



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L CASE NO. 124 OF 2014.

IN THE MATTER OF SECTION 38 OF THE LIMITATION OF ACTION ACT (CAP 22) LAWS OF KENYA.

FOR AN ORDER THAT THE PLAINTIFF HAS ACQUIRED TITLE UNDER THE LIMITATION OF ACTIONS ACT AND SHOULD BE REGISTERED AS THE OWNER OF 1.3 ACRES IN LAND PARCEL NO. NANDI/KURGUNG/497

BETWEEN

KIPKURGAT TARUS.....PLAINTIFF

VERSUS

JOSEPH KIPSANG TARUS.....DEFENDANT

JUDGMENT

By an Originating Summons dated 16th April 2014 the plaintiff herein sued the defendant seeking for the following orders: -

- a) That KIPKURGAT TARUS be registered as the owner of a portion of 1.3 acres in land parcel known as NANDI/KURGUNG/497 having acquired ownership and or proprietary rights through adverse possession and the title of the defendant to the portion measuring 1.3 acres be declared as having been extinguished.
- b) That upon declaration being made, that 1.3 acres of land in that parcel number NANDI/KURGUNG/497 be subdivided into two and the resulting portion measuring 1.3 acres be transferred and registered in the name of the plaintiff.
- c) That the Deputy Registrar, Eldoret High Court do sign all the necessary documents including the application for consent and transfer forms to facilitate the implementation of the above court order made pursuant to (1) above.

Plaintiff's Case

It was the plaintiff's case that the defendant had previously sold the land to one Musa and agreed that the plaintiff would buy the suit land from Musa who was unable to complete payment. PW1 stated that he paid Kshs. 24,500/ which was refunded to Musa and paid the defendant the balance of Kshs. 15,500/. He further stated that he took possession of one acre in 1993 and is still in possession to date.

PW1 stated that A.F.C came and advertised the land for sale due to the unpaid loan by the defendant who asked him to pay Kshs. 19,000/ on his behalf of which he paid. PW1 also testified that they went to the Land Disputes Tribunal which ruled in the plaintiff's favour and subsequently he was given the land. The award was filed and adopted as a judgment of the court and a copy of the award was produced as an exhibit.

Lastly, the plaintiff testified that he has been in occupation for over 24 years and prayed that he be awarded the 1.3 acres. On cross examination, he stated that he bought the land in 1993 but he neither had the sale agreement nor the acknowledgement letter to show that he paid the balance.

PW1 further testified that the High Court set aside the decision of the Tribunal and that there are two cases in respect of the suit land and further that the decision was registered at the land registry after the Kapsabet Court's decision. He stated that he was given 0.3 acres in respect of the loan he paid to A.F.C. The plaintiff therefore urged the court enter judgment as prayed in the plaint

PW2 MUSA SOME LELACHEI testified that he bought land from JOSEPH KIPSANG TARUS at Kshs. 25,000/ and paid Kshs. 20,000/ leaving a balance of Kshs. 5,000/. He later asked defendant to look for another buyer so that he can refund him his money. That in 1995, they went before the elders where it was agreed that the land be sold at Kshs. 40,000/. The plaintiff paid Kshs.24, 500/ and he was refunded

Kshs. 20,000/. He had bought one acre but was later sold to the plaintiff when he was refunded the money. He produced a copy of the agreement and a certificate of translation as Pex 2.

PW3 HILLARY SOME stated that the plaintiff sent him with Kshs. 10,000/ to A.F.C to pay for him and the receipt was written in his name as the person who had paid the money and that the plaintiff had agreed with the defendant to buy the suit land. The plaintiff is in occupation of the suit land.

Defence Case

DW1 JOSEPH KIPSANG ARAP TARUS stated that he sold land to MUSA SOME LELACHEI who was unable to complete payment of the purchase price. That they agreed with the plaintiff to buy the land. He stated that he was paid Kshs. 4,000/ and Kshs. 20,000/ was paid to the Musa Some Lelachei. It was his evidence that there was a balance of Kshs. 15,500/ which he has never been paid.

DW 1 produced an official search showing that the land is registered in his name. He further testified that there was a criminal case in respect of the suit land. On cross examination, he stated that he sold the land to the plaintiff who paid the purchase price leaving a balance of Kshs. 15,500/. He allowed the plaintiff to take possession of 1.3 acres and that the plaintiff is in occupation of the suit land. He further stated that he has never seen the green card of the suit land. That the award was entered in the green card and has never been set aside.

