



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELCNO. 97 OF 2014 (OS)

VIOLET INZIANI.....PLAINTIFF

VERSUS

CLEMENT ODHIAMBO.....1ST DEFENDANT

FRANCIS JUMA TAABU.....2ND DEFENDANT

CECEILA MAITHA NJUKI.....3RD DEFENDANT

EDWARD MUSAZI.....4TH DEFENDANT

JUDGEMENT

The Plaintiff brought this suit by way of Originating Summons dated 20th March 2014 seeking orders that the Plaintiff has obtained the title to land parcel No. Soy/Soy Block 10 (Navillus)/2141 by adverse possession and that the Defendants' title over land parcel No. Soy/Soy Block 10 (Navillus)/2141 has been extinguished by lapse of time.

Pursuant the above the land registrar, or the registrar in charge of the Uasin Gishu District Land Registry, or the registrar where the register for the land do delete the name of the 4th Defendant and in lieu thereof enter the name of the Plaintiff and issue the Plaintiff with a title deed to parcel No. Soy/Soy Block 10 (Navillus)/2141.

Pursuant to the above, the Land Registrar Uasin Gishu District Land Registrar, or the Registrar having lawful custody of the register for parcel No. Soy/Soy Block 10 (Navillus)/2141 be ordered to issue a fresh title deed to the Plaintiff over the said land parcel No. Soy/Soy Block 10 (Navillus)/2141. Costs be borne by the Defendants.

The Plaintiff swore a Supporting Affidavit dated 20th March 2014 in which she averred that she was the daughter of the late Janet Mmboga Ohoko who was a shareholder of Ishieywe Self Help Group and who was allocated a plot No. C14 in Soy/Soy Block 10 (Navillus)/66. That her mother had given her the parcel as a gift *inter vivos* which she perfected on 11th March 1997 by entering into occupation, building a temporary house and farming thereon. That they had received a letter dated 18th July 2000 informing them that they were to solely process their title after 6th September 2000 if they did not make certain compliances. That she cleared the balance on 14th February 2001 and gave title deed processing fees in her late mother's name but no title was issued to date. That she had been on the suit land in open uninterrupted peaceful and continuous possession since 1997.

The Plaintiff averred that the land parcel was later registered as Soy/Soy Block 10 (Navillus)/2141. That the parcel was then registered in the name of the 1st Defendant, the 2nd Defendant, and the late Hannington Elly's Oriedo. That after the death of the late Hannington Oriedo on 17th September 2007, the 1st Defendant transferred the parcel and title deed was issued. That the transfer was effected even before registration was done on 28th September 2007. That the 3rd Defendant got title to the parcel without any agreement or payment, and the Plaintiff later charged with trespassing onto the parcel vide Eldoret CMCR 5814 of 2010 but she was acquitted. That the Defendants had never taken possession and their title stood extinguished by March 2009 by virtue of adverse possession and the original sale having been void for lack of consent of the Land Control Board.

3rd Defendant's Response

The 3rd Defendant filed a Replying Affidavit sworn on 28th May 2014. The 3rd Defendant's response was that the Plaintiff's Originating Summons was defective and an abuse of the court process. That the Plaintiff lacked *locus standi* to institute the suit without having taken out any grant of letters of administration nor obtained *ad litem* for purposes of instituting proceedings on behalf of her late mother. That the interest of the Plaintiff's late mother was a deceased right of personal action which could not be passed to the Plaintiff.

The 3rd Defendant asserted that the doctrine of adverse possession could not apply as the Plaintiff's mother passed on in the year 2004, 10 years before the suit. That adverse possession is a right against the title, yet the 1st – 3rd Defendant had ceased to hold such and the same was held by the 4th Defendant. That the 1st – 3rd Defendant had been wrongly enjoined in the proceedings as they no longer held any interest in the suit land.

The 3rd Defendant stated that the Plaintiff had never occupied the said parcel and had not provided any evidence to prove she was gifted the land and any evidence of occupation. That when the Plaintiff claimed to have started occupation, the land was still owned by Lonrho Agribusiness (EA) Ltd whereof the 1st and 2nd Defendants acting as trustees of Ishieywe Self Help Group bought the same much later vide a sale agreement dated 20th July 1999. That the 3rd Defendant acquired the parcel as a registered member of the self-help group and paid a consideration of Kshs. 80,000/=, and then later sold the same to the 4th Defendant, as clearly demonstrated in the green card. The 3rd Defendant prayed that the suit be struck out with costs.

Plaintiff's Case

At the hearing, the Plaintiff adopted her statement dated 30th November 2016 as evidence. The statement was to the effect that her mother was a member of the Ishieywe Group from 21st December 1996. That the Group collected member contributions and bought land from Lonrho Agribusiness (EA) Ltd on 20th July 1999 using the money contributed. That a meeting was called and balloting done upon which the Plaintiff's mother picked Parcel C14. That on the ground the Plaintiff's mother was given a special commercial plot No. 66 at the cost of Kshs. 80,000/= instead of farm land and was told she would be refunded, but this never happened.

