



**REPUBLIC OF KENYA**

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

**AT ELDORET**

**E&L CASE NO. 7 OF 2018**

**IN THE MATTER OF SECTIONS 7, 17, 38 OF THE LIMITATION OF ACTIONS ACT, CAP 22**

**AND**

**IN THE MATTER OF ORDER 37 RULE 7 OF THE CIVIL PROCEDURE RULES, 2010**

**AND**

**IN THE MATTER OF SECTION 30 (f) AND 30 (g) OF THE REGISTERED LAND ACT, CAP 300 (REPEALED)**

**AND**

**IN THE MATTER OF SECTION 28 (h) OF THE LAND REGISTRATION ACT, 2012**

**AND**

**IN THE MATTER OF LAND PARCEL KNOWN AS UASIN GISHU/KIMUMU SETTLEMENT SCHEME/272 AND ITS ATTENDANT SUB-DIVISION BEING UASIN GISHU/KIMUMU SETTLEMENT SCHEME/5709**

**BETWEEN**

**CHARLES ALUZAGE KAGALI.....PLAINTIFF**

**AND**

**JOSEPH HINGA GATHIL.....DEFENDANT**

**JUDGEMENT**

By an Originating Summons dated 15<sup>th</sup> February 2018 and amended on 7<sup>th</sup> June, 2018 the plaintiff herein sued the defendant claiming that he had acquired by way of adverse possession 0.045 Hectares comprised in the land parcel known as **UASIN GISHU/KIMUMU SETTLEMENT SCHEME** which is a resultant sub –division of the land parcel known as **UASIN GISHU/KIMUMU SETTLEMENT SCHEME/272** with an approximate area of 2.0 Hectares and sought the court’s determination of the following questions:

1. Whether the plaintiff has been in open, continuous and uninterrupted occupation of 0.045Hectares comprised in the land parcel known as **UASIN GISHU/KIMUMU SETTLEMENT SCHEME** which is a resultant sub –division of the land parcel known as **UASIN GISHU/KIMUMU SETTLEMENT SCHEME/272**.
2. Whether the occupation has been without the consent of the defendant.
3. Whether the defendant’s title has been extinguished in respect of the land parcel known **UASIN GISHU/KIMUMU SETTLEMENT SCHEME** which is a resultant sub –division of the land parcel known as **UASIN GISHU/KIMUMU SETTLEMENT SCHEME/272** by adverse possession and the right to recover the land by action equally having been extinguished.
4. Whether the plaintiff is entitled to be registered as the proprietor of land parcel known as **UASIN GISHU/KIMUMU SETTLEMENT SCHEME** measuring 0.045Hectares in place of the defendant.

5. Whether the defendant should execute the requisite instruments of transfer and in default the Deputy Registrar of this Honourable Court do execute the same pursuant to section 98 of the Civil Procedure Act Cap 21 of the Laws of Kenya

6. Who should meet the costs of this suit.

The court gave directions and parties agreed to canvas the matter vide viva voce evidence.

#### **PLAINTIFF'S CASE**

PW1 swore an affidavit in support of the Originating Summons on 5<sup>th</sup> June, 2018 whereby he deponed that he resides on the land parcel known as **UASIN GISHU/KIMUMU SETTLEMENT SCHEME** measuring 0.045 Ha or 1/8<sup>th</sup> of an acre and further stated that the land is registered in the defendant's name who became so registered on 1<sup>st</sup> March, 2011.

PW1 also stated that the land parcel is a sub division of the land parcel known as **UASIN GISHU/KIMUMU SETTLEMENT SCHEME/272** measuring 2.0 Ha and was registered in the name of the defendant on 27<sup>th</sup> January, 1995 and upon subdivision the defendant became registered as the proprietor on 1<sup>st</sup> March, 2011. That the he has been in occupation of the initial parcel of land known as **UASIN GISHU/KIMUMU SETTLEMENT SCHEME/272** and even its resultant sub-division since December, 1997.

It was PW1's evidence that he bought the land in 1997 and made payments by instalments to the defendant's agents Jotham and Associates Commercial Agencies as follows: Kshs. 500 on 6<sup>th</sup> September, 1997, Kshs. 20,000 on 6<sup>th</sup> September, 1997 Kshs. 20,000 on 8<sup>th</sup> September, 1997 and Kshs. 30,000 on 13<sup>th</sup> October, 1997 which in full and final settlement of the purchase price.

