninterrupted possession of the same since 1996 and that the plaintiffs' title over land reference number 9930/14 has been extinguished by dint of adverse possession and all the Limitation of Actions Act.

Therefore, it is hereby ordered that a vesting order be registered in land reference number 9930/14 in favour of the defendant, Zacharia Kimeli Koima. The plaintiffs do pay the costs of the suit.

**Dated and delivered at Eldoret this 11<sup>th</sup> day of July, 2019.**

**A. OMBWAYO**

**JUDGE**