Lastly, he stated that he has neither filed a case for eviction nor a counter claim for the land. He therefore urged the Court dismiss the plaintiff's case with costs

Plaintiff's Submissions

Counsel listed two issues for determination as

- a) Whether Kipkurgat Tarus purchased a portion measuring 1.3 Acres in NAND1/KURGUNG/479 from Joseph Kipsang Tarus
- b) Whether the Plaintiff is entitled to a portion measuring 1.3 acres in Nandi/ Kurgung/497 by way of Adverse Possession.

Counsel submitted that the plaintiff took immediate possession of the suit parcels of land in the years 1990 and 1993 where he built his matrimonial home and has developed the suit property. That during that period, the defendant has never engaged in any act that could amount to dispossession.

Counsel further submitted that in order to acquire land by statute of limitation, title to land which has a known owner must have lost his rights by being dispossessed of it or by having discontinued his possession. Further that the plaintiff purchased the suit land from the defendant upon which he paid the entire purchase price and he entered his portion and started utilizing it without permission of the defendant thus extinguishing the rights of the defendant over the said portion.

Counsel cited the case of Virginia Waniiku Mwangi v David Mwangi Jotham Kamau (2013/e I(LR Justice A. Ombwayo stated that:-

"The Plaintiffs claim is based on principles of adverse possession whose import is that any person who claims to be entitled to land by adverse possession must prove possession of the land exclusively and openly as of right and without interruption for a period of 12 years, Adverse possession requires basic conditions being met to perfect the title of the adverse part)

(a) Open and notorious use of the property: For this condition to be met the adverse part)' use of the property is so visible and apparent that it gives notice to the legal owner that someone may assert claim.

If legal owner has knowledge, this element is met. This condition is further met by fencing, opening or closing gates or an entry to the property, posted signs, crops, buildings or animals that a diligent owner could be expected to know about

Counsel submitted that the Plaintiff entered into the said portion, fenced it, built his house which is now matrimonial home and has been planting crops and rearing animals for a period of Twenty (20) years thus the Plaintiff has had open and notorious use of the portion measuring One Decimal Three (1 .3) acres

(a) Continuous use of property

The adverse part)' must, for statute of Limitations purposes, hold that property continuously for the entire Limitations period, and use it as a true owner would for that time. This element focuses on adverse possessor's time on the land, not how long true owner has been dispossessed of it. Occasional activity on the land with long gaps in activity fail the best of continuous possession incidences such as merely cutting timber at intervals when not accompanied by other actions that demonstrate continuous possession fails to demonstrate continuous possession. If the true owner ejects the adverse party from the land, verbally or through legal some time, the adverse party returns and dispossesses him again, then the of limitation starts over from the time of the adverse part)' return. me cannot the time between his ejection by the true property owner and the date which he returned.

(a) Exclusive use o/ the property.

The adverse part)' holds the land to the exclusion of the true owner. If, for example, the adverse part)' builds a barn on the

owner's property, and the owner then uses the barn, adverse party cannot claim exclusive use. There may be more than one adverse possessor, taking as tenants (i.e owners) in common, so long as the other elements are met.

Counsel further submitted that the Plaintiff has had exclusive use of the said portion and that the Defendant has never accessed the said portion.

(b) Actual possession of the property.

The adverse party' must physically use the land as a property owner would, in accordance with the type of property, location and uses merely walking or hunting 01 land does not establish actual possession.

The actions of the adverse party must change the state of the land as b)' clearing, mowing, planting, harvesting fruit of the land, logging or cutting timber, mining, fencing, pulling tree stumps, running livestock and constructing buildings or other improvements.....

On the issue of non-permissive hostile or adverse use of the property, Counsel submitted that the Plaintiff purchased the suit portion from the Defendant upon which he paid the entire purchase price and he entered his portion and started utilizing it. He therefore claimed title of the said portion by entering the said portion and utilizing it without permission of the Defendant thus extinguishing his right to the land

Defence Submissions

The defendant's Counsel submitted that the defendant is the registered owner of parcel NANDI/KURGUNG/497 measuring 4 acres.

That he entered into a sale agreement with the plaintiff for the sale of a portion of one acre at an agreed consideration of Kshs. 40,000/. Counsel submitted that the plaintiff was however not able to pay the purchase price as agreed, thereby breaching it and fundamentally rendering it null and void.