PW 1 further stated that upon making the full payments of the agreed consideration he entered into a sale agreement with the 1<sup>st</sup> defendant's agents on 13<sup>th</sup> October, 1997 in which the defendant's name was indicated and immediately assumed occupation and constructed a semi-permanent house where he fenced, installed electricity, dug a well, piped water and planted trees without any interruption for more than a period on 12 years.

PW1 further testified that the defendant attempted to take possession of the suit property sometimes on 12<sup>th</sup> July, 2017 while acknowledging that PW1 had been in possession for 19 years without his consent thus affirming his claim for adverse possession.

PW1 produced a copy of the sale agreement, payment receipts, copies of green card for the suit parcel, and allocation plan of the suit plot as exhibits before the court. He therefore urged the court to allow his claim as prayed in the Originating Summons.

On cross-examination, he stated that the defendant took him to pay the money to Jotham and Associates Commercial Agencies where he paid the money and signed the agreement with the agent and the defendant's name affixed but he did not sign. PW1 also stated he was not aware that the property was charged at the time he purchased the same. He was only informed by the chief that the property had been advertised for auction. He also stated that it is not true that he refused to pay the defendant.

PW 2 was Tom Shiveregi Shangali, a village elder and a resident of Kimumu area testified that he moves to Kimumu Settlement Scheme in 1966 and that the plaintiff took possession of the suit land in 1997 and has been in occupation since then without any interruption.

#### **DEFENDANT'S CASE**

DW1 testified and stated that he is the registered proprietor of land known as **UASIN GISHU/KIMUMU SETTLEMENT SCHEME/272** measuring 2.0 ha which was charged to Barclays Bank of Kenya in 1996. It was DW1's evidence that he later had difficulties repaying the loan and opted to subdivide the suit land to help him offset the loan.

DW1 stated that the subdivision was done by one John Mathenge Kinyua trading as Jomath's a registered surveyor whom he gave instructions to only sub divide and not sell or allow any developments on the plot without his authority.

DW1 testified that he was aware of the plaintiffs' occupation and that it is not true that he has had a quiet and uninterrupted stay for the last 12 years as he had asked him to pay for the land on several occasions.

It was DW1's evidence that the plaintiff colluded with surveyors to grab his land and even petitioned the bank to sell them the said parcel of land. DW1 further stated that there was no peaceful occupation by the plaintiff as the Bank severally sent auctioneers to sell the piece of land and on several occasions the land was gazetted for auction.

DW1 stated that the suit land was subject of judicial proceedings between himself and the Barclay Bank in **Eldoret High Court Civil Case No. 12 of 2001 Joseph Hinga Gathii vs Barclays Bank of Kenya Limited** and the matter was concluded in the year 2010 where the bank discharged the property vide a court order dated 24<sup>th</sup> June 2010.

It was his evidence that after the discharge, he started the process of transferring the parcels of land to the buyers who had cleared with him and that the plaintiff had not paid the purchase price in full.

On cross examination the defendant stated that the surveyor was not his agent and further the plaintiff did not buy the land from him. He testified that he had asked the plaintiff severally to vacate the land or to pay him the purchase price but he has refused to do so. He therefore

urged the court to dismiss the plaintiff's suit with costs.

## **PLAINTIFF'S SUBMISSIONS**

Counsel for the plaintiff submitted on the requirements for an adverse possession claim and stated that the plaintiff had satisfied as he has been on the suit land without the consent of the proprietor since 1997 to date.

It was counsel's submission that by the time of filing this case the plaintiff had been on the property for about 20 years whereby the plaintiff has fenced and developed the same.

Counsel relied on the case of **Kimani Ruchire v Swift Rutherfords & Co. Ltd (1980) KLR 10** as where the court held that:

*The plaintiff must show that the company had knowledge (or the means of knowing actual or constructive) of the possession or occupation ..”*

Counsel further cited the case of **Mwangi Gitau v Livingstone Ndeete (1980)eKLR** where the court held that:

*“The case of Gatimu Kinguru V Muya Gathangi High Court Civil Case No. 176 of 1973, is an example of an adverse possessor obtaining title by adverse possession to an identifiable portion of an owner's land. It is stated in volume 24 of Halsbury's laws of England, 3<sup>rd</sup> edition, at page 252.*

*To constitute dispossession, acts must have been done with inconsistent with the enjoyment of the soil by the person entitled for the purpose for which he had a right to use it. Fencing off is the best evidence of possession of surface land; but cultivation of the surface without fencing off has been held sufficient to prove possession.”*

Counsel submitted that auction or attempted auctions did not interfere with the running of time as the plaintiff was never removed from the land by the defendant and that the only way the defendant could interfere with the running of time was to assert his interest over the land by filing a suit seeking to eject the plaintiff prior to the limitation of the 12 years expiring.