That once the Plaintiff's mother was shown the land, she entered and started utilising the land immediately by digging a toilet and building a structure. That the Plaintiff's younger brother was left looking after the plot. That when the Plaintiff's mother became sickly, she gave the Plaintiff the land as a gift which the Plaintiff took over immediately and the Plaintiff had been utilising the land since 1999.

That immediately after her mother's death, the officials asked the members to pay some money for purposes of going to the Land Control Board. That the Plaintiff went to the office and met the 1st and 3rd Defendants. That the 3rd Defendant told her to pay Kshs. 15,000/= and the Plaintiff gave her the original receipts to handle succession and process the title. That the Plaintiff gave her copies of her mother's receipts instead. That they stayed on the land, and in 2010 the Plaintiff was told to move out because the 3rd Defendant had the title to the land. That the Plaintiff did not move out and continued to do construction thereon until she was reported to the police but was later acquitted.

The Plaintiff produced photographs of the suit land, depicting a semi-permanent structure, fencing and farming activity (P. Exhibits 3a – 3f). She testified that she had tried to obtain the title to the land but was told that someone had obtained title to the land. She also produced receipts showing payments made to the group by her mother (P. Exhibit 9) and a ballot paper showing allocation of Plot C14 in Block 66 (P. Exhibit 10). She stated that they had been ploughing the land since 1999 and she had been staying on the land since 2004.

John Lumadede testified as PW2. He stated that he was a member of the Group and was given plots Nos. 4 and 5. That the Plaintiff's mother was member and neighbour who got her plot on 27th July 1999. That he was appointed as a caretaker in 2000 and was present when the plots were surveyed and distributed. That the 3rd Defendant was not a member and she did not get any plot in parcel Soy/Soy Block 10 (Navillus)/66. That when the Plaintiff's mother became sick, the Plaintiff began coming to the parcel and working on it, even after the death of her mother in 2004. He stated that the Plaintiff's family had been in occupation since 1999.

Isaya Yasena Kanjirwa, another member of the Group, testified as PW3 and stated that he was a neighbour to the late Janet Mmboga and that they were both given land on the same day. That they built around the same time and one of her sons stayed in the land for some time before the Plaintiff came and took over the land. That he learnt that the 3rd and 4th Defendants wanted to evict the Plaintiff. That he since they were given the plots, he has only known Janet Mmboga and her daughter as the owners of the plot.

Francis Mulefu testified as PW4 and stated that he was a village elder and owned land at Ishieywe since 1999. He stated that he knew the Plaintiff's mother and that the Plaintiff's mother used to work on her land which was Plot No. 66. That the deceased left the land to her children, particularly the Plaintiff. That the 3rd Defendant did not stay in the land. On cross examination, PW4 stated that he knew the members of the Ishieywe group and that he did not know and had never seen the 4th Defendant. That it was the group's chair who knew who owned which land.

Defendant's Case

The 1st Defendant testified as DW1. He adopted his statement of 2nd December 2016 in which he had stated that he and the 2nd Defendant were officials of the Ishieywe Self Help Group, and that the 3rd Defendant had purchased shares and acquired over ¼ an acre. That the 3rd Defendant sold her shares to the 4th Defendant as reflected in the green card. That the Plaintiff's mother was sold shares worth Kshs. 12,000/= equivalent to 1/8 acre, and that the Plaintiff had never taken occupation of the same.

DW1 testified that they allocated the Plaintiff's mother Parcel No. 175 which was 1/8 acre. That the land the Plaintiff's mother paid for was not the one in dispute and was available. That it was the 3rd Defendant who paid for and was allocated the suit parcel. DW1 produced receipts, a ballot allotment sheet, and share certificate to this effect. DW1 asserted that the land was transferred to her and she took possession in 1999. That the 3rd Defendant subsequently sold the land to the 4th Defendant. That the Plaintiff took possession of the land in 2010 and before that it was empty.

On cross-examination, DW1 stated that the 3rd Defendant was allocated the parcel when she paid for the same in 1999 but the receipts did not indicate the number of the plot. That the subdivision was done before allocation and after payment to the original owners Lonrho based

on their agreement dated 20th July 1999. That the land indicated in the receipts he produced was Soy/Soy Block 10 (Navillus)/2141. That the share certificate dated 16th April 2007 was issued 8 years after the land was allocated to the 3rd Defendant. DW1 acknowledged his signature on some of the receipts produced by the Plaintiff. He admitted that he had not come with any evidence to the effect that the one acre given over to parcel 2115 was allotted to the Plaintiff's mother, and had no evidence of possession of the suit parcel by the 3rd Defendant. On re-examination, DW1 reiterated that the 1/8 acre on parcel 2115 was what was allocated to the Plaintiff's mother and was still available to her.