It was Counsel's further submission that the plaintiff cannot be said to have been entitled to the suit land by adverse possession since his occupation to the suit land was with the defendant's permission when he took possession in the year 2000. Further that the defendant was quick to assert his rights with regard thereto as early as 2002. Counsel stated that for a suit for adverse possession to succeed, the statutory period of twelve years must have lapsed hence this suit does not qualify for adverse possession since the plaintiff was permitted into the suit land and occupied the same since 2000 but when he displayed hostility in 2002, he moved to assert his right as the indefeasible owner.

A person claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.

Counsel cited the case of **Samuel Miki vs. Jane Njeri Richu CA No 122 of 2011 where the Court of Appeal** held that "it is trite law that a claim of adverse possession cannot succeed if the person asserting the claim is in possession with the permission of the owner or in pursuance of an agreement of sale or lease or otherwise.

The Plaintiff has sought for orders that he be registered as proprietor of parcel NANDI/KURGUNG/497 having acquired the title by virtue of the doctrine of adverse possession.

Analysis and Determination

The Issues for determination by the Court are as follows

a) Whether or not the Plaintiff has acquired the suit property by way of adverse possession.

The legal attribution to the doctrine of adverse possession in Kenya which is embodied in Section 7 of the Limitation of Actions Act, (Cap 22). Section 7 of the Limitation of Actions Act provides as follows:

"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him..."

Section 13 of the Limitation of Actions Act aforesaid further provides that:

A right of action to recover land does not accrue unless the land is in the possession of some person in whose favor the period of limitation can run (which possession is in this Act referred to as Adverse possession) and, where under sections 9, 10, 11 and 12 (of the Act) a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

Sections 37 and 38 of the Limitation of Actions Act stipulate that if the land is registered under one of the registration Acts, then the title is not extinguished but held in trust for the person in adverse possession until he shall have obtained and registered a High Court Order vesting the land in him.

Section 37 of the Limitation of Actions Act provides that:

Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37, to land or easement or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

Where a person claims to have become entitled by adverse possession to land, he must apply to the High Court for an order that he be registered as the new proprietor of the land in place of the registered owner.

It is not in dispute that the plaintiff bought the suit land and that the same is admitted by the defendant. It is further not in doubt that the plaintiff is in occupation of the suit land and has been in such occupation for a period of over 20 years. The critical period for the determination as to whether possession is adverse is 12 years and the burden is on the person claiming to be entitled to the land by adverse possession to prove, not only the period but also that possession was without the true owner's permission, that the owner was dispossessed or discontinued his possession of the land, that the adverse possessor has done acts on the land which are inconsistent with the owner's enjoyment of the soil for the purpose for which he intended to use it.

The defendant had claimed that there was a case at the land Disputes Tribunal and a criminal case and therefore time stopped running.

In the case of **KISUMU C.A NO. 181 OF 1996 JASON MASAI –VS- MASAI KIPSAMU** – the Court of Appeal held that a “mere demand letter did not amount to interruption of possession. It therefore means that the letter issued by the Respondents agent dated 17th August, 2005 to pay profits and vacate the land did not interrupt possession nor did it stop the running of time.”

In the case of Kipketer Togom v Isaac Cipriano Shingure (2012)eKLR Justice A. Mshila stated that.

“Alternatively, the Respondent should have proceeded to institute legal proceedings in a court of law against the trespasser asserting his rights against the trespasser with prayers for his eviction and ejection from the property). is there interruption to occupation and possession and when does time stop running. The proceedings initiated or instituted by the Plaintiff do not amount to interruption ” Justice T. Mbaluto in Francis Mungai Kimani v Ngendo Kibogoro(1988) eKLR stated that:-

"Filing suit does not interrupt adverse possession in certain cases it may even amount to a reaffirmation of adverse possession”

Further the Court of Appeal in the case of the Public Trustee and Beatrice Muthoni v Kamau Wanduru(Court of Appeal Civil Appeal No. 73 011982) in which it was held that:-

"Even a decree establishing the proprietor's right to the suit land will not without successful execution interrupt adverse possession”

From the forgoing I find that the plaintiff has proved his case that he has acquired the suit land by way of adverse possession and is entitled to be registered as owner of 1,3 acres of the suit land. The defendant to pay costs of the suit. The defendant to sign all the relevant documents to facilitate transfer and in default the Deputy Registrar to sign on his behalf.

DATED and DELIVERED at ELDORET this 5TH DAY OF NOVEMBER, 2019.

M. A. ODENY

JUDGE

JUDGMENT read over in open court in the presence of Mr.Kipkurui holding brief for Mr.Melly for Defendant and in the absence of Miss.Tum for the Plaintiff.

Mr.Mwelem – Court Assistant