Mr. Mogambi cited the case of Joseph **Gachumi Kiritu v Lawrence Munyambu Kabure (1996)eKLR**.

*“Time which has begun to run under the Act is stopped either when the owner asserts his right or when his right is admitted by the adverse possessor. Assertion of his right occurs when the owner takes legal proceedings or makes an effective entry into the land. The old rule was that a mere formal entry was sufficient to vest possession in the true owner and to prevent time from running against him. He must therefore make peaceable and effective entry or sue for recovery of land.”*

Mr. Mogambi submitted that the plaintiff's claim is for adverse possession is classified as an overriding interest as provided by section 30(f) of the RLA (repealed) as well as section 28 (h) of the Land Registration Act, 2012.

Counsel relied on the case of **Alfeen Mehdimohammed v Basil Mohammed & 223 Others (2016)eKLR** where the court held that:

*“The acts done on the suit land by the respondents as enumerated above are adverse to the owner's title and it is immaterial that the appellant only acquired the suit land recently. His title, when acquired was subject to the existence of an overriding interest in the form of adverse possession by the respondents”.*

Counsel also submitted that the issuance of a demand letter cannot be taken as an act of asserting interest on the land and cannot interrupt time from running. Further that suit against Barclays Bank as well cannot affect the plaintiff's claim as the plaintiff was not a party to it.

Mr. Mogambi further relied on the case of **Isaac Cypriano Shingore v Kipketer Togom (2016)eKLR** where the court held that:

*By the time the respondent filed the originating summons in November 2006, he had been in possession of the property for about 24 years. Even by the time the appellant became registered as proprietor by transmission on 28<sup>th</sup> April 2000, the appellant had been in occupation of the property for about 18 years. No attempts were made by the appellant over all those years to assert title. There is no merit in the argument by the appellant that the objection proceedings in the succession cause by the respondent and the complaint by the respondent before the Land Disputes Tribunal had the effect of interrupting the respondent's possession of the property. We are unable to appreciate how steps taken by the respondent to assert his claim to the property can be construed as steps by the appellant to assert his right to ownership of the property.”*

Counsel further submitted that in the alternative and without prejudice to the adverse possession claim the court can make a finding that the defendant holds the land as a trustee for the plaintiff the facts having established the existence of a trust. Counsel submitted that the Court ought to invoke the provisions of section 28(b) of the Land Registration Act, 2012 and find that the defendant holds the land as a trustee for the plaintiff.

## **DEFENDANT'S SUBMISSIONS**

Counsel submitted that the plaintiff has not proved his case for adverse possession and further stated that the plaintiff acknowledged that the

defendant had sub-divided the land to offset a bank loan.

Counsel submitted that the defendant does not dispute that the plaintiff lived on the parcel of land but only disputes that the plaintiff lived without his consent.

On whether the stay was uninterrupted, counsel submitted that there was no uninterrupted stay as there was constant threats of the property being auctioned by the bank to an extent that the plaintiff and other purchasers opted to indulge the bank to save the land from being auctioned. Further the fact that the defendant always visited the chief and other public administration officers to resolve the issue of payment demonstrated that the stay was interrupted.

Mr. Mogire submitted that most of the purchasers finalized their payments after they confirmed that the defendant had cleared the legal issue with the bank. Counsel relied on the cases of **Busia ELC No. 10 of 2017 Michael Onrinyo Alus –vs- Natama Bank Kenya Limited** and **Chuka ELC 110 of 2017 M’Mbaoni M’ Thara –vs- James Mbaka**.

### **ANALYSIS AND DETERMINATION**

The issues in a claim for adverse possession are now well settled, the essential requirements that one has to meet in order to succeed in a claim for adverse possession are as was held in by the Court of Appeal in the case of Wambugu –v- Njuguna (1983) KLR 173, Adverse Possession contemplates two concepts: Possession and discontinuance of Possession. It further held that the proper way of assessing proof of adverse possession would be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period, and not whether or not the claimant has proved that he or she has been in possession for the requisite number of years.

It is not disputed that the plaintiff has been in possession of the suit land from 1997. The defendant admitted that the plaintiff has been in occupation but stated that the occupation has not been without his consent. How then did the plaintiff take possession of the defendant’s suit land?