The 3rd Defendant testified as DW2. She stated that she became a member of Ishieywe Self Help Group in 1998 as Member No. 1907. That she paid for shares worth Kshs. 80,000/= equivalent to a ¼ acre. DW2 produced receipts (D. Exhibits 2a – 2c) reflecting the purchase. DW2 stated that she was allocated parcel Soy/Soy Block 10 (Navillus)/2141 in October 1999. That she occupied the land and cleared the bushes. That she sold the parcel to the 4th Defendant in 2010. That in September 2010, the Plaintiff tried to enter the land when the 4th Defendant had already taken possession, prompting the criminal case. That the photographs produced by the Plaintiff showed the fence erected by the 4th Defendant.

The 4th Defendant testified as DW3. He stated that the land in dispute was his land and produced a copy of a title deed. DW3 stated that he bought the land from the 3rd Defendant after doing a search. That the 3rd Defendant was using the land and that he lived in the neighbouring parcel No. 2140. That he did not know who had planted on the suit parcel but assumed it was the owner. That he fenced the land in 2010. That he found that the Plaintiff had entered into the land in 2014. That he had been ploughing the land since 2010.

On cross-examination, DW3 stated that he saw 6 men building on the land in 2010. That he could not remember what was planted on the parcel in 2010. That he did not go with the 3rd Defendant to see the parcel and the 3rd Defendant had to him that the maize planted on the parcel was hers. That he had no means to verify this and that he had never stayed on the parcel. That he trusted the title he had obtained.

Plaintiff's Submissions

Counsel for the Plaintiff submitted that the Plaintiff has had continuous and uninterrupted possession of the suit land since 1997, without the consent of the Defendants. That the 4th Defendant admitted that he had never taken possession and the 3rd Defendant admitted that she was not in occupation at the time of purchase. Counsel submitted that time started running in 1997 when the Plaintiff took possession.

Counsel cited ***Ruth Wangari Kanyagia v Josephine Muthoni Kinyanjui [2017] eKLR*** for the proposition that the combined effect of the relevant provisions of sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of the 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.

Counsel also cited ***Jacob Kiprono Kiplagat v Mary Kobil Barkwang & another [2017] eKLR*** for the proposition that time ceases to run under the Limitation of Actions Act either when the owner asserts his right by taking legal proceedings or by an effective entry into the land or when his right is admitted by the adverse possessor. Counsel asserted that the mere fact that the 3rd and 4th Defendants got titles in 2007 and 2010 respectively did not stop the time from running.

Counsel cited ***Wambugu v Njuguna 1983 KLR 173*** that the rights of a person in possession or occupation of land are equitable rights which are binding on the land and the land is subject to those rights. Counsel submitted that the Plaintiff had *locus standi* to institute the proceedings as she was the one in possession of the parcel since 1997 when her mother gifted her.

Defendants' Submissions

Counsel for the Defendants submitted that the Plaintiff never exhibited anything to support her allegation of the gift *inter vivos* from her late mother. That the evidence of the Plaintiff's witnesses were mired with inconsistencies. That the photographs produced by the Plaintiff showed new structures and not old ones.

Counsel submitted that the court ruling in Eldoret CMCR Case No. 5841 stated that there was a lot of doubt as to whether the Plaintiff was in actual possession of the parcel.

Counsel submitted that the Plaintiff was not clear as to whom she was claiming adverse possession against. That regarding her claim against the 3rd Defendant, the time would start running from 2007 when the 3rd Defendant obtained title. That regarding her claim against the 4th Defendant who is the registered owner of the suit land and title registered in 2010, the time would have started running in 2010.

Counsel submitted that from the Green Card produced, the suit parcel was still registered to the Government in 1999 and later registered in the name of Lonrho Agribusiness EA Ltd in 1999, bringing to question how the Plaintiff would have been in possession of the land. Counsel asserted that the Plaintiff could not sustain a claim against the Government or Lonrho who owned the land before the Ishieywe Self Help Group acquired it. That even when computed from the time when the 3rd Defendant was the registered owner, it was obvious that 12 years was yet to lapse and therefore the suit was premature.

Counsel submitted that the criminal case instituted by the 3rd Defendant against the Plaintiff amounted to interruption of the Plaintiff's possession, citing the case of ***John Chelimo Seguton v Joseph Kitur Kiplangat [2018] eKLR*** which held that the arrest and charging of the Plaintiff removed any presupposition that his possession was peaceful, and time would start running afresh after the Plaintiff's acquittal.