The plaintiff tendered evidence and stated that he entered into a sale agreement with Jomaths Company Limited on 13<sup>th</sup> October, 1997. A Mr. John Mathenge signed the Sale Agreement on behalf of Jomaths Company Limited as the defendant’s agent having been authorized to do so. If there was no such agreement, then the plaintiff would not have taken possession of the suit land. The defendant was aware of the plaintiff’s occupation for all the years but did not take any action to remove or interfere with such occupation. There is also no evidence that the defendant took any steps to interrupt the plaintiff’s occupation.

If there was any impropriety on the part of the agent Jomaths limited for having acted ultra vires as alleged by the defendant then, he should have taken action against the said agent. This was not done and there was no evidence led to show that the defendant reported the matter to the relevant authorities for investigation.

Adverse Possession in Kenya is embodied in Section 7 of the Limitation of Actions Act, (Cap 22) in these terms:

*‘An action may not be brought by any person to recover land after the end of 12 years from the dated on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person’.*

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.”*

**Section 38(1)** and (2) states;

*“(1) Where a person claims to have become entitled by Adverse Possession to land registered under any of the Acts cited in section 37 of this Act, 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.*

*(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”*

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 28(h) of the Land Registration Act, 2012 recognizes overriding interests on land, some of which are rights acquired or in the process of being acquired by virtue of any written law relating to the limitation of actions or by prescription.

The Court of Appeal in the case of **Benjamin Kamau Murma & Others vs Gladys Njeri, CA No. 213 of 1996** held 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.”*

It is incumbent upon a person claiming Adverse Possession to

*“.. to prove that they have used this land which they claim as of right: Nec vi, nec clam, nec precario (No force, no secrecy, no evasion). So the Plaintiff must show that the defendant had knowledge (or the means of knowing, actual or constructive) of the possession or occupation. The possession must be continuous. It must not be broken for any temporary purpose or by any endeavors to interrupt it or by any recurrent consideration”*

As In the case of Mtana **Lewa v Kahindi Nala Mwangandi [2015]eKLR:**

*“... Adverse possession is essentially a situation where a person takes possession of land and 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, is twelve (12) years. The process springs into action essentially by default or inaction of the owner. The essential prerequisites being that the possession of the adverse possessor is neither by force or stealth nor under the licence of the owner. It must be adequate in continuity, in publicity and in extent to show that possession is adverse to the title owner...”*

From the evidence adduced by the plaintiff and the defendant it is not disputed that the plaintiff has been on the suit land since 1997 uninterrupted. The fact that there was a charge to the property and the case between the defendant and the Bank did not affect the plaintiff's occupation as the defendant alluded to. The Plaintiff led evidence that he has been in exclusive control of the suit land and demonstrated his *animus possidendi* in developing the suit land through planting trees, installing electricity, digging a well, connecting piped water, fencing the land using iron sheets and construction of a shop as well as other activities such as planting vegetables and sugar cane and practicing subsistence farming on the suit land as though it was as of right.

**In the case of Kweyu v Omuto, C.A Civ Appeal 8 of 1990** cited with approval in **Gichinga Kibutha v Caroline Nduku [2019] eKLR** held that;

*“In deciding the issue of Adverse Possession, the primary function of a Court is to draw legal inferences from proved facts. Such inferences are clearly matters of law. Thus, whereas possession is a matter of fact, the question whether that possession is adverse or not is a matter of legal conclusion to be drawn from the findings of facts.”*

It is also on record that the only time the defendant attempted to directly engage the plaintiff is on 15<sup>th</sup> April, 2011 when vide a demand letter he asked the plaintiff to pay for the property to enable the processing of title deed. Whereas a mere demand for payment of purchase price does not amount to interruption of peaceful stay, by the time the demand was sent in 2011, the plaintiff had already been in occupation for a period of 14 years. According to the evidence, it is only on 12<sup>th</sup> July, 2017 when the defendant attempted to take possession of the property while acknowledging that the plaintiff had been occupying the same without his knowledge, the plaintiff had been in occupation for over 20 years.

Having considered the evidence on record, submissions by counsel and authorities cited, I find that the plaintiff has proved his claim for adverse possession and is therefore allowed as prayed.

**DATED and DELIVERED at ELDORET this 29<sup>TH</sup> DAY OF JUNE, 2021**

**M. A. ODENY**

**JUDGE**