Counsel asserted that the Plaintiff had not satisfied the ingredients for a claim of adverse possession

Issues for Determination

The Court of Appeal in Mombasa Teachers Co-operative Savings & Credit Society Limited v Robert Muhambi Katana & 15 others [2018] eKLR enumerated the required elements to prove adverse possession as follows:

“Likewise, it is settled that a person seeking to acquire title to land by of adverse possession must prove non permissive or non-consensual, actual open, notorious, exclusive and adverse use/occupation of the land in question for an uninterrupted period of 12 years as espoused in the Latin maxim, nec vi nec clam nec precario. See Jandu vs. Kirplal & Another (1975) EA 225. In other words, a party relying on the doctrine bears the burden of demonstrating that the title holder has lost his/her right to the land either by being dispossessed of it or having discontinued his possession of it for the aforementioned statutory period. See this Court’s decision in Wambugu vs. Njuguna [1983] KLR 173.”

The issues for determination in this case are therefore as follows:

1. The year from which the adverse claim should be computed

Even though the Plaintiff has pleaded that she has been in occupation of the suit property since 1997, the green card produced indicates that the land was registered in favour of the Government until 4th July 1999 when Lonrho Agribusiness (East Africa) Limited became the registered owner. The Plaintiff’s cannot claim adverse possession and occupation of the suit parcel before this period as the land was still in the hands of the Government. The Court of Appeal in Sammy Mwangangi & 10 others v Commissioner of Lands & 3 others [2018] eKLR held as follows:

“It is a well settled principle that a claim for adverse possession can only be maintained against a registered owner; nor can one claim adverse possession against public land... We reiterate that if the land is registered in favour of the Government the doctrine of adverse possession would not apply to it and the claim would fail.”

The earliest date from which the Plaintiff’s adverse claim can be computed is after the sale of Soy/Soy Block 10 (Navillus)/66 to Ishieywe Self Help Group on 20th July 1999. Furthermore, the testimonies of the Plaintiff’s witnesses also indicate that the Plaintiff and her family had been in occupation of the suit property since 1999. It follows that time would start running with respect to the adverse claim from the year 1999.

2. Whether the Plaintiff’s possession of the property was interrupted

For the Plaintiff to succeed in her claim, she should demonstrate that she had been in peaceful and uninterrupted possession and occupation of the suit parcel for a period of 12 years from 1999 that is until the year 2011. The Defendants’ argument that the Plaintiff’s possession would have been interrupted by a change of ownership from the 3rd Defendant to the 4th Defendant is not persuasive. It was held in the case of Githu v Ndeete [1984] KLR 776 that:

“The mere change of ownership of land which is occupied by another person under adverse possession does not interrupt such person’s adverse possession.”

The Court of Appeal in Titus Kigoro Munyi v Peter Mburu Kimani [2015] eKLR cited with approval the decision in Maweu v Liu Ranching & Farming Cooperative Society Ltd., 1985 KLR 430 at 434 which stated that:

“Any man who buys land without knowing who is in possession of it risks his title, just as he does, if he fails to inspect his land for twelve years after he had acquired it.”

The registered owners’ conduct upon knowledge of the Plaintiff’s possession of the suit parcel is an indicator of whether the possession was peaceful and uninterrupted. The 4th Defendant upon realising the Plaintiff had entered into the suit parcel, triggered Eldoret CMCR 5814 of 2010 in which the Plaintiff was charged with forceful detainer. Notwithstanding the outcome, the criminal case was a clear indication that the 4th Defendant was resisting the possession by the Plaintiff and asserting his rights to the property. This event interrupted the adverse possession by the Plaintiff and the time would have to be computed afresh from the date when the Plaintiff was charged in 2010. The original period of possession between 1999 and 2010 is 11 years. The subsequent period of adverse possession from the criminal case in 2010 to the filing of this suit in 2014 is 4 years. None of these periods meet the required threshold of 12 years.

3. Relevant orders

The doctrine of Adverse Possession is one of the ways of land acquisition in Kenya. The statutory provisions that underpin the doctrine are set out in the Limitations of Actions Act Cap 22 and the Registration of Land Act No 6 of 2012;

Section 7 states that “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 or, if it first accrued to some person through whom he claims, to that person”

Further in **Section 13 states that** “(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour 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 this 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. (2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in Adverse Possession, the right of action is no longer taken to have accrued, and a fresh right of action does not accrue unless and until some person again takes Adverse Possession of the land.(3) For the

purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3) of this Act, the land in reversion is taken to be Adverse Possession of the land”.

Since the Plaintiff has failed to meet the 12year threshold, her claim under the doctrine of adverse possession ought to fail. The suit ought to be dismissed and is hereby dismissed with costs.

Signed, Dated at Kisumu this 26th day of April, 2021.

A.O OMBWAYO

JUDGE

DELIVERED AND SIGNED AT ELDORET THIS 5TH DAY OF MAY 2021.

S.M KIBUNJA

ENVIRONMENT & LAND

JUDGE